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Nicholas Bala
Queen's University

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Child Sexual Abuse Prosecutions in Canada: 
A Measure of Progress

Nicholas Bala *

INTRODUCTION

Until the early 1980's, child sexual abuse was a virtually ignored social phenomenon in Canada. It is now clear that the cases reported to the police and child protection authorities were a small fraction of the actual incidence of abuse. The legal system, especially the criminal justice system, contributed to the perception that child sexual abuse was not a widespread problem and, indeed, that many of the cases reported were unfounded. Canadian law was premised on the notion that victims of sexual abuse, particularly children, are inherently unreliable. The courts frequently dismissed the evidence of children and made it difficult for children to even be heard as witnesses. Too often the legal system produced "secondary traumatization" of those children who were witnesses. ¹

In the last decade in Canada, there has been a dramatic change in attitudes and awareness concerning child sexual abuse, as well as enormous increases in the numbers of reported cases. Encouraged by growing professional sensitivity and by the feminist movement, adult survivors of childhood sexual abuse have come forward to document the social patterns of denial. Growing public and professional awareness of the problem was reinforced by the 1984 release of the government commissioned Report of the Committee on Sexual Offenses Against Children [hereinafter "Badgley Committee

* Nicholas Bala is a Professor of Law at Queen's University in Kingston, Canada. He received his LL.B. from Queen's University in 1977 and his LL.M. from Harvard Law School in 1980. At Queen's, he lectures primarily on issues of family and children's law.

1. The emotional traumatization of children in the Canadian criminal justice system is documented in London Family Court, Reducing the System - Induced Trauma for Child Sexual Abuse Victims Through Court Preparation, Assessment and Follow-Up (1991). While the report indicates that there is a need for more detailed research, it concludes:

In our observations of the criminal justice system we saw first-hand the negative side; how sometimes laying charges and going to court resulted in the child being thrown into a system which was extremely slow moving, required frequent recall of abuse, led to stigmatization through public exposure and exacerbated feelings of self-blame, guilt and fear during cross-examination.

Id. at 115.
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which documented the extent of child sexual abuse in Canada, revealed major systemic and legal deficiencies, and made many recommendations to improve how society responds.\(^2\) The Canadian public was also shocked by revelations of abuse of children in various institutions, perhaps most prominently at the Mount Cashel orphanage in Newfoundland, where the Catholic priests had subjected many of the boys to physical and sexual abuse, and in residential schools for aboriginal children, where many native children were victims of abuse at the hands of teachers and supervisors, most of whom had religious affiliations.

Canada’s Parliament\(^3\) responded to this newly recognized problem by enacting Bill C-15,\(^4\) which came into force on January 1, 1988, and which substantially altered the laws governing criminal prosecutions for child sexual abuse. There have also been a number of very significant judicial decisions that have displayed a new sensitivity to the problem of child sexual abuse. The changes in the law have resulted in more successful prosecutions, which have heightened public awareness and in turn weakened the social attitudes of denial of the existence of the problem.

This article discusses some of the legislative and judicial reforms in the laws governing child sexual abuse prosecutions in Canada, including consideration of some of the recent constitutional challenges to the new legislation.

**QUALIFYING THE CHILD AS A WITNESS: STATUTORY REFORMS**

The Canadian courts and Parliament established rules that made it difficult, or impossible, for children even to be heard by the courts. At common law, children could testify only if they “under-

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3. In Canada, the federal Parliament has jurisdiction under the Constitution Act, 1867 for the enactment of laws governing criminal law and procedure, although the provincial governments have responsibility for law enforcement and the prosecution of cases. Canada thus has a national criminal law.


stood the nature and consequences of an oath."\(^5\)

Since 1890, it was legally possible for a child to give unsworn evidence, but it was necessary for a judge to be satisfied that the child was "possessed of sufficient intelligence to justify the reception of the evidence" and "understood the duty of speaking the truth,"\(^6\) a requirement that in practice may not have differed much from requiring evidence under oath. Further, if a child gave unsworn testimony, it was necessary to have corroboration, which made it even more difficult to secure a conviction. The practical effect of requiring an understanding of an oath was that it was difficult, or impossible, for children, particularly young children, to testify in court about what happened to them.

Gradually, Canadian courts started to develop a more flexible approach to permitting children to testify, particularly in the context of giving unsworn evidence. This trend has been significantly reinforced by the enactment of Bill C-15.\(^7\) While there is still some controversy about what exactly is meant by "understand the nature of an oath," with the amendments to the *Canada Evidence Act* found in Bill C-15, the significance of this has diminished as a child can now give unsworn evidence with relative ease.

As a result of Bill C-15, children who do not understand the nature of an oath may now testify if they have the "ability to communicate," upon "promising to tell the truth," without the statutory requirement for corroboration.\(^8\)

In 1988, in *R. v. Khan*,\(^9\) Judge Robbins of the Ontario Court of Appeal explained the distinction between situations in which a child could give sworn or unsworn evidence:

To satisfy the less stringent standards applicable to unsworn evidence, the child need only understand the duty to speak the truth in terms of ordinary everyday social conduct. This can be demonstrated through a simple line of questioning directed to whether the child understands the difference between the truth and a lie, knows that it is wrong to lie, [and] understands the necessity to do so. . . . Any frailties that may be inherent in the

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child's testimony go to the weight to be given the testimony rather than its admissibility.

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The test is whether the child's intellectual attainments are such that he or she is capable of understanding the simple form of questions, that it can be anticipated will be asked, and is able to communicate the answer in an understandable manner.\(^\text{10}\)

The Khan decision was affirmed by the Supreme Court of Canada in September 1990, with Madam Justice McLachlin quoting with approval from the preceding passage. Madam Justice McLachlin added that in refusing to permit the four and one half year-old girl to give unsworn testimony, the trial judge erred by placing "too much weight on the fact that the child was very young, in effect drawing a distinction between children of tender years and older children."\(^\text{11}\) It is apparent that under this new regime, it will be possible for children as young as three or four to testify.

If a child under the age of 14 does not understand the nature of the oath, the focus of inquiry must be upon the child's "ability to communicate." The "ability to communicate" referred to in section 16 of the Canada Evidence Act requires an assessment of the child's ability to communicate in the context of court proceedings. Thus, while children as young as one year of age may have the ability to communicate, to communicate in court requires a degree of verbal comprehension and vocabulary, sufficient memory skills to recall and describe past events, and the capacity to carry on a simple form of conversation. It is clear that the child need only have the capacity to respond to a "simple form of questions," and, for example, need not be able to respond to the double negative questions and complex vocabulary that lawyers are prone to employ.

A child who does not understand the nature of an oath or affirmation but has the ability to communicate may testify "on promising to tell the truth." No particular form of promise is required. While the child must give the promise, either in response to a question or by making a statement, there is no statutory requirement that the child establish a precise understanding of the abstract concepts of "promising" and "truth" in order to give unsworn testi-

\(^{10}\) Id. at 206 (emphasis added). The Court was in fact interpreting the standard for unsworn evidence under the old legislation, but specifically stated that this test was applicable to the provisions dealing with unsworn evidence found in Bill C-15.

\(^{11}\) 79 C.R. (3d) at 7.
mony. Though it may add weight to a child's testimony if the child can articulate an understanding of these concepts, the admissibility of the testimony does not depend on a verbal articulation of the understanding of abstract notions like "promise" and "truth." In particular, if a child lacks understanding of the oath or affirmation, an inquiry into the child's religious knowledge or background is inappropriate.

Although not explicitly stated in the legislation, there is caselaw that indicates that sworn testimony and unsworn testimony of children are now legally equivalent.

Corroboration and the common law "warning"

Historically, the most obviously discriminatory rules were those that required corroboration of the evidence of an alleged victim of child sexual abuse, even one giving sworn testimony. These rules made it difficult to obtain a conviction since typically there were no witnesses to the abuse other than the victim. Like many discriminatory laws, the old rules about child witnesses in abuse cases were based on the purported "scientific" findings of a by-gone age. These findings were in reality more reflective of social prejudices than of objective scientific inquiry. The rules were premised on the erroneous belief that allegations of sexual abuse were inherently likely to be fabricated. Perpetrators of these acts, invariably men, were considered less likely to lie than those who made the allegations, usually women and children.

In recent years, these rules have been abrogated by statute, with regard to complainants in sexual offenses in 1983 and for children giving unsworn evidence in 1988.

12. For suggestions of appropriate questions to ask a child at a competency hearing, see Marcellina Mian et al., The Child As A Witness, 4 C.R. (4th) 359 (1991).

13. The London Family Court Clinic reported that children were particularly embarrassed by questions about religious observation or instruction if they did not attend church regularly. Supra note 1, at 108.

In R. v. Meddoui, 61 C.C.C. (3d) 345 (Alta. C.A. 1990), aff'd, [1991] S.C.J. 81, the Alberta Court of Appeal took a flexible approach to the qualification of child witnesses. The Court of Appeal upheld a conviction where two children gave unsworn testimony, indicating that questioning of a child did not have to deal explicitly with whether a child understands the meaning of the "promise to tell the truth." This decision was affirmed without reasons by the Supreme Court of Canada.


Beyond the statutory rules regarding corroboration, a common law rule of practice developed in Canada that required the judge to warn the jury of the "frailties" of the evidence of a child, even one giving testimony under oath. While this rule applied to any criminal case, it was most frequently applied in cases where children were the victims of alleged sexual abuse, and often where their testimony could not be supported by other evidence. In a 1991 decision, R. v. V.K., the British Columbia Court of Appeal concluded that the "assumption" implicit in this rule "is no longer valid and the [1988] statutory amendments ... reflect its rejection by a society moving to rid itself of such gender-related stereotypical thinking." This approach was also followed in 1992 in R. v. R. W., where the Supreme Court of Canada concluded that there is no longer a rule requiring special caution before convicting an accused on the basis of the unsupported evidence of a child, though in individual cases the judge in a criminal case may still comment to the jury about the credibility of a particular witness, including a child witness.

CLOSED CIRCUIT TELEVISION AND SCREENS

The Canadian Parliament has recognized that victims of child sexual abuse may be traumatized by the process of testifying in court. Children are invariably more than simply nervous about being in court; they often are afraid of facing their assailant again. There have, for example, been cases in Canada involving children so frightened of the accused while testifying that they were physically ill on the witness stand and the prosecution had to be stopped, or so frightened that they were unable to answer questions.

In Bill C-15, Parliament adopted some of the procedures developed in the United States to permit a child in a sexual offense case to testify from behind a screen or from another room via closed circuit television. In order to use this provision, the Crown must establish an "evidential base," and must satisfy the court that this "is necessary to obtain a full and candid account of the acts com-

R. v. Bickford, 51 C.C.C. (3d) 181 (Ont. C.A. 1989), where the Court upheld the constitutionality of the repeal of the statutory requirement that the evidence of children must be corroborated.
19. Id. at 348.
plained of.” This is usually done by calling evidence, in the absence of a jury, from parents, social workers, the child, or others about the child's apprehension of the court or accused.

The Ontario Court of Appeal held in *R. v. Paul M.* that a trial judge has "substantial latitude" in deciding whether to order that a screen or closed circuit television be employed, and that the evidence need not "take any particular form." It is not necessary for the judge to hear evidence from the child before making a ruling. The Court did emphasize the "evidential base" requirement of section 486(2.1), indicating that the purpose of this provision, and the focus of inquiry concerning its use, is not prevention of trauma to the child, but rather on promoting a full inquiry into the facts alleged. Of course, there is a strong linkage between the issues. A child who is emotionally traumatized by the experience of testifying will inevitably be unable to give a "full and candid account" of the acts complained of. However, *Paul M.* illustrates that the Crown must adduce evidence linking the child's emotional state to the ability to give a full account of the events in question; mere discomfort on the part of the child will not be sufficient.

In *R. v. Levogiannis,* the Ontario Court of Appeal ruled that section 486(2.1) did not violate the *Charter of Rights* guarantee to be treated in accordance with the "principles of fundamental justice" (section 7) and to have a "fair trial" (section 11(d)). The Court accepted the "general truth" of the proposition that it is "more difficult not to tell the truth about a person when looking at that person eye to eye," but recognized that it is important not to "dogmatize about this — and in some cases . . . eye to eye contact may frustrate the obtaining of as true an account from the witness as is possible." The Court also noted that "the prevention of trauma is not the expressed object of our legislation although . . . the trauma of the witness may, in many cases, be the most important factor to be considered in deciding whether the statutory requirement has been met."

**EXCLUSION OF THE PUBLIC AND PUBLICATION BAN**

The *Criminal Code of Canada* section 486(1) allows for the ex-
clusion of some or all members of the public from some or all of a trial if their presence in the court room is not consistent with the "proper administration of justice." However, the courts have stated that the fact that a case involves a sexual offense or evidence that may be "embarrassing" to a witness is not sufficient reason to exclude the public.26 There is an onus upon the Crown to satisfy the court that it will be "more difficult" for a witness to testify in the presence of members of the public, or that the presence of too many persons may cause the witness to be unable to testify.27

Under section 486(3) of the Criminal Code in any case involving a sexual offense, a court may make an order directing that "the identity of the complainant or of a witness and any information that could disclose the identity . . . [of that person] shall not be published . . . or broadcast in any way." Children under the age of 18 must be informed of their right to seek a publication ban, and the court must make the order under section 486(4)(b) if an application is made on behalf of a child. However, if the court is satisfied that publication of the accused's identity would reveal the child's identity, the order may cover the accused as well;28 this could most obviously occur if a man is charged with incest, since publishing his name would effectively reveal his daughter's identity.

Although a publication ban restricts the constitutionally protected freedom of the press, the constitutionality of this provision, at least as it regards complainants, has been upheld as it is intended to protect victims from the trauma of widespread publicity and thereby facilitate disclosure and prosecution for what have historically been offenses that frequently are not prosecuted.29

Videotapes

Section 715.1 of the Criminal Code, also enacted as part of Bill C-15, permits a court dealing with an offense involving child sexual abuse to admit "a videotape made within a reasonable time after the alleged offense, in which the complainant describes the acts complained of . . . if the complainant adopts the contents of the videotape while testifying." This provision does not eliminate the need for the child to testify, as the videotape is received in addition to the child giving evidence.

Initially the practice of videotaping investigative interviews with children in sexual abuse cases was undertaken for the purpose of eliminating the need to subject the child to repeated interviews by allowing the tape to be shared with investigators from different agencies as well as with therapists. Repeated interviewing is potentially traumatic. In some cases repeated interviewing may even have the potential to give the child the impression that the allegations are not being believed by the investigators, or might cause the child to begin to embellish on details of the abuse or to be affected by repeated suggestions from different interviewers.

In addition, even if videotapes are not admissible in criminal court, they may be useful in securing guilty pleas if shown to the accused prior to trial. The videotape may demonstrate that the child is likely to be a convincing witness. Further, there is a psychological tendency for those who are guilty of abuse to deny to themselves what they have done. Particularly in cases of intra-familial abuse, viewing the videotape of a child's statement may cause an abuser to take responsibility for his or her acts and plead guilty.  

Videotapes may also be admissible in child protection or other civil proceedings that may affect the child's future well-being. In these proceedings the videotape may sometimes be shown instead of having the child testify, thereby reducing the trauma of these civil proceedings to the child.

In enacting section 715.1, Parliament intended to facilitate prosecutions for child sexual abuse cases. The videotape of an interview made within a reasonable time after the alleged offense in a relatively relaxed setting should serve to give the trier of fact a fuller account of the incident than testimony given months or even years later in the more intimidating environment of a court room. Videotapes have been admitted under section 715.1 at preliminary inquiries and trials in several provinces, but there is continuing


32. One of the most extensive videotape projects for child witnesses has been in Manitoba. Over 600 videotapes were made, though very few were used at trial. By June, 1989, tapes were admitted at five preliminary inquiries and two trials; in one of the two trials it was defense counsel who tendered the videotape for the purposes of attacking the child's credibility. See Anne McGillivray, Abused Children in the Courts: Adjusting the Scales After Bill C-15, 19 Manitoba L.J. 549, 567-569 (1990).
controversy about the appropriate interpretation of this provision, as well as in regard to its constitutionality.

In its 1990 decision in *R. v. Meddoui*, the Alberta Court of Appeal recognized the value of section 715.1 and gave the provision a liberal interpretation. The Court ruled that it could be used whether the child gives sworn or unsworn testimony, and that the child could also provide a description of the assailant. The Alberta Court of Appeal recognized that

a very early account may be of more probative force than present testimony. . . . Where the child might remain almost mute in the traditional method of inquiry, question and answer, he might divulge much in casual spontaneous activity, even play activity, at the tape interrogation . . . [and] might even report a fact unselfconsciously. 34

In *R. v. J.K.*, Judge de Weerdt of the Northwest Territories Supreme Court held that section 715.1 did not violate the *Charter of Rights*, since the accused still has the right and opportunity to cross-examine the child. The judge commented that “the special problems faced with very young witnesses, particularly where giving an account of traumatic events in their lives, made use of a videotape necessary if their evidence is to be heard at all in many cases.” 36 However, the judge ruled that he had the discretion to exclude a videotape in situations where “undue prejudice to the accused” can be shown, indicating that if a videotape is “replete with otherwise objectionable hearsay, grossly misleading questions or suggestions [by the interviewer] concerning material issues of fact,” it may be excluded. 37 The court also indicated that it could consider the circumstances in which a videotape was made to ensure that there was no “coaching of the witness through off camera cues and so forth.” 38

In its 1991 decision in *R. v. Laramee*, the Manitoba Court of Appeal ruled that section 715.1 of the *Criminal Code* violates sections 7 and 11(d) of the *Charter of Rights*. Madam Justice Helper, in the majority opinion, emphasized that section 715.1 violates the historic common law rule prohibiting admission of “previous con-

34. Id. at 354.
36. Id. at 353.
37. Id.
38. Id. at 354.
consistent statements." She expressed concern that children could be misled by interviewers, remarking that "young people have difficulty separating suggestion from reality." She concluded that section 715.1 is "inconvenient, ineffective and grossly unfair to the accused." She was especially concerned with the fact that an accused cannot challenge the statements of the child at the time that these are made.

The Manitoba Court of Appeal decision in *Laramee* is disappointing for its extensive reliance on archaic notions of evidence law developed in the nineteenth century and earlier. The videotape provision is intended to improve the quality of evidence received, premised on the believe that the earlier statement of a child is likely to be more accurate and complete. Section 715.1 should be seen as enhancing the truth seeking function of the judicial process, while preserving the accused's right to challenge the accuracy of the child's statement both by permitting cross-examination of the child and by permitting inquiry into the circumstances in which the videotape was made. Indeed, if, as is quite common, the defense rests on the premise that the child was improperly coached or interviewed, the existence of a videotape may be a potentially important piece of evidence for the accused. Without section 715.1, such tapes are less likely to be in existence.

**RECOGNIZING THE CAPACITIES OF CHILDREN**

In *R. v. G.B.*, Judge Wakeling of the Saskatchewan Court of Appeal acknowledged the need for greater judicial sensitivity in the assessment of the reliability of child witnesses and the significance of their silence or vagueness during cross-examination. He held that children should not be held to the adult standard of assessing credibility, noting that a young witness may find comfort in silence or in agreeing with counsel's suggestions. "Nor do I find it difficult to understand that the trauma resulting from the incidents of assault would prevent a witness from having an accurate and detailed recall of the event, even if it were being recalled on the day it occurred."

40. *Id.* at 290.
41. *Id.* at 292.
42. *Id.* at 296.
43. It has been held that the accused can use a videotape of an interview in any case where the child testifies, even if the prosecution does not want to have the tape admitted as evidence. *R. v. I.D.K.*, [1991] A.J. 918 (Q.B.).
45. *Id.* at 150.
This decision was affirmed by the Supreme Court of Canada, with Justice Wilson commenting:

In recent years we have adopted a much more benign attitude to children’s evidence, lessening the strict standards of oath taking and corroboration, and I believe that this is a desirable development. The credibility of every witness who testifies before the courts must, of course, be carefully assessed, but the standard of the ‘reasonable adult’ is not necessarily appropriate in assessing the credibility of young children.  

While many Canadian judges have not yet displayed this level of sensitivity, it is apparent that there is a slowly growing judicial understanding of the dynamics of child abuse and of the capacities of child witnesses. The National Judicial Education Institute is offering training programs for all judges on child abuse related issues, though attendance is voluntary.

COMMON LAW EVIDENCE RULES

In the past, difficulties of proof made the police very reluctant to lay charges in child sexual abuse cases. Legislative changes, such as those concerning the admissibility of videotapes, have made it easier to prove abuse. Canadian judges have also begun to display a more realistic attitude through the development of common law rules governing the admission of prior out-of-court statements of children, expert evidence, and evidence of prior incidents of abuse by the accused. This type of supportive evidence may be highly relevant, and can assist a trier of fact in discovering the truth of the allegations.

Child’s Prior Statements and Hearsay

There is a general rule of evidence law in Canada that previous statements made by a witness consistent with the testimony offered in court are not admissible. Such statements are considered irrelevant and self-serving, and contests over their accuracy might needlessly prolong trials. Further, if the child is not called as a witness, any statements made by the child to others are normally regarded as hearsay and inadmissible for that reason.

The general rules about the exclusion of previous consistent statements and hearsay are basically sound. However, they should not be applied so strictly that the trier of fact is deprived of highly relevant and probative information. Not infrequently in child sex-

46. 56 C.C.C. (3d) at 219-220. This approach was also followed by the Supreme Court of Canada in R. v. R.W., [1992] S.C.J. 56.
ual abuse cases the initial disclosure of abuse by the child to a parent or another trusted person is graphic and directly supportive of the allegations that form the basis of the charge. Recent appellate decisions demonstrate a willingness to admit this type of evidence in a variety of situations.

In *R. v. Khan,* the Ontario Court of Appeal ruled that a mother could testify about statements made by her three and a half year-old daughter approximately 15 minutes after an alleged sexual assault by a doctor, even if the child did not testify and these statements were technically hearsay. Judge Robins ruled that this was admissible under the "spontaneous declaration" (*res gestae*) exception to the hearsay rule.

The Supreme Court of Canada affirmed the decision of the Court of Appeal in *Khan,* though taking a different, and arguably broader, approach to the admissibility of this type of statement. Madam Justice McLachlin observed that there is a "need for increased flexibility in the interpretation of the hearsay rule to permit the admission in evidence of statements made by children to others about sexual abuse," but indicated that it was unnecessary to stretch the spontaneous declaration rule to deal with this situation.

Rather than apply the spontaneous declaration rule, Madam Justice McLachlin utilized the more flexible test of "necessity and reliability." The test first asks whether the reception of the hearsay statement is reasonably necessary. For example, the child's evidence may be inadmissible or a psychological assessment may indicate that the child might be traumatized from testifying in court.

On the facts of the case, Madam Justice McLachlin ruled the mother's statement admissible.

The Canadian courts have begun to apply *Khan.* While there is still some controversy over its interpretation, most judges seem to be taking a flexible approach. For example, in *R. v. K.O.S.,* Judge Wetmore of the British Columbia Supreme Court applied *Khan* to admit the statement of a three year-old child to her grandparents concerning allegations of sexual abuse by her mother's common law husband. The statements were made in the two days following the incidents. The child later refused to discuss the

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48. 79 C.R. (3d) at 11.
49. Id. at 13-14.
50. Id. at 15.
events with investigators, and the judge accepted this as a situation of “necessity” for receiving the hearsay evidence. The judge received expert evidence from a child psychiatrist about this child and ruled that there was sufficient evidence of the reliability of the statements to admit them, though acknowledging that the “ultimate reliability” of the statements must be assessed in light of all of the evidence at trial.

**Expert Evidence**

It has long been accepted that a medical doctor, with appropriate education and experience, can give expert evidence about the results of a physical examination of a child who is alleged to have been sexually abused. A doctor may describe the nature and extent of injuries, and may, for example, testify that the condition of a girl's vagina was consistent with being penetrated by a penis or finger, or that the trauma to the vagina could not have occurred as a result of an accident described by the parent.

More recently, Canadian courts have begun to deal with the issue of whether they should receive evidence from experts who are prepared to express an opinion on whether the child's mental, psychological, or behavioral condition is consistent with allegations of abuse. There is an increasing number of experts—pediatricians, psychologists, psychiatrists, and social workers—who have extensive experience in interviewing children and assessing the reliability of their allegations. There is also a growing body of literature on this subject. The assessment of the reliability of an allegation rests on such factors as the child’s emotional state when describing the incidents, the age-inappropriateness of the child’s sexual knowledge, the detail offered in the description, and the pattern and consistency of disclosure. While an assessment of the reliability of a child’s statement is not an exact science, trained experts can be of genuine assistance to the courts, particularly if they explain why they think an allegation is true or false.

Experts can also explain the significance of delayed or incomplete disclosure of abuse, which, in the absence of an explanation, might be viewed as damaging to a child’s credibility. They are also familiar with the “child abuse accommodation syndrome,” which often results in children falsely recanting their allegations due to familial pressure or guilt. Again, in the absence of an explanation, a trier of fact might draw incorrect conclusions about a child’s credibility as a result of the prior inconsistent statement. Experts can also explain how children who are victims of abuse may subse-
quently tend to fantasize, and explain that evidence of their fantasizing or “telling stories” should not necessarily undermine their credibility.\(^2\)

One of the first appellate judgments in Canada to deal with the admissibility of this type of expert evidence was the 1986 case of *R. v. Kostuck*.\(^3\) At trial, a psychologist testified that children “very, very rarely lie about sexual abuse,” and the judge apparently placed significant weight on this evidence in convicting the accused. The Manitoba Court of Appeal reversed the lower court and acquitted the accused, with Judge Hall stating: “It has long been part of the law for which no authority need be cited that a witness, expert or otherwise, may not testify that an accused, including a complainant, is likely telling the truth.”\(^4\)

While *Kostuck* could be interpreted as a general prohibition on expert evidence related to the reliability of a child’s allegations (sometimes confusingly referred to as a “prohibition on oath-helping”), the better view is that *Kostuck* only precludes reliance on expert assertions regarding the general incidence of veracity of allegations of child abuse. In *R. v. G.B.*,\(^5\) Judge Wakeling of the Saskatchewan Court of Appeal suggested that *Kostuck* was simply rejecting any evidence which would seem to support a determination of credibility based on statistical probability.

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On the other hand, I see no objection to expert testimony which does nothing more ... than show that psychological and physical conditions which occurred were consistent with sexual abuse, a factor which might otherwise be nothing more than conjecture or speculation on the part of the judge or jury. The trial judge’s conclusions are always at least twofold in nature, one requiring a determination of whether the offence occurred, and the second whether the accused was the perpetrator of the offence. If expert testimony is available to corroborate either of these conclusions, it should be accepted by the trial judge as a welcome assistance to what is always a difficult task, but is even more difficult when the incident involves reliance upon the evidence of children.\(^6\)

This decision was affirmed by the Supreme Court of Canada.\(^7\)

While this type of expert evidence is admissible in child sexual abuse cases, there is a need for some caution in its use, particularly

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54. *Id.* at 192.
56. *Id.* at 149.
57. See also *R. v. Lavallee*, 55 C.C.C. (3d) 97 (S.C.C. 1990), which takes a flexible
in a jury trial. A 1990 decision of the Ontario Court of Appeal, *R. v. F.E.J.*, 58 recognized both the utility of expert evidence and the need for judicial care in its use. The case involved a man charged with numerous acts of sexual abuse of his daughter over a period of years, including sexual intercourse. Shortly before the preliminary inquiry, the daughter, then aged 15, wrote to the social worker to whom she initially reported the abuse stating that she had “lied” about her father having abused her. At trial she testified that she had been abused and that the letter was not true, but only written to help her deal with the terrible events in her life. The trial judge permitted a psychologist with extensive experience in dealing with child sexual abuse to testify about the phenomena of false “recantations,” even though the expert had not interviewed the girl. The Ontario Court of Appeal upheld the admission of this type of evidence, recognizing the importance of expert evidence in child abuse cases, but also emphasizing the need for judicial caution and limitations, with Judge Galligan observing:

> The admission of evidence of that kind, as well as being probative, could have a very serious prejudicial effect. The crucial issues in the criminal law, the credibility of witnesses and the guilt or innocence of accused persons, must not be decided by expert witnesses, no matter how high their qualifications. An impressively qualified expert must not be allowed to appear to put his or her stamp of approval upon the testimony of a witness. Worrisome as I find those concerns to be, I am unable to say that they could prevent the evidence from being admitted. However, they do call for the greatest care on the part of trial judges in the use of such evidence. 59

It is submitted that Canadian courts should follow the trend of these decisions, which recognize the value and admissibility of expert evidence for dealing with child sexual abuse allegations, but

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59. 74 C.R. (3d) at 276. The Ontario Court of Appeal nevertheless affirmed the conviction. In *R. v. Mohan*, [1992] O.J. 743 (C.A.), the same Court held that an accused physician also had the right to call expert evidence in a child abuse case to show that he is not one of “a narrow class of individuals” who would commit the acts alleged against his patients.

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http://lawcommons.luc.edu/annals/vol1/iss1/14
also recognize that it is ultimately for the trier of fact and not for experts to decide a case.

**Similar Facts**

Many of those who sexually abuse children have multiple victims. In incestuous situations, it is common for a father to become sexually involved with each daughter, often as she reaches puberty. Some pedophiles have hundreds of young victims. Police and child protection workers who are investigating an allegation of abuse are naturally interested in whether a suspect has a prior history of abuse. Given the difficulties of proving in court that a child has been sexually abused, it is understandable that courts have begun to admit evidence of a prior history of abuse under the "similar fact" rule, though exercising caution to ensure that such evidence is not used unfairly.

A 1990 decision of the Supreme Court of Canada, *R. v. C.R.B.*, recognized the special nature of child sexual abuse cases and the potential value of similar fact evidence for this type of case. The accused was charged with acts of sexual misconduct against his daughter during a two year period after the death of her mother, commencing when she was 11 years old. According to the complainant's testimony, her father abused her during the period from 1981 to 1983. At issue was whether the Crown could adduce evidence that between 1974 and 1975 the accused had been sexually involved with the then 15 year-old daughter of his then common-law partner; the accusations did not result in criminal charges. The trial judge admitted the testimony of the older girl as "similar fact" evidence, a decision upheld by the Supreme Court of Canada.

Writing for the majority in the Supreme Court, Madam Justice McLachlin articulated the approach that courts must adopt when deciding whether to admit evidence of other "similar" incidents to assist in determining whether the accused person is guilty of the offense with which he is charged.

In determining its admissibility, one starts from the proposition that the evidence is inadmissible, given the low degree of probative force and the high degree of prejudice typically associated with it. The question then is whether, because of the exceptional probative value of the evidence under consideration in relation to its potential prejudice, it should be admitted notwithstanding the general exclusionary rule.61

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60. 76 C.R. (3d) 1 (1990).
61. Id. at 21.
The Supreme Court thus articulated a generalized approach, and rejected the view expressed in some earlier cases that similar fact evidence was only admissible for certain specified categories of purposes, such as to help establish the identity of the accused or to prove that conduct that may appear innocent in nature was in fact sexual in nature.62 Madam Justice McLachlin acknowledged the need for caution in the use of this type of evidence, especially in a jury trial, since it would be wrong to convict an accused simply because he is a bad or suspicious person.63 However, she specifically noted the utility of similar fact evidence on the issue of credibility in child sexual abuse cases, where the word of the child is pitted against the word of the accused.

It must be appreciated that _R v. C.R.B._ only gives general guidance to trial judges. Perhaps inevitably the test articulated for the admission of similar fact evidence has a conclusory or circular aspect to it. The Supreme Court, however, demonstrated a sensitivity to the problems arising in child abuse cases. The Supreme Court showed a willingness to allow courts to admit evidence about prior incidents of alleged abuse, especially if they occurred within a reasonable time of the incidents and form the basis of the charges in question, or involve similar types of relationships between the accused and the other alleged victims.64 Such evidence is clearly relevant and probative, and if not too remote in time or nature to the incidents forming the basis of the charges, is not unfairly admitted.

**CONCLUSION**

Too often in the past Canadian children have been failed by their legal system. It is apparent that the laws governing child sexual abuse are being improved, though there is substantial need for further reforms, some of which are identified in this article. Perhaps more pressing is the need for sufficient resources and training so that professionals, like judges, prosecutors, police, social workers,
prosecutors, child victim witness support workers, and correctional professionals, can deal adequately with the cases they now have.

While the criminal justice system cannot, by itself, "solve" the problem of child sexual abuse, it can have an important symbolic and deterrent role, as well as serving to vindicate victims. Further, most sexual offenders are highly resistant to treatment without the involvement of the courts, and their rehabilitation is only likely to occur if they are convicted and judicially directed towards treatment. It must also be recognized that some sexual offenders may not be amenable to treatment, and that society will only be protected if they are incarcerated.

65. For an analysis and recommendations on a broad range of issues related to child sexual abuse, see Rix Rogers Report, supra note 2.