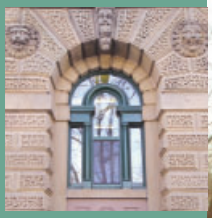

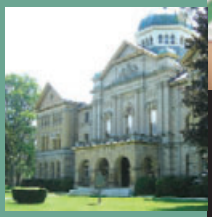

"a full and candid account"

Using Special Accommodations and Testimonial Aids to Facilitate the Testimony of Children

BOOK 6

Hearsay Evidence and Children

by Alison Cunningham and Pamela Hurley

The opinions expressed herein are those of the authors and do not necessarily reflect those of the Department of Justice Canada or the Government of Canada.

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Zach, age four, was ready for his bedtime bath on Monday night. Climbing into the bathtub he exclaimed, "ouch, my bum hurts." He then blurted out to his mom, "Kyle hurts my bum – he puts his pee pee in my bum. Kyle said that's a secret." Zach went on to say that it happened "lots of times" and "in the bathroom" and that the last time "it hurt." Zach's father came upstairs and the child repeated the information adding more details. Kyle, a college student, is Zach's cousin and a trusted babysitter. Their mothers are sisters and the families are close. Next morning, Ms Brown called the police and arrangements were made for a medical examination and also for the child abuse specialists to interview Zach. At the police station, Zach clung to his mother and was reluctant to go with the interviewers. In the interview room, Zach didn't sit down but answered questions as he moved about the room. He described details of his recent birthday party, a camping trip with his family and his favourite activities. He recounted names and relationships of family members, omitting Kyle. When the topic of Kyle was broached, Zach grew distressed and began kicking the furniture. He shouted "Kyle is bad" and "hurt my bum." He demanded to see his mother and the interview ended. During the following months, Zach had temper tantrums and nightmares and wet the bed. The daycare centre reported that he initiated sexualized play with other children. He was referred for play therapy. After several months, he appeared to be progressing well both at home and at school. The Crown met with Zach several weeks before the preliminary inquiry. Zach repeatedly stated "I don't remember" and "Kyle is bad. I don't want to talk about Kyle." Zach appeared to have no memory of talking to the police. The Crown requested an evaluation of Zach. It seemed to her that Zach could not or should not testify. Perhaps Zach's mother could repeat Zach's disclosure in court instead?

The focus in this handbook is on the use of children's out-of-court statements as evidence. Because of young age, emotional trauma, or the passage of time, some children cannot give direct evidence. In 1990, the Supreme Court of Canada first ruled that a child's out-of-court statement is admissible when *reasonably necessary* and where the circumstances suggest it is *reliable*. In other words, if a child describes events related to a criminal victimization, but is unable or unavailable to testify, the person who received the information can repeat the child's words from the witness box. This is hearsay evidence.

The Hearsay Evidence of Children: Introduction

Although a difficult and often distressing task, most children can testify with adequate help and the use of testimonial aids. Children as young as four or five can effectively give direct testimony. When a child is unable to testify, it may be necessary to introduce the evidence by other means, for example using hearsay.

The hearsay rule

Hearsay is second-hand information, when a witness testifies not about something he or she witnessed or experienced (direct evidence) but about what someone else said. As a general rule, these "out-of-court statements" are not admissible. This is the hearsay rule. Hearsay is considered with caution by the courts because:

- the accused cannot confront his or her accuser;
- the declarant is not available for cross-examination;
- the trier of fact cannot assess the demeanour of the declarant; and,
- the declarant did not promise to tell the truth or make a solemn affirmation or oath when the statement was made.

The hearsay rule comes to us from English common law where it emerged and evolved in the seventeenth century.

Categorical exceptions to the hearsay rule

There are exceptions to the hearsay rule. In other words, hearsay is admissible under certain circumstances. Dying or death-bed declarations is one example of an exception. Other traditional exceptions are spontaneous or excited utterances and admissions or declarations against self-interest. A witness being "unavailable" may also constitute an exception, as when the witness has died, is missing, or might suffer trauma if required to testify even if testimonial aids are used. If the witness is unavailable to testify for these or other reasons, introduction of the hearsay may be deemed by the Court as "necessary."

Admissibility versus weight

The Court can choose to admit hearsay but the trier of fact is free to assess the weight the evidence should carry.

Hearsay and children

This topic usually comes into play when a child discloses information about a criminal victimization but cannot testify, because he or she is too young to testify, too traumatized to testify, or where testifying itself would be traumatic. The recipient of the disclosure may be permitted to repeat the child's statement in court.

In the landmark 1990 case of *R. v. Khan*, the Supreme Court of Canada endorsed the principled (as opposed to categorical) approach to the hearsay rule for the out-of-court statements of children by advancing a two-prong test of "necessity and reliability" (see page 4). Previously, the hearsay had to fit within the existing categorical exceptions to be admissible.

The "Khan" application

Requesting the admission of a child's out-of-court statement is sometimes referred to as a "*Khan* application." A case such as that of Zach might be referred to a professional with training in child development and the effects of trauma on children. Features of the assessment process are described on page 7. One purpose of this assessment is to determine if the child cannot or should not testify. It is important to note that the *Khan* assessment never focuses on the credibility of the child or the veracity of the statement. Those are matters for the Court.

Children may not be able to testify for several reasons.

- Because of age, some children cannot respond to questions in the courtroom environment. The courtroom setting requires a high level of linguistic competency, memory skills and capacity to engage in conversation.
- Some children have blocked the memory or forgotten details. Age, length of time since first report and the impact of trauma are often factors.
- Some children simply cannot talk about what happened or refuse to do so. Recalling and re-telling a trauma can overwhelm a child whose most effective coping strategy is to avoid thinking about the traumatic event.

For more information about how trauma interferes with the task of testifying, see handbook No. 2 in this series.

- In some cases, the child was so traumatized by the offence that his or her emotional well-being will be compromised if forced to testify.
- In some cases, the act if testifying itself will traumatize the child.

Voir dire

A voir dire is held to determine if the circumstances described in the *Khan* application meet the threshold of necessity and reliability.

The Khan Decision (1990)

Dr. Khan was a physician who vaccinated a 3.5 year-old girl in the presence of her mother. While the mother prepared for her own examination, five or seven minutes elapsed when the child was alone with the doctor. Approximately 15 minutes after the pair left the office, the girl described to her mother details of a sexual assault. Forensic examination later confirmed semen and saliva on her clothing. The doctor was charged with sexual assault.

By the time of trial, the girl was four months shy of her fifth birthday and the judge decided she was too young to give evidence (a decision later frowned upon by both appellate bodies). The trial judge also ruled that the mother's rendition of what her child said was not admissible as an exception to the hearsay rule. The statement was not "spontaneous," being made possibly 30 minutes after the offence.

The Ontario Court of Appeal disagreed, ruling that the statement was admissible under the "spontaneous utterance" exception to the hearsay rule. The Supreme Court of Canada, in affirming that the mother could repeat her daughter's statement in court, took a different tack. It applied a principled, more flexible approach, to hearsay exceptions.

Dr. Khan was eventually convicted.

The two-pronged test

In the *Khan* judgment (*R. v. Khan*, [1990] 2 S.C.R. 53), the Court held that a child's hearsay statement can be received as evidence if two requirements are met: necessity (meaning "reasonably necessary") and reliability.

Necessity

Reasons that might support a finding of necessity include:

- the inadmissibility of the child's evidence; and,
- sound evidence based on psychological assessment that testimony in court might be traumatic or harm the child.

However, it was conceded that there could well be other circumstances in which it is possible to establish necessity.

Reliability

The indicia of reliability included these factors in *Khan*:

- the child's information was spontaneously reported without prompting;
- the child had no motive to fabricate a story; and,
- the child could not be expected to have knowledge of such sexual acts.

Considerations relevant to the reliability requirement might include: timing of the statement, demeanour of the child, personality, intelligence and understanding of the child, and the absence of any reason to fabricate.

Why Some Children Cannot Give Direct Evidence to the Court

Some children cannot cope with the task of recalling and recounting traumatic events in the context of the adversarial process. When a child appears not to remember, he or she may be using denial as protection from the stress of recalling the event. Some children are not developmentally ready for the task. Consider these case examples.

Young children who are not competent to testify

João, age four, was attending pre-court preparation sessions. His mother reported that he "never listens and never sits still, except when watching his favourite TV shows." Using a model courtroom with toy figures, the sessions focussed on learning about the court process, developing listening skills and practising age-appropriate question and answer activities. It was extremely difficult to engage João in any activity. His attention span for any task was less than two minutes. He would not be separated from his mother, even for a short period. During a court orientation visit, he refused to sit at the table in the testimony room.

A child is emotionally unable to testify

At age five, Lola was interviewed by a police officer. She gave detailed information about sexual abuse by her grandfather. One year later, the matter came to trial. Closed-circuit televised testimony with a designated support person were arranged. Lola confidently answered questions about herself, but did not give any information about the offences before the court. She began to cry and stopped responding to questions. After a recess, Lola put her head on the table and remained silent. An adjournment was ordered and four weeks later Lola returned to the courthouse. She began weeping upon entering the testimony room and remained silent.

Testifying would be traumatic

Six-year-old Sonia saw her father fatally injure her mother. She told her grandmother what she witnessed and gave a statement to the investigating officer. She has not spoken of the event since that time. She is on a waiting list for therapy.

The child is at risk

Thirteen-year-old Leah was sexually assaulted by her step-father. The abuse escalated in intrusiveness and violence over five years until she disclosed to the school principal. Leah was hospitalized on several occasions for self-harming behaviour and was diagnosed with post-traumatic stress disorder. The weekend before the trial, she made a serious attempt to take her own life. At the trial, she was emotionally distraught and could not testify. The case was adjourned to May 30th. On May 29th, Leah was hospitalized again.

Section 16.1 of the Canada Evidence Act

Young age on its own is not a barrier to testifying. In Canada today, children under 14 years of age are presumed to have the capacity to testify. Children's evidence must be received if they can understand and respond to questions. A witness under age 14 is not sworn or affirmed, but testifies on promising to tell the truth.

Person under 14 years of age	(1) A person under 14 is presumed to have the capacity to testify.
No oath or solemn affirmation	(2) A proposed witness under 14 shall not take an oath or make a solemn affirmation despite a provision of any Act that requires an oath or a solemn affirmation.
Evidence shall be received	(3) The evidence of a proposed witness under 14 shall be received if they are able to understand and respond to questions.
Burden as to capacity of witness	(4) A party who challenges the capacity of a proposed witness under 14 has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to understand and respond to questions.
Court inquiry	(5) If the court is satisfied that there is an issue as to the capacity of a proposed witness under 14 to understand and respond to questions, it shall, before permitting them to give evidence, conduct an inquiry to determine whether they are able to understand and respond to questions.
Promise to tell the truth	(6) The court shall, before permitting a proposed witness under 14 to give evidence, require them to promise to tell the truth.
Understanding of promise	(7) No proposed witness under 14 shall be asked any questions regarding their understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence shall be received by the court.
Effect	(8) If the evidence of a witness under 14 is received by the court, it shall have the same effect as if it were taken under oath.

The Assessment Process of a Child who is a Potential Court Witness

Where a child seems too immature or traumatized to testify, the prosecutor may seek the opinion of a qualified mental health practitioner. The primary focus of such an assessment is on the issue of "necessity" as articulated in the *Khan* decision, but factors related to "reliability" are also considered. This is a multi-dimensional process involving the inter-play of cognitive, social, emotional, and familial factors.

Collection of collateral information

The assessor must acquire all relevant information about the alleged offences, including any transcripts or video recordings of investigative interviews with the child. Information about the child's relationship with the accused, any prior victimization, and quality of support system also inform the assessment. The child's current perception of safety and feelings about the accused must be considered. Information from key people (parents, relatives, caregivers, daycare staff, teachers, therapists etc.) contributes to a composite picture of the child's current functioning.

PRACTICE TIP: Avoid discussing or asking the child for details of the alleged offence. It is not the role of a Khan assessor to form an opinion about the credibility of the witness or the veracity of the allegation.

Interviews and direct observation

No *Khan* assessment is complete without spending some time with the child. Interviews with young children include observation of the child at play and while interacting with others. The child's communicative competence, ability to concentrate on a task, and self-regulation are part of the assessment.

Understanding trauma

We discussed in handbook No. 2 how trauma can affect children in their role as court witnesses. In short, trauma changes the thoughts, feelings and behaviours of victims. The intensity of the fear associated with the trauma may remain intact for years. Asking the child to testify may trigger a re-emergence of the fear experienced while the trauma was occurring. For some children, testifying is an untenable task.

The Khan report

The assessor writes a report and should be available to testify about the process and findings if required. If several months elapse between the assessment and the date it will be used, an updated assessment is suggested.

FAQs About Hearsay and Children's Evidence

Q. *Who makes the decision to make a Khan application?*

A. The prosecutor makes this decision and must present evidence to support the application at a voir dire. The evidence might include the findings of a professional assessment.

Q. *How is the child's hearsay evidence presented to the Court?*

A. The person who heard the child's words repeats that statement in the witness box. This person is also subject to cross-examination.

Q. *Could a Khan application be made for a child who 'freezes' on the stand?*

A. Every case is different. Some children return to testify after a short break. Others require a longer period of time, during which they can learn coping skills to return and complete their testimony. If not used the first time, have testimonial aids available. Seeing the accused in the courtroom or in the waiting area or the re-telling of a terrifying experience triggers a post-traumatic reaction in some children. In these cases, the child may never complete his or her testimony.

Q. *If a child testified at a preliminary inquiry and subsequently demonstrated significant developmental regression related to testifying, could a Khan application be made before the trial?*

A. Yes, the prosecutor could consider making an application, depending on the circumstances of the case.

Q. *I'm a teacher in a childcare facility who received a child's disclosure. The prosecutor wants me to testify about what the child told me. I'm a little nervous. What should I expect to do as a witness?*

A. There is a lot of information about being a court witness on the Internet. The prosecutor may meet with you beforehand and can answer questions then. You will read your statement to refresh your memory before testifying. Prepare for a long wait on the day of court! There may be a private waiting area in the courthouse. Contact your local victim services for information.

Some Tips for Working with Young Children

Young children are at once a joy and a challenge to work with. Before your first meeting, learn pertinent information about the child's current circumstances, family background, support system, interests, abilities, special needs, etc. Remember:

- Each child is unique!
- Young children give accurate information if questioned in a way they understand.
- Children can be upset or frightened in unfamiliar environments: this reaction is exacerbated if they have been traumatized.
- Children are better informants when in a familiar environment.

PRACTICE TIP: Children can be excellent informants and have "insider" information about themselves. Consult their expertise.

Children's understanding of temporal attributes

Children will not understand the concept of time until old enough to do so, at about seven years of age. It is not something you can teach them until then. They may use words we associate with time (like hour, week or month), but you have no guarantee they are using the words correctly.

- Younger children do not know concepts such as yesterday or tomorrow.
- Even children who can recite the days of the week and months of the year may not be unable to identify a day or date.
- Young children cannot say (accurately) how many times something happened.

Young children have difficulty describing the sequencing of events, dates, number of occurrences, duration of an event, and rate of occurrence. A total of 250 sexual-abuse interviews with four to ten year-olds were reviewed. The number of these temporal references increased significantly across the age span from an average of 12 references for four-year olds to an average of 63 for ten-year-olds.

Yael Orbach & Michael Lamb (2007). Young Children's References to Temporal Attributes of Allegedly Experienced Events in the Course of Forensic Interviews. Child Development, *78(4): 1100-1120.*

Principles of Effective Adult-Child Communication

James Garbarino and his colleagues observe that, in the legal system, the adults involved have different and sometimes contradictory roles as advocates, therapists, evaluators/assessors, investigators, or judges. In their book, *What Children Can Tell Us*, they put forward these principles of effective adult/child communication.

- There are few fixed and specific formulas for communicating effectively with children; adaptability to the characteristics of each child, each situation, and each adult is essential.
- The better one's knowledge of normal child development, the better prepared one is to identify effective ways to communicate with children.
- It is important to be critical of one's own conclusions about a child's motivation that attribute irrationality or meaninglessness to the child; consider how things might look and feel to the child.
- Observed behaviour may not account for underlying capacity; always seek situations that maximize the child's opportunity to demonstrate competence.
- In general, the more confident and mature the child, the more positively familiar the setting, and the more conversational the inquiry, the more effective the process of communication and the more valid the information will be.
- Some adults get better information from children than others; children give better information to some adults than others.
- The more sources of information an adult has about a child, the more likely that adult is to receive the child's messages properly.
- While the competence issues are obviously greater with respect to children, information-seeking is in fact a reciprocal relationship: the more competent the adult, the less competence is required of the child.

James Garbarino, Frances Stott et al. (1992). What Children Can Tell Us: Eliciting, Interpreting and Evaluating Critical Information from Children. San Francisco CA: Jossey-Bass.

Looking Abroad for Innovations in Children's Testimony

Hearsay is not the only way to introduce the evidence of a child who cannot deliver it directly. In other countries, we find these ideas.

Intermediaries

An intermediary is a "translator" for questions and answers passed between the Court and the child. These questions may come from the judge, the prosecutor, or the defence attorney. In qualifying cases, the intermediary listens to a question asked of the child and relays it to the child, re-phrasing the question if necessary into words consistent with the child's age and level of intellectual development. As an added advantage, any hostility or accusatorial tone of the question is eliminated. In turn, the intermediary communicates the child's responses to the court. The child will typically be testifying outside the courtroom using a technology such as closed-circuit television.

Intermediaries are used in several countries including South Africa under the *Criminal Procedure Act* in cases where testifying would cause "undue mental stress or suffering." They are also used in the United Kingdom, under the *Youth Justice and Criminal Evidence Act 1999*, for example.

The use of intermediaries was tested in six communities in England and Wales. In total, 76 local professionals came forward to be included on a roster of people willing to be called in on cases as needed. They were speech and language therapists, psychologists, occupational therapists and others from the health and educational sectors. Intermediaries were used for both investigative interviews and also to facilitate court testimony. In accordance with the law, they could be used for witnesses under 18 years of age but also for adults with developmental delay or other factors making them vulnerable to testimony-related trauma. About one-third of the victims (39%) were children but fewer than half of them qualified only because of age. Most had intellectual impairments or mental disorders. A key benefit of the approach was how it gave crime victims a voice in cases that might otherwise have gone un-prosecuted. It was also felt by some that intermediaries saved court time by keeping the witnesses focussed and improving the quality of evidence.

Joyce Plotnikoff & Richard Woolfson (2007). The 'Go-Between': Evaluation of Intermediary Pathfinder Projects. *London UK: Ministry of Justice.*

Key points related to intermediaries are:

- Intermediaries will ideally have training in children's speech patterns and language use and comprehension.
- They must be approved by the Court.
- They must not prompt the child or influence the answers (i.e., they have the same obligations as language interpreters).
- Usually, the intermediary cannot make comments such as suggesting that a different order of questions would be more fruitful.
- In some places, they are used to relay the questions from unrepresented accused seeking to cross-examine the child.

There is no provision in Canadian law to encourage this practice. However, it may be argued that the role of intermediary is not greatly different from that of spoken language or sign-language interpreter.

Video-taped cross-examination by neutral questioner

Another approach is to have a neutral third-party interview the child using questions posed by the defence. The interview can be video taped and admitted into evidence. A similar approach is used in Sweden, where children under 12 rarely testify. In a variation seen in countries using the inquisitorial system, the judge interviews the witness based upon his or her reading of a thorough dossier compiled about the case. The defence may suggest questions to the judge, as may the prosecutor.

The proxy or surrogate witness

Finally, it is possible in some jurisdictions for a neutral professional to interview the child and then him or herself testify to relay the child's statement to the Court. This approach is sometimes used in the United States, for example.

In this American mock-trial study, children's evidence was presented live, on videotape, or by a social worker (the hearsay). Half the children told the truth and half were instructed to lie. There was little association between juror's perceptions of accuracy and children's actual accuracy in any of the presentation formats. However, case verdict did vary. Jurors had greater sympathy towards children who testified live and were less likely to believe that the child was giving a false statement.

Gail Goodman, John Myers et al. (2006). Hearsay Versus Children's Testimony: Effects of Truthful and Deceptive Statements on Jurors' Decisions. Law & Human Behavior, *30(3): 363-401.*

Further Readings

In addition to sources already cited, these resources may be helpful.

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Goodman, Gail & Annika Melinder (2007). Child Witness Research and Forensic Interviews of Young Children: A Review. *Legal & Criminological Psychology*, 12(1): 1-19.

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† These documents are available on the Internet.

About the Handbook Series

This is one of seven handbooks written to aid front-line justice personnel who use special accommodations and testimonial aids for young victims and witnesses in criminal proceedings. The series title – "*A Full and Candid Account*" – reflects the legislative imperative of facilitating the conditions whereby a child witness can best communicate his or her evidence to the Court. The seven topics covered in the series are:

1. Overview of issues related to child testimony
2. Testimony outside the courtroom
3. Witness screens
4. Video-recorded evidence
5. Designated support person
6. Hearsay evidence and children
7. Children and teenagers testifying in domestic violence cases

These booklets provide a concise and convenient summary of legislation, operational and logistical issues, FAQs, and helpful tips for working with children and teenagers.

The information, references and guidelines in this handbook focus on child witnesses (under age 18), although some material will be relevant for some adult witnesses contemplated in the provisions for vulnerable witnesses.

Over two decades, our own research and experience at the Child Witness Project have clearly demonstrated how the stressful aspects of testifying can be ameliorated to maximize a child's ability to give "*a full and candid account*" of his or her evidence. Special accommodations and testimonial aids are important tools available for this purpose.

Every child witness in Canada has the right to ask for measures including closed-circuit or remote testimony, screens, and recourse to a support person while testifying. Yet, there is wide variation in the frequency of use of the special accommodations and testimonial aids now provided for in the *Criminal Code*. The overarching goal of this handbook series is to ensure that no child is denied access to the appropriate accommodation or testimonial aid only for want of awareness, knowledge or understanding. By creating these timely and useful handbooks, we hope to fulfill the promise of special protections made available by Parliament so children and young people will not be traumatized by their experiences as witnesses.