



VIVA VOCE

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WINTER 1999

A NATIONAL NEWSLETTER ABOUT CHILD VICTIMS AND WITNESSES

ONTARIO MULTI-SITE STUDY IDENTIFIES MINIMAL PROGRESS FOR WITNESSES

Each year hundreds of children across Canada are expected to testify in criminal courts. Often, the Crown attorney's case rests on the testimony of these young witnesses. The adult-oriented, adversarial nature of the criminal justice system makes testifying in Court an often daunting and, in many cases, a traumatic experience.

An Ontario Study entitled, *I'm Doing my Job in Court, Are You? Questions for the Criminal Justice System* was released in May 1999. The report was prepared by Dr. Louise Sas and involved the collaborative efforts of the Child Witness Network and the Victim/Witness Assistance Programmes across South-western Ontario. The study sought to evaluate children's experiences in the criminal justice system as well as to examine the extent to which legislative reforms were being implemented. A multi-site, retrospective file analysis was conducted involving over 900 cases of sexual and physical abuse of children who were referred for court preparation during 1995. The study identified numerous problems in the system, in particular the variability in the treatment of young witnesses in different jurisdictions. Also of concern was the inconsistency in the implementation of legislative reforms.

The difficulties and challenges child witnesses face in Court have been identified and well documented. The system has responded in many respects, however much remains to be done to address the inequities still experienced by these children. The Ontario study highlights the need for a proactive program to provide all child witnesses with the services to which they are entitled. The following represents a summary of the problems identified by the members of the Child Witness Network as well as recommendations for improving children's experiences within the justice system.

Court Preparation to be Available for all Children

Court preparation assists children in understanding court procedure, understanding their role as witnesses and in alleviating their anxieties

Study Findings:

- Not all jurisdictions have a specific program or preparation services for children

Recommendations:

- Court preparation and specialized services should be available to all child witnesses
- Referrals should be made to a Victim/Witness Assistance Programme

and/or a Court Preparation Program at the time the charges are laid

Special Attention by Crown to all Cases Involving Child Witnesses

(also referred to as red flagging)

Child witnesses will feel more comfortable during examination-in-chief talking to someone they have already met

Study Findings:

- Only half of the cases received early attention from Crowns
- When the case was red flagged, the Crown met with the child witness at least once (70%)
- Few children had more than one meeting with the Crown

CONTINUED ON PAGE 2

INSIDE THIS ISSUE

- Ontario Multi-site Study Identifies Minimal Progress for Witnesses
- British Columbia Study Recommends Improvements for Child Witnesses
- Adult Witnesses with Developmental Disabilities
- Events & Conferences
- Subscription Opportunity

CONTINUED FROM PAGE 1

Recommendations:

- Early meetings with Crown to establish rapport with child witness
- Early meetings provide opportunity for the Crown to assess the child's communicative ability and level of anxiety
- Enable the Crown to determine whether expert testimony will be required

Continued Training and Education**Recommendations:**

- More training and education regarding the special needs of child witnesses is required
- Education workshops should be made available to the judiciary, Crown counsel and all other criminal justice system personnel
- Education should focus on social and cognitive developmental issues (e.g., age-appropriate questioning), disclosure patterns and trauma-related issues

Child Friendly Court Houses**Study Findings:**

- Not all courthouses have separate waiting areas for the accused and the child witness--children often feel intimidated, and in some cases may experience subtle forms of harassment or threats
- In terms of testifying, the physical surroundings of the courtroom can be daunting--the rooms are large, with the witness stand raised above the rest of the courtroom and quite often, the child witness testifies directly in front of the accused and his/her counsel

Recommendation:

- Child friendly courtrooms should exist in every courthouse; the report recommends using J-court in Toronto as a model

Improved Treatment of Children on the Stand**Study Findings:**

- The length of time on the stand varied from under an hour to over eight hours
- Young children, between six to ten years of age, tended to be on the stand the longest
- Children often were asked questions well beyond their level of understanding
- Most disturbing were observations concerning cross-examination--on many occasions defence counsel was aggressive and harassing; it was not uncommon for child witnesses to be reduced to tears

Recommendation:

- A code of ethics should be adopted by defence lawyers with respect to their handling of child witnesses in the courtroom

Increase in Use of Testimonial Aids**Study Findings:**

- Despite the availability of testimonial aids, the screen and CCTV were rarely used
- In many cases, the criteria for determining whether testimonial aids could be used were too stringent

Recommendation:

- Use of provisions for testimonial aids should be standard practice

All Cases Involving Children Should Be Expedited Through System

- One of the most stressful aspects of testifying for child witnesses and their families is the numerous delays between hearings
- Further, given limitations in children's memory, the longer the delay the greater the likelihood that children will forget details of the event

Recommendation:

- A special effort should be made to expedite cases involving children through the justice system

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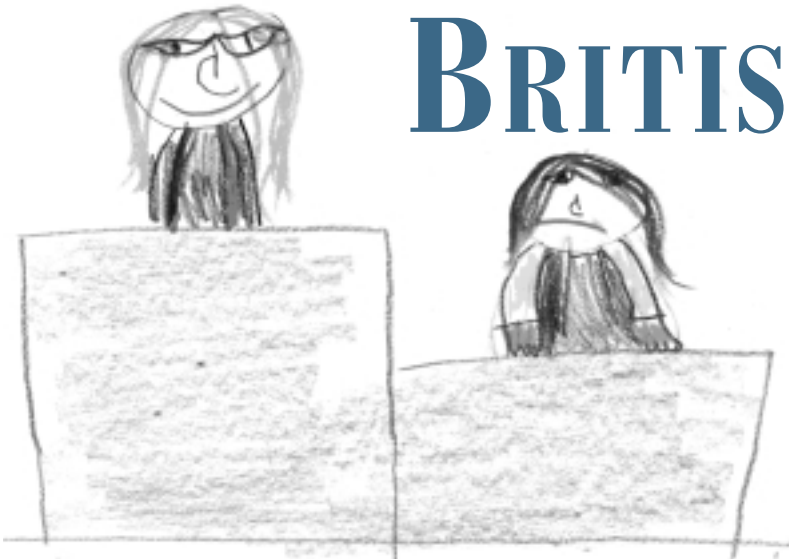
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BRITISH COLUMBIA STUDY ALSO SEEKS TO IMPROVE EXPERIENCE OF CHILD WITNESSES

The concerns raised in the Ontario study are consistent with a recent brief written by the Child Abuse Prevention and Counselling Society of Victoria, British Columbia (March, 1999). The report was written for the Attorney General to bring to the attention of professionals as well as the public the experiences of sexually victimized children who were required to testify in BC Courts.

The authors describe the courtroom as primarily an adult-oriented environment where children are intimidated by rigorous cross-examination and have difficulty in understanding the age-inappropriate language used in this adversarial milieu. Lengthy delays and frequent adjournments, the lack of concern around a child's needs, and disclosure of their counselling records are among the concerns which were strongly stated in this report.

In their report, the Society offered numerous recommendations to improve the treatment of child sexual abuse victims in the criminal justice system. In addition to several recommendations consistent with those made in the Ontario study, the following suggestions were made:

- British Columbia to adopt alternative models in order to prosecute violent crimes against children within a six-month period

- British Columbia to implement recommendations contained in the report "Children and Other Vulnerable Witnesses: A Guidebook on Court Design", commissioned by the Ministry of Attorney General in 1997. In particular the sections which promote: the use of testimonial aids such as closed circuit television or screens and the introduction of videotaped statements
- Child witnesses to be questioned by one interviewer who is knowledgeable in child development and the suggestibility of children. This person would question the witness on behalf of both the Crown and the defence counsel
- British Columbia to develop and implement a public education campaign to provide information about the rights of children

In response to these recommendations, the Attorney General in British Columbia recently announced funding to improve court design and technology in 18 courtrooms throughout the province. The changes will include improving existing technological services to enable the use of closed-circuit television and, in 12 courthouses, video conferencing for child witnesses. The Attorney General made the announcement during a round-table discussion concerning support for child

victims/witnesses on October 5, 1999. Attorney General Ujjal Dosanjh noted that the procedural changes and expanded technology are being implemented to "help protect child victims/witnesses from further emotional distress and trauma when they testify in court and help to make sure that they are not victimized twice".

For more information about this report,

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Counselling Society of Victoria BC*

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Concluding Comments

Children are witnesses with special needs and vulnerabilities. Both the Ontario study and the British Columbia report highlight the importance of finding a means in which to strike a balance between the rights of the defendant and the needs of children. Despite significant legislative reforms, more work needs to be done to improve children's experience within the criminal justice system.



We welcome responses to these studies. We are particularly interested in learning more about how child witnesses are served in your area.

ADULT WITNESSES WITH DEVELOPMENTAL DISABILITIES

Over the past several years, the Child Witness Project has received a number of referrals to assist in the court preparation of adult witnesses with developmental disabilities. This trend likely is due, in part, to an increasing awareness of the vulnerability of people with developmental disabilities to physical and sexual abuse. For example, North American studies estimate that prior to age 18, between 16 and 68% of individuals with developmental disabilities will be sexually abused (Senn, 1988). Further there has been an increased willingness on the part of the criminal justice system to prosecute these cases.

Individuals with developmental disabilities are more dependent on others (both emotionally and physically) than is typically the case with most adults. Their social environment fosters a “learned compliance” by encouraging and rewarding obedience to authority (Ericson, Perlman & Isaacs, 1994). Coupled with a tendency for society to devalue or patronize these individuals, most adults with developmental challenges fail to develop a sense of independence or understanding of their personal rights.

Most individuals with developmental disabilities often are not adequately educated about sexuality and sexual abuse. Further they may have misunderstood what they were taught and, as a result, may be confused about what is considered inappropriate versus appropriate behaviour (e.g., touching). Offenders may target individuals with developmental disabilities because they expect the victim

will be unable to report the abuse and therefore, do not anticipate any negative consequences for their actions.

The special vulnerabilities of these individuals are compounded by a general misapprehension within the justice system concerning their competence as witnesses. Surveys of police officers and lawyers indicate that they receive little training or information concerning the social/cognitive competencies of individuals with developmental disabilities and, as a result, tend to underestimate the abilities of these people (Bull & Cullen, 1992).

Adult witnesses with developmental disabilities, like children, often are perceived as unreliable and suggestible (see Ericson et al., 1994 for a review). There is a growing awareness of the importance of determining whether individuals with developmental disabilities are reliable, credible witnesses and the circumstances under which competency can be facilitated. The following case will be used to highlight some of the strategies which may be adopted to assist in maximizing the accuracy and reliability of their testimony.

CASE: *James, a young man in his early twenties with significant intellectual challenges, was the victim of sexual assault by a previously convicted paedophile. The perpetrator, prohibited by the Court from having contact with children, preyed on James' vulnerabilities which included social isolation, an inability to discriminate or understand sexual overtures, and compliant behaviour. James also was disinhibited by alcohol and pornographic videos. He likely*

interpreted the interest in him as a sign of friendship rather than predatory or exploitive.

James did however, report some of these incidents to a community worker. An extremely shy person, he experienced great difficulty and embarrassment in providing a complete disclosure. It took him many hours to give details of the sexual assaults to the investigating officer and he was quite distressed at the prospect of having to recount his victimization before the Court.

Preparation Guidelines

- Begin sessions at least 10 weeks before court date
- Gather collateral information regarding intellectual and social functioning
- Involve witness's community support person when possible
- Practice question and answer techniques
- Determine the individual's understanding of time
- Encourage assertiveness
- Reassure witness it is important to say when they do not understand a question
- Remind witness important not to guess
- Consult with Crown and arrange an early meeting
- Role play in courtroom

James attended several sessions of court preparation. His community service worker provided valuable information about James' level of functioning, his communicative skills as well as his ability to negotiate his environment. Psychological testing and school reports indicated that James had an IQ of approximately 75 and that he had particular difficulty dealing with abstract concepts. In the preparation sessions it was apparent that his concept of time was very poor. James was reluctant to admit his lack of knowledge which was of concern with respect to court testimony. There was a further concern regarding potential emotional and psychological damage to this timid individual as a result of rigorous cross-examination.

In applying theory to practice, it is unclear the extent to which intelligence is related to understanding abstract concepts such as truth, lie or oath. Our own experience suggests that adults with developmental disabilities likely will not have the typical understanding of legal terminology and court proceedings seen among most adults. However, we have found that witnesses with developmental challenges appear to benefit from direct instruction concerning court procedure.

Tips on Questioning

- Ask short, simple questions
- Questions should be structured and specific
- Avoid using abstract concepts or hypothetical questions
- Avoid repeating questions
- Clarify that the witness has understood the question
- Reassure the witness that they are doing well

Prior to court preparation, James had little to no knowledge of court procedure. Early sessions focussed on education about the court system. James was able to acquire a basic understanding of courtroom personnel and procedures.

Much of the court preparation involved practice listening and responding to questions. In particular, James needed to be reassured of the acceptability and permissibility of asking for clarification and stating when he did not understand a question. Consistent with previous studies of individuals with developmental disabilities, James was susceptible to leading and misleading questions. Further, when a question was posed that he did not understand, rather than ask the interviewer to repeat the question James would guess at the meaning and attempt to answer the question. Research indicates that a pattern of responding as illustrated by James' behaviour likely reflects a desire to comply with the perceived wishes of the interviewer. This tendency for compliance likely stems from the fact that people with developmental disabilities are surrounded by authority figures and, unlike most typical adults, are actively reinforced for compliance (Ericson et al., 1994).

Several weeks before the trial date, the Project clinician arranged a meeting with the Crown and a court tour. Visiting the courtroom enabled James to familiarize himself with the court setting as well provided an opportunity for the clinician to explain court procedure in more concrete terms. Consultation was provided to the Crown with respect to the special challenges and difficulties James would experience as a witness.

During the court tour, the Crown met with James and was involved in a role play of the trial (it is important to note that the content of evidence was never discussed during court preparation). The role play proved not only useful to James but also gave the Crown an opportunity

to observe, first hand, some of the difficulties this witness had and ways to facilitate his testimony. For example, to enhance the reliability of responses and to avoid effects of acquiescence the Crown was encouraged to refrain from asking leading questions and questions that call for a "yes" or "no" response. Further, the Crown was advised to avoid repeating questions. Our own informal observations indicate that individuals with developmental disabilities tend to change answers when the question is posed a second time. Given their desire to comply to authority, witnesses may infer that their first response was considered inappropriate and therefore, change their response in an attempt to provide a more acceptable response.

Given James' cognitive limitations, the Crown tailored his interview so as to avoid questions about dates or times and also provided a frame of reference when referring to a particular point in a sequence of events. It was apparent during the role play that James had difficulty following and comprehending lengthy or complicated questions. Short statements with single questions were much easier for him to answer. It is important to ensure that the message given was the message received as the witness may not ask for clarification.

Court Outcome: James appeared quite relaxed and confident on the day of court. He did not have to testify however, as a guilty plea was entered at the last minute. The Crown attributed the plea to the fact that James was prepared and willing to testify.

ARTICLE CONTINUED ON PAGE 6

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SUPREME COURT OF CANADA RECOGNIZES SPECIAL NEEDS OF CHILDREN

R. v W.J.F. (May 24, 1999)

The accused was charged with sexually assaulting a five-year-old girl. The complainant, who was six years eight months at trial, testified in a cleared courtroom from behind a screen with a support person present. The trial judge conducted the examination to determine whether she understood the nature of an oath. Many responses demonstrated that the complainant was simply nodding or shaking her head. The trial judge noted that it was going to be with some difficulty for the complainant to communicate the evidence.

When asked by the Crown about the assaults, the complainant did not respond. When Crown counsel attempted to have the complainant adopt the contents of her videotape to permit its receipt under s. 715.1 of the *Criminal Code*, the complainant would not respond to any of the questions. The Crown applied to have her out-of-court statements to relatives about the alleged assaults introduced into evidence for the truth of their contents as an exception to the hearsay rule, on the basis that the statements met the requirements of necessity and reliability. On a voir dire, the trial judge ruled that the statements were inadmissible because the Crown had not presented sufficient evidence to establish why the child failed to testify. The Crown presented no further evidence and the accused was acquitted. The majority of the Court of Appeal dismissed the Crown's appeal.

At issue for the Supreme Court was whether the Crown could not establish necessity absent extrinsic evidence explaining why the child refused to testify. The majority of the Supreme Court Justices held that the appeal should be allowed and a new trial ordered.

Excerpts from the Reasons for Judgement

Per Gonthier, **McLachlin**, Bastarache and Binnie JJ: If circumstances reveal that the child cannot, for whatever reason, give evidence in a meaningful way, then the trial judge may conclude that it is self-evident, or evident from the proceedings, that out-of-court statements are "necessary" if the Court is to get the evidence and discover the truth of the matter. An insistence on evidence to support necessity in every case cannot be reconciled with the values underlying the hearsay rule and the increasing sensitivity in society generally to the difficulties children face when called upon to testify. Here the record disclosed inability to testify consistent with trauma and negated the suggestion that the child was unwilling to testify.

Per **L'Heureux-Dubé J**: When a child witness is unable to respond in a meaningful way, sometimes what happened may make it so clear that the witness was truly unable to testify that necessity can be inferred absent evidence as to why the witness cannot testify. Expert testimony is neither a panacea nor a prerequisite to observing and understanding the traumatized child witness.

Per **Lamer C.J.** and Iacobucci and Major JJ (dissenting): The reason a witness stopped talking has everything to do with present and future availability and ability to testify and must accordingly be subject to a specific determination on an evidentiary foundation before the admission of hearsay evidence becomes reasonably necessary.



The complete judgement is available at:
<http://www.droit.umontreal.ca/doc/csc-scc/en/>
(file number: 26854)

EVENTS AND CONFERENCES CALENDAR

OCTOBER 27-29, 1999,

Vancouver, BC

*Fifth International Conference on
Children Exposed to Family Violence:
Creating a Legacy of Hope,*



BC/Yukon Society of Transition Houses,
Co-host: London Family Court Clinic
(604) 669-6943; Fax: (604) 669-6962
Web Site: <http://home.istar.ca/~bcysth>

Call for Papers

JUNE 14-18, 2000,

Ottawa, ON

*Beyond 2000: Healthy Tomorrows
for Children and Youth,*

The Canadian Paediatric Society,
The Canadian Institute of Child
Health and The Canadian Academy
Of Child Psychiatry
e-mail: cich@igs.net
Web Site: <http://www.cich.ca>

JUNE 25 -28, 2000,

Durham, NH USA

*Victimization of Children & Youth: An
International Research Conference,*
Family Research Laboratory & Crime
Against Children Research Center,
University of New Hampshire
(603) 862-0767 Fax: (603) 862-1122
e-mail: maverill@hopper.unh.edu
Web Site: <http://www.unh.edu/frl>
Submissions Deadline February 4, 2000

JUNE 29- JULY 1, 2000,

Ottawa, ON

CPA 61st Annual Convention,
Canadian Psychological Association
1-888-472-0657 Fax: (613) 237-1674
email: klpretin@cpa.ca
Web Site: <http://www.cpa.ca>

SEPTEMBER 3-6, 2000,

Durban, South Africa

*13th International Congress on Child
Abuse and Neglect,*
Implementing the United Nations
Convention on the Rights of the Child:
Myth or Reality, International Society
for the Prevention of Child Abuse
and Neglect
Kimberley Svevo
(312) 578-1401 Fax: (312) 578-1405
email: ispcan@aol.com
Submissions Deadline January 31, 2000

SEPTEMBER 23-27, 2000,

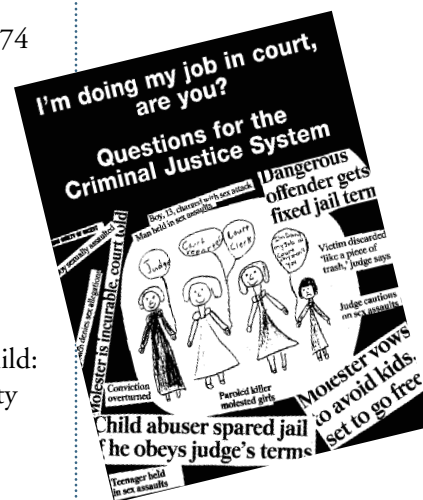
San Diego, CA USA

*5th International Conference on Family
Violence Working Together to End Abuse:*
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the Children's Institute International
(CII), and the California School of
Professional Psychology
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Publications Now Available

*I'm doing my job in court, are you?
Questions for the Criminal Justice
System (1999).
Child Witness Network Agencies.*

*Copies may be obtained from the
London Family Court Clinic and
Child Witness Network Agencies.*



UPCOMING ISSUE:

The next issue of Viva Voce is in the works! The newsletter will focus on the criminal justice response to child witnesses of spousal abuse. Topics to be discussed will include the impact of witnessing domestic violence on children, the emotional and psychological consequences of testifying in court and an examination of legal issues and concerns regarding calling child witnesses to testify. Contributing authors will include Peter Jaffe, Executive Director of the London Family Court Clinic.

If you would like to contribute to the Spring Issue please send your submission by January 31, 2000.



**Submissions Invited:
Soumissions invitées :**

Send to:

Ann Hoffer
by January 31, 2000

*Opinions, Commentaries and
Letters to the Editor are welcomed.*



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- Attending a national tele-conference in my community.
Topic of interest _____
- Learning more about facilitating a national tele-conference in my community

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