

IMPLICATIONS OF FINDINGS

Integrating the knowledge gained from 1) the initial evaluation of the Child Witness Project; 2) the follow-up study; and, 3) our data base of information on child witnesses and their court cases, we have developed a sense of the strengths and deficiencies of current laws and policies for children who testify in court. In this chapter, we offer our views of these topics. We conclude by describing the research areas that have been suggested by our findings. First, however, we will present some data on the characteristics of our cases from 1991 and 1992 because we have relied also on this information for our recommendations.

CURRENT OPERATION OF THE CHILD WITNESS PROJECT (1991 AND 1992)

As described in Chapter One, the Child Witness Project was initially a demonstration project funded by Health and Welfare Canada. Since then, we have been operating with funding from the Attorney General of Ontario. Beginning in January of 1991, our mandate was expanded to include children who have experienced and witnessed physical assaults. Between January of 1988 and December of 1992, the Child Witness Project provided court preparation and related services to 395 children and tracked the cases of 102 more. All cases have been declared founded by the police and have resulted in the laying of charges. Demographic, abuse, and court process information on each case is collected and coded and is available for statistical analysis.

As described in Chapter Three, the follow-up study was conducted on the 126 child victims who were seen at the Child Witness Project in the two years immediately following proclamation of Bill C-15. This was Phase I of the Project. Phase II was a short period when the project operated primarily on a fee-for-service basis and was able to provide service to only a small number of children. In Phase III, the calendar years of 1991 and 1992, we received 207 referrals and tracked 51 other cases. We are able to report briefly the characteristics of the referrals for child sexual abuse and make some comparisons to the data collected during Phase I.

DEMOGRAPHIC DATA ON CHILD VICTIMS

Preliminary analyses on the 183 child victims of sexual abuse observed during Phase III revealed that most of the children (83 percent) were girls and a slight majority of children had alleged abuse by someone outside their family (58.5 percent). On average, they were ten and one-half years old when the abusive incident occurred or when the abuse started. Most (59 percent) reported one abusive incident while 14 percent indicated that the abuse had occurred for more than two years. One-quarter had lived with their alleged abuser and an additional 4.4 percent had been abused by a father while on access visits in his home. Compared with the first sample, these figures reveal a slight decline in the incidence of male victims (from 20 to 17 percent) and a slight increase in intrafamilial cases (38 to 41.5 percent).

ABUSER-VICTIM RELATIONSHIP

Even though 41.5 percent of children alleged abuse by someone in the family, the complainant and defendant were related by blood in only 27 percent of all cases, or 64 percent of all intrafamilial cases. This is because of the high proportion of step relatives. For example, the proportion of children abused by step-fathers (8.2 percent of total) was almost as high as the number of children abused by biological fathers (12.1 percent). Only 16 children (8.8 percent) alleged abuse by a stranger, so the abuser was known to the child in the vast

majority of cases.

ABUSER CHARACTERISTICS

The alleged abusers of 42 percent of the children had prior criminal convictions. In almost all cases (97.8 percent), the perpetrator was male. Two children alleged sexual abuse by a woman and two children alleged sexual abuse by a man and woman together. Some defendants were same-age peers with the complainants and some were more than 60 years older than the victim. On average the defendants were 21 years older than the children. It is important to note that, popular opinion to the contrary, the abusers of the children referred to us were not typically pedophiles. They had apparently conventional lives, often married with children.

ABUSE CHARACTERISTICS

The abuse typically occurred in the child's home (49 percent) or in the defendant's home (33 percent). Fondling was reported by 74 percent of the children and it constituted the most intrusive sexual act alleged by 42.5 percent. Vaginal intercourse was reported by 22 percent of the girls. Another incident involved the forced intercourse of a young boy with an adolescent girl. Oral genital contact was reported by 21 percent of the children and constituted the most intrusive type of abuse in 15 percent of the cases. Ten children alleged that they had experienced anal intercourse, five boys and five girls. In six percent of the cases, the children revealed that they had been exposed to pornography by their abusers.

COURT EXPERIENCES

Most of the victims were expected to testify in adult court (81 percent) rather than youth court (18 percent). Two children faced the prospect of testifying in both. The majority (71 percent) were the only victim associated with the case. However, 25 percent of the children saw sexual abuse charges laid for other child victims (usually siblings or peers), three percent for adults who had been a child when abused, and one percent for an adult victim. As it turned out, most children (62 percent) were never called upon to testify, usually because of a guilty plea and sometimes because the charge was withdrawn. Seven percent testified at a preliminary inquiry only, 14 percent at a trial only, and 17 percent at both. Compared with the sample of children who went to court between 1988 and 1990, this represents a large increase in the proportion of children who did *not* have to testify (up from 39 percent to 62 percent).

Table 34

Court Outcomes for 1988/1990 and 1991/1992 Cases

COURT OUTCOME	1988-1990		1991-1992	
Withdrawal of Charges	6	(4.8)	9	(7.5)
Stay of Proceedings	0	--	1	(0.8)
Acquittal	34	(31.7)	25	(20.8)
Conviction at Trial	37	(29.4)	16	(13.3)
Guilty Plea	49	(38.9)	69	(57.5)

TOTAL	126	(100%)	120	(100%)
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COURT OUTCOMES

For those cases which had been completed by the end of 1992, the outcomes are listed in Table 34. Compared with the outcomes for the cases from Phase I, there has been an increase in the proportion of cases that end in a guilty plea (from 39 percent to 57.5 percent) and a corresponding decrease in the proportion of cases that proceed to trial (from 61 percent to 34 percent).

Sentencing: In our 1991 and 1992 sample, the cases of 73 children had proceeded to the sentencing stage by December 31, 1992. Considering all the children together, 35.4 percent saw their case end with the incarceration of the offender. Considering just the cases where there was a conviction, a slight majority of the child victims (52 percent) saw their abusers sentenced to prison. The breakdown of sentences can be seen in Table 35.

Table 35

Breakdown of Sentences for Child Sexual Assault, 1988/1990 and 1991/1992

SENTENCE	1988-1990		1991-1992	
Penitentiary	18	(20.5)	4	(5.5)
Reformatory	48	(54.5)	33	(45.2)
Youth Custody	4	(4.5)	1	(1.4)
Adult Probation	10	(11.4)	17	(23.3)
Youth Probation	7	(8.0)	11	(15.1)
Fine	1	(1.1)	3	(4.1)
Absolute Discharge	0	--	3	(4.1)
Time Served	0	--	1	(1.4)
TOTAL	88	(100%)	73	(100%)

The custody rate of 52 percent of all convictions represents a large drop in the rate of incarceration over the period immediately after the proclamation of Bill C-15. Possible explanations for the drop include the fact that more cases are now being proceeded with summarily rather than by indictment; and, the likelihood that the cases which end in guilty pleas are attracting lower sentences.

IMPACT OF FEDERAL LAW REFORM

One of our intentions in conducting a follow-up study was to learn how the children felt about the legal changes that had opened the doors to child testimony. Using their opinions, combined with our own observations and a consideration of the data that we have just described, we wanted to be able to comment on the implementation of the Bill C-15 reforms. The goals of the drafters and legislators of Bill C-15 articulated at the time of its passage were: 1) to provide better protection to child sexual abuse victim/witnesses; 2) to

enhance the successful prosecution of child sexual abuse cases; 3) to improve the experience of child victim/witnesses; and, 4) to bring sentencing in line with the severity of the offence. Were these goals met? Has there been any change over the five years that the provisions have been in place?

In April of 1993, members of the Child Witness Project appeared before the Standing Committee on Justice and the Solicitor General and presented our observations on the impact of Bill C-15.⁶⁵ We concluded that our ability as a society to respond to child victims of sexual abuse has been enhanced, if only because the options have been expanded to include prosecution in a wider range of cases. The legal reforms have been accompanied by wide-spread recognition of child sexual abuse as a serious social problem. In part, this may be linked to the media coverage of the increasing number of sexual abuse trials and sentencing. Misconceptions about child sexual abuse (such as delay in disclosure indicating fabrication) are slowly eroding as criminal justice professionals learn more about the subject. In short, the issue is receiving the attention it deserves.

PROVISIONS REPEALED BY BILL C-15

We applauded the directions for reform taken by Bill C-15 and recognized the legislative amendments that we felt have had beneficial effects. First, we commended the elimination from the *Criminal Code*⁶⁶ of the following provisions: 1) a spousal immunity for any sex offence; 2) the requirement that a complainant be of "previously chaste character"; and, 3) the requirement that the accused has to be "more to blame" than the child victim when the two are in a dependency relationship.

With these changes, the legislators abrogated three long-standing rationalizations for adult sexual contact with children: it is legal to have sex with a child if you marry her,⁶⁷ she has had sex (including forced sex) before, or because she "consents" to sex because of a dependency relationship. By eliminating these provisions, legislators made the statement that all children are to be equally protected by the law. Further, they recognized that "consent" to sex by a child within a dependency relationship is inherently coerced and cannot be consensual. And no less important, protections from unwanted sexual contact have been extended to boys by the repeal of all sex offences that related only to male perpetrators and female victims in favour of gender-neutral offences.

In sum, those three deletions represented philosophical changes in how we view adult sexual conduct with children. The next three amendments marked important substantive reform that expanded the ability to prosecute child sexual abusers. First, the limitation that some offences had to be prosecuted within one year was abolished. Second, Bill C-15 extended the protections of Bill C-127 by abrogating the rule of recent complaint for all sex offences. These developments were applauded because they recognized the reality that disclosures of sexual abuse are typically delayed, sometimes for many years.

Third, the repeal of s. 586 of the *Criminal Code* and s. 16(2) of the *Canada Evidence Act*⁶⁸ eliminated the requirement for corroboration for the testimony of a child who cannot take an oath. This extended the protection of the criminal law to children under 14 years of age. In our observation, this has been one of the

⁶⁵ L. Sas, P. Hurley, A. Hatch & S. Malla (1993). *Brief Concerning Bill C-15 Submitted to the Standing Committee on Justice and the Solicitor General*. London: Child Witness Project, London Family Court Clinic. Copies are available for the cost of duplication and postage.

⁶⁶ R.S.C. 1970, c. C-34.

⁶⁷ Until 1983, marriage had been a defence to three sex offences involving girls under the age of 21. Bill C-127 repealed s. 139(2) that stated that an accused could not be convicted of these offences if he could prove that he subsequently married the girl.

⁶⁸ R.S.C 1970, c. E-10.

most critical changes, because so few cases of child sexual abuse involve corroborating evidence. By its very nature, child sexual abuse is a clandestine act. In our observation, this amendment has had the greatest impact where very young children are concerned. Instead of barring the evidence of young children from the court, the trier of fact is given the task of judging the weight to be given the testimony and the relative credibility of the complainant and the accused.

CONSENT NO DEFENCE

Section 150.1(1)⁶⁹ provided a positive statement that consent is not a defence to a sexual offence involving a complainant under the age of 14 years (except in the subsequently listed circumstances). In our experience, child sexual abuse does not typically involve physical force by the assailant or injury of the child. Abusers present their actions as legitimate (e.g., they are educating the child or doing something that everyone does), threaten, bribe or trick the child, or even initiate the abuse while the child is asleep. In 20 percent of our Phase III cases, the perpetrator used his role as an authority figure in the child's life. A weapon was used in only three percent of cases and 88 percent of the children sustained no physical injury. Child molesters can rationalize their objectively-inappropriate behaviour by convincing themselves that the child who did not resist had consented to the act. The criminal justice system will no longer collude with them in this delusion.

In our jurisdiction, s. 150.1(1) may have had a significant impact in that few defendants have been observed to use consent as a defence. The most frequently observed defence at child sexual abuse trials is that of fabrication by the child of the allegation. The second most common defence is that of mistaken interpretation of an accidental or innocent gesture.

SEXUAL INTERFERENCE, INVITATION TO SEXUAL TOUCHING, AND SEXUAL EXPLOITATION

These three new offences have not been used frequently in our jurisdiction. Overall, "sexual assault" is the charge used in the vast majority of cases. When used, the new charges are typically laid in conjunction with a charge of sexual assault and can be dropped before conviction. However, with increasing frequency, we are observing the use of sexual interference as the only charge laid for a case. In addition, we have recently observed two cases where the charge of sexual exploitation was laid on its own and a conviction was gained:

! a 16 year old boy was fondled and invited to engage in sexual acts by a minister. The boy had been experiencing family conflicts and he was living with the minister, who had offered to assist him with his problems; and,

! a 16 year old boy was fondled by a group home worker who had used the pretext of a leg massage.

In both of these cases, the offenders were convicted as charged after a trial.

We are unable to explain the low rate of use of these provisions, except a suspicion that the requirement to prove that the action was for a "sexual purpose" is difficult. Defendants justify their actions by stating that the act was intended to be affectionate or comforting, not sexual.

The relatively infrequent use of these three new charges, however, does not mean that these charges are not worthwhile. The charge of invitation to sexual touching has enabled law enforcement officers to lay charges in cases where the sexually-abusive behaviour may not constitute an assault. We feel that this particular offence is especially important because it captures the behaviours common in the early stages of the sexual abuse grooming process. The offence of sexual exploitation is important in that it recognizes that older adolescents

⁶⁹ *Criminal Code*, R.S.C. 1985, c. C-46. All subsequent references to section numbers refer to this revised version.

can be the victims of breach of trust. Moreover, it is important because it is a law that recognizes the importance of the relationship between the abuser and the victim.

One advantage of using these provisions is that an offender's criminal record will reflect the fact that the offences involved children. When the charge is sexual assault, this is not immediately obvious. The fact that the victim was a child may be of interest to, for example, correctional officials when an inmate is admitted to custody or to a person reading a C.P.I.C. record.

EXPOSURE

Section 173(2) describes the offence of exposure of genital organs to a person under 14 years of age. This charge has not been used frequently in our jurisdiction. When a sexual assault also involves the exposure of the perpetrator, it is typically the case that a charge is laid for sexual assault only. Forty-one percent of the allegations involved the accused exposing himself to the child. In part, the paucity of charges under s. 173(2) may be attributed to the fact that, until recently, most cases have been proceeded with by indictment, so this summary conviction offence is not used. We are now observing that a greater proportion of cases are being proceeded with summarily so use of this section may well increase.

TESTIMONIAL AIDS: SCREEN AND CLOSED-CIRCUIT TELEVISION

The use of the screen to aid the testimony of children has not been widely used in our jurisdiction and its use has declined over time. In the follow-up, all children who had been able to testify from behind a screen were grateful for the concession. But the remainder of the testifiers did not widely endorse it as a device that would have helped them. This was somewhat surprising given that so many of them had said that seeing the defendant was the hardest part of testifying. However, those who dismissed it as being probably unhelpful had sensible explanations for their decision: it would block their view of support people or it would not prevent them from feeling the presence of the defendants.

The hypothetical option of closed-circuit television as a testimonial aid was far more popular among the child testifiers. It has not been an option that has been available to us, however, and we are anxious to make use of this technology. A sub-committee of our Local Advisory Board has been struck to investigate this issue. In our view, and apparently in the view of many child witnesses, the option of closed-circuit video is superior to that of the screen. However, the screen should be retained as an option as it is highly unlikely that closed-circuit technology will ever be uniformly available across Canada. For example, the screen is portable and, therefore, useful for areas serviced by circuit courts.

Many American and Commonwealth jurisdictions have been using closed-circuit technology for several years. For example, in England and Wales, an evaluation of 154 cases concluded that closed-circuit video had positive effects on the ability of the children to give evidence. Moreover, it received wide-spread acceptance by all members of the court.⁷⁰ There are significant variations across jurisdictions in terms of the upper age of the child witness, which range from 10 to 17. The procedure can typically be used for sexual offences and in some jurisdictions for physical assault. As but one example, in New South Wales closed-circuit testimony is mandatory in all trials where the child is under 10 years of age. The judge is required to inform the jury that this is a standard procedure required by law and that no inference of guilt should be drawn.⁷¹ In England and Wales, where the upper age was originally set at 13, the *Criminal Justice Act* of 1991 increased it to 17 years, where sexual

⁷⁰ G. Davies & E. Noon (1991). *An Evaluation of the Live Link for Child Witnesses*. London: Home Office.

⁷¹ J. Szwarc (1991). Improving the Court Environment. In J. Vernon (ed.), *Children as Witnesses, Conference Proceedings*. Canberra, Australia: Australian Institute of Criminology, pp. 131-7.

assaults were concerned. The upper age limit of 13 was retained for physical assaults.

VIDEO-TAPED EVIDENCE

Section 715.1 provides that a video-taped statement made within a reasonable time after the alleged offence is admissible, if the child "adopts the contents" on the stand. We have never observed the use of this option, in great part because statements of children are not routinely video taped in London. Moreover, because the provision does not obviate the need for the child to testify, we feel it to be of little value from the child's point of view. As discussed below, however, we would envision that video-taped statements would be useful within the context of trials that use hearsay statements of individuals who have received abuse disclosures, and to obviate the need for children to testify at preliminary inquiries.

CANADA EVIDENCE ACT AMENDMENTS

The final amendment upon which we commented is the repeal and replacement of s. 16 of the *Canada Evidence Act*. Currently, a witness under the age of 14 years who is able to communicate the evidence but is unable to understand the nature of an oath may testify on a promise to tell the truth. The amendment was closely related to those, discussed above, that repealed the need for corroboration in cases where children testified unsworn. A well-regarded legal scholar concluded: "there is case law that indicates that sworn testimony and unsworn testimony of children are now legally equivalent."⁷²

We are glad to see the declining importance of the oath. We have always observed a tenuous connection between our clinical judgment about a child's ability to comprehend the implications of testifying and the judicial determination of same. The qualification of children is a subjective process and the decision necessarily is accomplished after a brief discussion with the child. There remains great variability in the nature and level of the difficulty of the questions, with some judges still relaying on questions of religion and religious practices. As a result, some children whose background has not included church attendance and religious instruction have felt uneasy and unprepared. Moreover, not all judges are knowledgeable on the full range of faiths in our society today.

It is our experience that, with appropriate questioning, children can articulate the importance of telling the truth and differentiate between a truth and a lie. This should be sufficient for the reception of their evidence. We do not see a real differentiation between a child -- or an adult for that matter -- promising to tell the truth in court rather than swearing an oath. In short, we applauded this amendment.

RECOMMENDATIONS FOR FEDERAL LAW REFORM

In addition to offering our observations on the operation of Bill C-15 for the Standing Committee on Justice and the Solicitor General, we presented nine recommendations for law reform. They were suggestions that we envisioned would improve the experience of child witnesses and thereby enhance their ability to provide effective and helpful evidence. While recognizing the need to protect the rights of criminal defendants, we take the view that the Court is aided by having complete and articulate testimony from victims and witnesses. Children give the best evidence when they are under the least stress.

QUALIFICATION FOR TESTIMONIAL AIDS

As we noted above, the extent to which child witnesses have been able to use the screen has been

⁷² N. Bala (1993). "Child Sexual Abuse Prosecution: Children and Mental Health Professionals in Court." Paper presented at the 33rd Annual C.P.R.I. Symposium, London, Ontario, May 12, 1993.

negligible. Its use has actually declined over the years, despite the availability of Child Witness Project therapists to act as expert witnesses. We believe our experience is typical of what is happening across Canada. In our view, the inability to use the screen is because the threshold -- absolute necessity to obtain a full and candid account -- is too limiting and virtually impossible to prove. Although it is our hope that closed-circuit testimony will soon be possible in London, the same problems in justifying its use are likely to arise. One option would be to relax the criterion for the use of the screen or closed-circuit. This would entail a retention of a case-by-case discretionary system but would, theoretically, open up the option to a wider group of children. We did not recommend this alternative.

A second option would be to have a law mandating the use of closed-circuit testimony in all cases. There are two key advantages to having a mandatory rule for special aids. First, there is less likely to be a presumption of guilt made by a jury when they know that the technology is required by law and used in all cases. Second, it will dispense with the need for lengthy legal arguments and expert testimony that have been observed under the current discretionary system. We have previously noted that such a system is used in several other countries. We have reservations about a mandatory system because some children benefit from being able to confront their abusers. Many of the former child witnesses in this study were able to articulate very sensible arguments against the utility of such aids. In addition, it is the belief of some observers that face-to-face testimony is more credible and will result in more convictions.

In the Australian Capital Territory,⁷³ it was learned that some children refused the opportunity to use closed-circuit video and some children accepted the chance. In a comparison state, where children did not have this option, they were asked whether they would have accepted or refused the opportunity to use a video link. One of the key findings was that closed-circuit testifiers experienced less stress than the comparison group of courtroom testifiers and were, in turn, judged to have given more effective evidence. However, it was concluded that the "children's observed emotional state was influenced more by whether they were able to use closed-circuit television when they wanted to rather than by whether they did or did not use it." In short, children were able to judge if they needed to use closed-circuit technology. It was recommended that "there should be a presumption in favour of allowing the use of closed-circuit television for children under 18, unless the child does not wish to use it or unless there are demonstrable reasons why it would be unfair."

After considering all the options, we felt that the most satisfactory approach was to make these provisions available to all child complainants, recognizing that some will decline the opportunity.

Recommendation F1: The option of testifying from behind a screen or via closed-circuit video should routinely be extended to all child complainants of sexual offences but it should not be mandatory

EXPANDING THE USE OF TESTIMONIAL AIDS

It is our understanding that amendments to s. 486(2.1) have recently been proclaimed which extend the use of testimonial aids to sexual abuse complainants of any age who are "able to communicate the evidence but may have difficulty doing so by reason of a mental or physical disability."⁷⁴ We have dealt with cases where this option would have been welcomed, especially where the victim is a developmentally-delayed young adult who must testify against a parent. The issue of dependency is even more poignant because these young people may well be dependent upon parents for a much longer period. This amendment will also go some way toward rectifying a paradox: if a disability puts someone at elevated risk for victimization, it is unconscionable that the

⁷³ J. Cashmore (1992). *The Use of Closed-Circuit Television for Child Witnesses in the ACT*. Sydney, Australia: Australian Law Reform Commission.

⁷⁴ 1992, S.C. c. 21, s. 9.

disability should prevent him or her from testifying in court.⁷⁵

There are other cases where we would have liked to have had the option of requesting a testimonial aid. In our contact with child witnesses, we have consistently found that anticipatory fears of testifying are almost universally associated with intimidation and fear of retaliation. As it is fear and not embarrassment that makes it difficult for children to tell their story in court, there is no reason to limit this option to cases where a sexual act has been alleged. Child victims of physical assault can be just as afraid of harm, or possibly more so, than victims of sexual abuse. The same is true of children who have witnessed violence, especially violence among their family members or the murder of a family member. We, therefore, recommend that the ability to testify from behind a screen or via closed-circuit video be extended to child victims of physical assault and to children who have witnessed a violent crime.

Recommendation F2. The option of testifying from behind a screen or via closed-circuit video should routinely be extended to all child complainants of physical abuse and those who have witnessed a violent crime

HEARSAY EVIDENCE

A source of concern for us has always been the plight of very young children whose experiences as witnesses are particularly difficult. While they may be clear and certain about what happened to them and who did it, the task of relaying the story in an adversarial arena may be beyond their ability and likely would lead to trauma. Having to testify twice is difficult for all children, but especially so for young ones.

We have observed that very young children often make statements to parents soon after the abuse, or when it is safe for them to do so (e.g., after returning from an access visit or after the babysitter has been driven home). Official action after that point takes the form of attempting to have the children repeat the same statement in several different settings: police station, prosecutor's office, and courtroom. Video tape is one means of preserving the child's statement to avoid the need for him/her to repeat the story.

Another solution is to have the person who first heard the disclosure testify as to what the child said. Such a statement would be hearsay, and hearsay is almost always inadmissible. However, some disclosure statements have been admitted as admissible because they fall under the spontaneous declaration exception to the hearsay rule. In other cases, hearsay testimony is admitted because the child is unable to testify for some reason. These issues have been the focus of much judicial consideration in the past few years in both Canada and the United States.⁷⁶ The U.S. Supreme Court⁷⁷ ruled that children's hearsay statements are not *per se* unreliable, creating a two-prong test: the declarant must be produced by the prosecution or be proved unavailable to testify; and, the statement must bear adequate indication of reliability.

We questioned the wisdom of restricting the information available to the trier of fact by creating barriers to the admissibility of such evidence. We advocated the creation of a statutory hearsay exception in the case of statements made by children disclosing sexual abuse. To some extent, such an amendment would be a codified

⁷⁵ For a further discussion of extending Bill C-15 protections to a wider range of victims, see: O. Endicott (1992). *Technical Report: The Impact of Bill C-15 on Persons with Communication Disabilities*. Ottawa: Research and Development Directorate, Department of Justice Canada.

⁷⁶ For a description of the legislation of each state, see: American Prosecutors Research Institute (1992). *Legislation Regarding Child Hearsay Exceptions in Criminal Child Abuse Proceedings*. Alexandria, VA: American Prosecutor Research Institute. The provisions vary widely by state, in terms of the age of the child victims, the type of offences for which this exception can be used, and the criteria for when a child is "unavailable" for testimony. In three states, the hearsay provisions have been declared unconstitutional. In 14 states, however, the provisions have been upheld by superior courts as being constitutional.

⁷⁷ *Idaho v. Wright*, 110 S.Ct. 3139 (1990).

extension of the Supreme Court of Canada ruling in *R. v. Khan*,⁷⁸ that such statements could be admitted if both necessary and reliable, a two-prong test similar to that articulated by the U.S. Supreme Court. A statutory hearsay exception was recommended for the civil courts by the Ontario Law Reform Commission.⁷⁹ In short, it advances the cause of justice when such evidence becomes an issue of weight rather than admissibility.

Recommendation F3: A hearsay exception should be codified recognizing the admissibility of testimony by those who have received sexual abuse disclosures from children

USE OF HEARSAY, DEPOSITIONS AND VIDEO-TAPED STATEMENTS FOR PRELIMINARY INQUIRY

A key reason that we advocated the greater use of hearsay testimony is that it would obviate the need for some children to testify, especially those whose emotional health would be at risk. It is sadly the case that those children most severely abused -- and whose abusers are most deserving of prosecution -- are often those whom we feel will be damaged by the very act of testifying in court. Of no less concern, however, is the fact that many children have to testify twice. This is a significant stressor for them. The utility of preliminary inquiries has declined with the rising popularity of pre-trial discussions and with the stringent rules regarding disclosure of Crown evidence. Perhaps they will be abolished soon. In the meantime, it would seem that the two primary goals of preliminary inquiries -- to establish a *prima facie* case and to disclose Crown evidence to the defence -- can be met through avenues which do not require testimony by the child. Specifically, with agreement by the defence, committal to trial could be accomplished using hearsay statements, depositions or video-taped statements by the child.

Recommendation F4: Hearsay statements, depositions and video-taped statements from children should be admissible, and encouraged, for preliminary inquiries

EXPEDITED HEARINGS

Our research has shown that one of the greatest stressors for children is the time it takes for their case to be resolved in the court system. Their lives are essentially on hold for one year and the wait for court constitutes perhaps the greatest source of secondary victimization. For example, it is after disclosure and before court that we observe the highest incidence of suicide attempts, school drop out, assaultive behaviour and acting out against authority. Family conflicts initiated by the disclosure cannot begin to be addressed and resolved until the verdict. Fear of retaliation by the accused typically continues unabated for the children, even those who are not objectively in danger. Follow-up studies of child witnesses generally show that emotional recovery does not begin until after the verdict. Moreover, some children are actively discouraged from seeking therapy because of fears that their evidence will be tainted. Any effort to reduce the time between charge and verdict would be welcomed. Again, we have found American models, in that several jurisdictions grant child cases docket priority or mandate that hearings involving child witnesses be expedited.⁸⁰

Recommendation F5: Expedited hearings when children are witnesses should be mandatory

SUPPORT PEOPLE FOR CHILD WITNESSES

⁷⁸ (1990), 79 C.R.(3d) 1. See also R. Bessner (1990). *Khan: Important Strides Made by the Supreme Court Respecting Children's Evidence*. 79 C.R.(3d) 15, where it is suggested that the child's having testified should not prevent the admission of hearsay statements.

⁷⁹ (1991). *Report on Child Witnesses*. Toronto: Ontario Law Reform Commission.

⁸⁰ As an example, see F.B. Rodgers (1992). *Develop an Accelerated Docket for Domestic Violence Cases*. *Judges' Journal*, 31(3): 2-8, 29-32.

Throughout our discussions with children about their testimony experiences, we were struck by the simplicity of their suggestions. They would have appreciated being able to sit during their testimony, to have a microphone, or to have a booster seat to see better the people who were asking them questions. Of greatest comfort for them was merely to see and feel the presence of familiar people. When parents are subpoenaed as witnesses, they cannot be in the courtroom to provide that reassurance.

As clinicians at the Child Witness Project we have often witnessed, and felt, the distress of children who had to walk unaided to the witness stand, past their abusers. It is at this crucial juncture that some children break down and are unable to continue. An innovation used in other jurisdictions is to permit children to be accompanied to the witness stand and to have the children testify while sitting on the lap of a person considered to be neutral, such as a representative of a victim/witness program. Having the person sit nearby is also helpful. In any event, especially because their support people may be excluded from the courtroom, child witnesses should be aided by a neutral support person.

Recommendation F6: Child witnesses should be permitted to have a neutral person accompany them to the witness stand and stay with them during their testimony

We are able to report that such a legislative proposal for such an amendment was initiated contemporaneous with our recommendation and was proclaimed into force on August 1, 1993.

CLOSED COURTS

Many children expressed to us their intense discomfort about their public exposure during their testimony. Many children have to testify in court rooms filled with school tours making observation visits to the courthouse. Moreover, especially in senior youth court proceedings, large contingents of friends can come to the court to support the defendant. When the complainant and the defendant are from the same school, this is particularly difficult for the victim. The same is true in intrafamilial cases where family members take the side of the accused and the child must testify while hostile relations are present. Current provisions permit it, but we have observed only three cases where the court room was closed to the public. This is why we recommended that all cases involving child complainants be routinely heard in closed courts.

Recommendation F7: When children are testifying, the court should be closed in all cases

BARRING THE ACCUSED FROM CONDUCTING CROSS-EXAMINATION

A child who stands out in our mind as having experienced a particularly difficult time in court is a teen-aged girl whose step-father, the accused, dismissed his lawyer at the last minute and conducted the cross-examination himself. In England and Wales, s. 34(A) of the *Criminal Justice Act* of 1991 absolutely prohibits the accused from carrying out cross examination himself when the victim is a child. It is recognized as being not only unduly arduous for the child, but difficult for the judge to deal with and prone to appeals.

Recommendation F8: The accused should be prohibited from personally conducting cross-examination of child witnesses

Such an amendment has since been made.

GENDER DISPARITY

It was one goal of Bill C-15 to eliminate gender bias in the prosecution of child sexual abuse. Certainly, prosecuting the abusers of boys was made easier by the creation of gender-neutral sexual offence categories. We had mixed feelings about the success of Bill C-15 in this regard, however. In five years, we have observed

only four cases involving female defendants, three with male victims and one with a female victim. Twenty percent of the victims in the original sample (1988-1990) were boys. Although in our most recent data (1991 and 1992) the proportion of boy victims is somewhat lower, we have no reason to believe that this is part of a trend away from laying charges for boys. We will continue to monitor the sex ratio of the victims to see if there is a systematic explanation for the reduction.

In terms of court outcomes, we have consistently observed a system bias in favour of male victims. This is manifested in a higher conviction rate for cases involving boy victims and strikingly higher sentences for abusers of boys victims, even when offence seriousness is controlled for. We will continue to monitor this situation as well.

In a tangentially related matter, we noted that the provisions abolishing consent as a defence were not extended to include anal intercourse.

Recommendation F9: The s. 150.1 provisions regarding consent as a defence should be extended to include s. 159 [anal intercourse]

In regard to the last recommendation, we would also concur with the suggestion made by the Institute for the Prevention of Child Abuse⁸¹ when they recommended that the offence of anal intercourse be abolished altogether, in part because the behaviour can lead to a charge of sexual assault.

The outcome of the Parliamentary review of Bill C-15 is not yet known. However, we can report the fact that No. 6 and No. 8 of the above recommendations have been included in a package of criminal law amendments first introduced to Parliament on April 27, 1993.⁸² The goal of recommendation No. 7 was also addressed.

IMPLEMENTATION OF BILL C-15

Perhaps it has become axiomatic that legislative reform will not be followed by actual change without 1) the support and commitment of those mandated to put the law into practice; and, 2) a commitment of the financial resources needed to give effect to the provisions. This latter point is especially significant in Canada, where the Constitutional division of powers assigns criminal law-making to the federal government and administration of justice to the provinces. But, returning to the first point, we believe that child victims and their families most of all need and appreciate information, assistance, and support. This can be provided within the existing justice infrastructure, if we reframe our views toward victims to see them as the primary clients of the system. In our discussions with the children during our follow-up study, they appreciated the patience and help offered by the investigating officers, the Victim/ Witness Assistance Program, the Child Witness Project and the Assistant Crown Attorney who was assigned to their case. Courts are inherently conservative institutions and resistant to rapid change. *People* must work to achieve change.

In London, the advent of the Bill C-15 reforms prompted a coordination of justice and community agencies regarding the approach to child witnesses. As noted above, the proportion of cases which end in guilty pleas increased significantly over the years. This led us to believe that with these efforts we had been able to spare an increasing proportion of children the trauma of testifying. Defence attorneys no longer see child witnesses as vulnerable targets who can easily be intimidated and confused. Specifically, the features of case processing which we have identified as assisting children to be good witnesses are listed in Figure 12.

⁸¹ (1993). *Responding to Child Victims: Balancing the Scales of Justice, Brief to the Standing Committee on Justice and the Solicitor General regarding Bill C-15*. Toronto: Institute for the Prevention of Child Abuse.

⁸² *An Act to Amend the Criminal Code and the Young Offenders Act*, Bill C-126, Third Session, Thirty-fourth Parliament, 1991-92-93.

We were pleased to find that the former child witnesses indicated that they were greatly assisted by the effort and commitment of the individuals who work in the local criminal justice system. Children who testify in Middlesex County have access to some of the best victim services currently available in the country. We are grateful to the Attorney General of Ontario for recognizing the need for clinical court preparation services and for funding the Child Witness Project. It is our hope that eventually all child witnesses will be able to take advantage of court preparation services. In addition, through our on-going research and publishing, we hope we are able to contribute to public education and professional development on the subject.

That said, however, we concluded in our review that any deficiency in the extent to which Bill C-15 met its goals was primarily related to problems of implementation. There were no funds designated by the federal government for the implementation of the Bill C-15 provisions. We identified six priority areas that come under the purview of the provincial government.⁸³

⁸³ L. Sas, P. Hurley & A. Hatch Cunningham (1993). *Brief Concerning Child Victims of Crime: Submitted to the Standing Committee on Administration of Justice*. London: Child Witness Project, London Family Court Clinic. In addition to the six recommendations concerning child witnesses, we presented 14 recommendations designed to ameliorate the experience of victims of personal crimes generally.

Figure 12

Case Processing Features that Assist Child Witnesses

- ! police officers with specialized training detailed to handle all child abuse cases;
- ! cooperation between law enforcement and child welfare officials that, for example, reduces the number of times a child has to be interviewed;
- ! sharing of information among mandated agencies;
- ! availability of clinical court preparation that is designed for children and tailored to the individual child;
- ! red flagging of cases so that one Crown attorney is assigned to follow the case to completion, with early meetings with the child, and enough meetings to establish rapport;
- ! moral support and victim-sensitive assistance of victim/witness staff;
- ! involving parents/guardians by providing information and emotional support for them;
- ! conducting court tours with children;
- ! having witness-only waiting rooms and a segregated area of the courthouse designated to victim/witness services;
- ! presence of victim/witness support people in the courtroom especially when parents/guardians are excluded;
- ! child-sensitive questioning by judges and Crown attorneys;
- ! concessions to the children such as being permitted to sit during testimony and taking periodic breaks;
- ! availability of mental health experts to testify as needed;
- ! preparation of victim impact statements that are informed by a knowledge of child sexual abuse and its impact;
- ! post-court debriefing and assistance with victim impact statements, criminal injuries compensation applications, and contact with paroling authorities; and,
- ! advocacy and referral to social services and therapeutic resources.

AVAILABILITY OF CLOSED-CIRCUIT TELEVISION SYSTEMS

Closed-circuit television is likely to become one of the most important techniques in child sexual abuse trials in the future. Technologically simple, it can be used as needed, without the separate procedures associated with videotape depositions. Courtrooms, with their adjoining chambers, provide ideal settings for closed-circuit testimony. Most important, while protecting

the child, closed-circuit testimony most closely approximates in-person testimony.⁸⁴

The former child witnesses with whom we spoke during our follow-up study generally preferred the option of closed-circuit testimony over the option of the screen. We would agree. Nevertheless, it has not been an option that is available to us because we lack the equipment. Earlier this month, we had occasion to observe the use of closed circuit television for the testimony of a five-year old girl, in neighbouring Elgin County.⁸⁵ The Crown Attorney arranged for the transportation from Ottawa of the only closed-circuit system available to courts in southern Ontario. This specialized video equipment had been purchased in Ottawa at a cost of \$50,000. Transportation and technical support would cost \$3,000 for each trip the equipment makes to southwestern Ontario.

The little girl benefitted immensely and her time as a witness was far less traumatic than the experiences of most testifying children. Using the Ottawa equipment, however, proved extremely time-consuming in terms of set-up and dismantlement. The experience has shown us that closed-circuit testimony can benefit children but that having a portable system for use in a wide geographic area is not practical. The government of Ontario should consider acquiring this equipment for centres where the volume of cases would justify its acquisition.

Recommendation P1: Closed-circuit television systems should be acquired to facilitate reliable child testimony

A DEDICATED CHILDREN'S COURT

A goal towards which we are working in London is to have a room in the Middlesex County courthouse dedicated as a children's court. This has recently been accomplished in Toronto,⁸⁶ where features of their court include: a smaller court room, a team of specialized prosecutors, a booster seat, microphones, and a private waiting area equipped with toys. Formal robing is foregone and the docket is arranged so that only two cases are heard each day. The number of spectators is thereby limited. We believe that a similar arrangement has been initiated in Manitoba except that the court room is dedicated to hearing all domestic crime cases as well.

Once acquired, the closed-circuit television system could be installed in such a dedicated court room so that it is available when needed. We believe that the government of Ontario should be working toward dedicated children's courts in centres where the volume of cases justifies it. It is paradoxical that young offenders have a separate court so that their "special needs" as young people can be met while child victims are not granted any of the same concessions.

Recommendation P2: Court rooms dedicated to the trial of cases involving child victims should be created in each jurisdiction where the volume of cases would warrant

TRAINING FOR CRIMINAL JUSTICE PERSONNEL

We have consistently observed that children are confused by the terminology and vocabulary used in court proceedings. They know what they want to say but the questions confuse them. An American observer has reported:

⁸⁴ B.W. Dziech & Judge C.B. Schudson (1991). *On Trial: America's Courts and their Treatment of Sexually Abused Children*. Boston: Beacon Press, at p. 154.

⁸⁵ S. Coulson (1993). Youngster Protected by Closed-Circuit TV as Sex Assault Hearing. *London Free Press*, May 19: B3.

⁸⁶ S. Fine (1993). Court to help children testify: Abuse trials get special attention. *The Globe and Mail*, 8 January: A1.

Though there are exemplary exceptions, as a rule, examiners continue to question children as if they were merely short, stubborn and not quite bright adults. Aspersions are cast on 4 year olds because they cannot tell an adult attorney what time of day they were sodomized or how often.... Long complicated questions are put to children without a murmur of caution from the court, and answers to these questions are accepted by all as if they actually meant something.⁸⁷

This description rang true for us. We once watched a boy struggling to describe being sodomized. He was at one point in the examination asked: "what was the frequency of occurrence of this event?" Feeling foolish at not knowing what to say, he began to cry. The boy was able to give a clear and definite answer when asked: "how many times did this happen to you?" As but one more example, a question pertaining to a child's "address" may, for some children, need to be rephrased to a more simple form: where do you live? what is your street called? what number is your house?

Training court personnel to be knowledgeable on and sensitive to the developmental limitations of children of various ages would greatly improve the quality of the information child witnesses are able to provide. With notable exceptions, judges seem the least able to adapt their regular court room persona when a child is on the stand. The difficulties this creates can be compounded when the judge is not familiar with the area of child abuse and/or intrafamilial crimes. For example, there are those judges who believe that delayed disclosure indicates that the allegation is likely false, when the research has shown that delayed disclosure is the norm in cases of intrafamilial sexual abuse. We also have concerns about the differential treatment of boy and girl victims, in terms of verdicts and sentences. And finally, it is no less true in child abuse cases than in any other case that judges should have formal means of getting feedback about the consequences of their actions and decisions.

Recommendation P3: Compulsory training should be instituted to educate judges, Crown prosecutors and those police officers who deal with child victims, about child development, child abuse and child sexual abuse syndrome

PRE-COURT SERVICES FOR CHILDREN

We feel that no child witness should have to walk into a court room without assistance and without being prepared for the experience. Where they exist, Victim/ Witness Assistance Programs provide this crucial service. Children associated with child protection agencies receive guidance from social workers. The majority of child witnesses in Canada, however, are required to testify without any preparation.

Recommendation P4: Court preparation services should be available to all children who are required to testify in criminal courts

AFTER-COURT SERVICES

One disturbing finding of our follow-up study was that the child victims and their families felt cut adrift by the justice system after the resolution of the court case. They found this to be in distinct contrast to the attention and support that they had experienced before the verdict. In the intrafamilial cases especially, victims were offended when they were patted on the back and told, "well, it's over now." It may be over for the justice system but it is rarely over for victims. Thirty percent of children, extrafamilial and intrafamilial cases combined, continued to have some degree of unwanted contact with their abuser several years after court. An even higher number continued to be afraid of reprisal or revictimization by the abuser. The issue of on-going victim safety is one that deserves some attention, especially for cases that end in acquittal, because any pre-court condition of

⁸⁷ A. Walker (1993). Questioning Young Children in Court, *Law & Human Behavior*, 17: 59-81. See also, for example, K. Saywitz, C. Jaenicke & L. Camparo (1990). Children's Knowledge of Legal Terminology, *Law & Human Behavior*, 14: 523-35.

non-association ends with the verdict.

Information provision after court is the other area that needs attention. Few families we have dealt with have even the vaguest understanding of corrections or the parole process. The two-year rule, for example, is a source of mystery to most. The degree of misinformation retained by the families was highest for the after-court phases than for any other part of the process. For example, some parents felt that they had the right to appeal a verdict or sentence if they wished. People relied on family and community rumour to know where the offender had served his sentence and when he had been released. Few were aware of their rights, whom to contact for information, or how to complain if the offender violated parole.

*Recommendation P5: **More consideration should be given to after-court victim services, with emphasis on victim safety and provision of information***

EMPHASIS ON PREVENTION

And, finally, we must comment upon the use of prosecution and punishment of child abusers as a means of assisting children. The ability to prosecute a child abuser is crucial as a means of responding to a particular situation. However, the value of punishment as a strategy to prevent child abuse is dubious. Proactive efforts must also be used.

*Recommendation P6: **Prosecution should not be the sole means of dealing with child abuse and efforts aimed at prevention and early detection should be given equal emphasis***
