

Children as Witnesses in Canada: Progress & Problems

Prof. Nicholas Bala

Faculty of Law, Queen's University, Canada
nicholas.bala@queensu.ca

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Presentation Outline

- Historical evolution of the laws dealing with children as witnesses in Canada's criminal justice system
- Areas of Progress, including Bill C-2
- Areas of Concern

Overall Assessment

- Substantial improvements in how society understands & deals with children who are victimized by adults.
- Better understandings of children has led to improvements in policing & investigation, laws and courts, prevention and services.
- Large increase in cases *reported* successfully prosecuted
- Likely decline in actual incidence of child abuse over past 25 years
- Still too many cases not dealt with adequately

History

- 1800's common law rules developed by male judges (and reinforced by early psychologists & Freud) premised on unreliability of children and female victims of sexual assault.
- Difficult for children to testify, had to demonstrate understanding of "oath" (divine consequences)
- Need for corroboration made prosecutions very difficult as abuse in private
- No accommodation & little support for child witnesses
- Children who disclosed abused often NOT believed & were punished for lying
- Child witness laws largely unchanged 1890 to 1988

Gradual Change

- 1980s: “Discovery” of child sexual abuse
 - Women’s movement supports adult survivors to disclose
 - growing professional awareness of child abuse
 - psychological research that children can be reliable witnesses if questioned appropriately
- 1988 & 1993 Criminal Code of Canada reforms
- 1990’s: 1000’s of adult survivors disclose institutional & familial abuse and litigation grows
- Evolution of common law (hearsay, similar facts)
- Better support services, training & court rooms

- Bill C-2 reforms : (likely in force by Jan 1, 2006)

Child Abuse: Criminal Justice Response

% of police reports (Stats Canada, 2005)

- Child victims under 18 yrs
 - 61% of all sexual assaults
 - 21% of all physical assaults
- Offenders (sexual assault against child/youth)
 - Parents & family (siblings, step parents): 32%
 - Friends & acquaintances : 48%
 - Strangers : 13%
- Family related sexual assault
 - 80% female victims (peak ages 12 – 14 years)
 - 20% male victims (peak ages 3 – 6 years)
- Underreporting of abuse (survey of adults GSS)
 - Only 18 % of childhood victimizations reported to the police
 - 8% if family related vs 24% if stranger
 - Youth had higher level of underreporting than adults

Child abuse victims often vulnerable

- Child abuse affects children from all economic, social & racial groups, but tendency for the most vulnerable to be exploited
 - emotionally vulnerable
 - single parent or lack of parental support
 - disabled (physically or intellectually)
 - institutionalized children (eg Residential schools, foster care)
- Problem for justice system that many of these victims may have difficulty in testifying in “convincing” manner

Children testifying in Criminal Court

- Child may feel powerless, stigmatized & betrayed by the criminal process, but also potential for empowerment & support (Hamblen & Levine 1997; Sas 1993)
- Adolescents express greater anxiety; greatest negative effects of testifying on behaviour seem to be on 6 -11 years
- repeated testifying & delay increase stress; maternal support decreases stress
- No evidence of *long term emotional trauma* from testifying, but 22% of child victims said that they would not want case prosecuted again in similar situation (Sas, 1993)

False Allegations

- Summit (1983): “Children do not lie” about sexual abuse
- There are false allegations, but false allegations by children much less frequent than false denials by abusive adults
- Distinguish: - false vs. unproven
 - malicious reports vs. honest mistake
 - child initiated vs. adult induced
- Some contexts have higher rates of false allegations:
 - Sexual abuse allegations when parental separation - miscommunication & mistrust more than malicious. (Also many true allegations in this context) (Trocmé & Bala , 2005)
 - Manipulative adolescents may make false allegations, but also frequent genuine victims
- Adults (investigators, therapists & parents) often source of false allegations. Problems of suggestibility of children & under-trained investigators (Martensville, Sask.)

Improved Investigations: Policies, training & resources

- Interagency protocols (police & child protection)
 - joint investigations
 - more cooperation
 - information sharing
- Increased training for police, prosecutors & judges, but still much to be done
- Victim witness supports & preparation for court
- Special court rooms

Delay in Criminal Courts

- time to resolve child witness cases (NS study)
 - 9 months
 - 10 month if withdrawal (N.S. 2000)
- Negative effects of delay on children
 - anxiety of children
 - cannot “move on”; therapy may be delayed
 - effect on memory
- Process reforms needed (have started)
 - scheduling priority for child abuse cases
 - continuity of police/prosecution/victim-witness
 - earlier decisions on withdrawal, including consultation with victim or parents

Child Competency Inquiry – CEA s. 16

- Before being allowed to testify, child under 14 yrs must correctly answer Q's about "oath", & "promise to tell the truth."
- Intrusive questions on oath
 - "Do you know what would happen if you lied to God?"
 - "Do you go to Sunday school?"
- Children have difficulty with abstract Q's:
 - "What is truth?"
 - "What does it mean to promise?"

Competency inquiry - reform

- Bala et al research (2000- 2005)
 - ability to correctly answer cognitive & moral questions about truth & lie NOT related to whether children will tell the truth
 - promise does increase truth telling with children
- Bill C-2 amends *Canada Evidence Act* s. 16
 - presumption of capacity to testify
 - Test: “able to understand & respond to questions”
 - child to “promise to tell the truth,”
 - BUT no questions about understanding of promise (adults face no questions about oath)

Videotapes of child interview: s. 715.1

- S. 715.1 makes tape admissible in sexual assault cases if child (under 18 yrs) testifies and “adopts the contents”
- Videotaping of police-protection child interviews:
 - can reduce stress on child,
 - improve evidence before court (more complete & emotions clear)
 - may induce more guilty pleas.
- Videotape will be revealed to accused.
 - Fair to accused to have clear record of investigation
 - May be misused
- Good quality taping requires protocols, equipment & training (Zebra in Edmonton)
- Child must testify, view and “adopt”
 - Child may be “cold witness”

Video-recording – Bill C-2 reforms

- s. 715.1 will apply to any offence for which child is a witness (eg child witnesses murder of mother)
- will allow videos for adult witnesses with disability

Screen & Closed Circuit TV: s. 486(2.1)

- Child often fears presence of accused & open court
- Screen & esp. CCTV give child psychological security
- Screen & CCTV rarely used
 - under 10% of cases with young children
 - more due to Crown reluctance & administrative difficulty than judicial refusal to allow
- CCTV preferable to child than screen
- Screen often clumsy
- CCTV/screen not a panacea
 - child may be “distant” or may “lose” the child
 - child may be less convincing to jury

- S. 486.2 : CCTV/screen only if “necessary” for child to give “full and candid account”
- Bill C-2
 - If requested, presumption of use for child under 18 unless it would “interfere with the proper administration of justice”
 - No longer need to show “necessary to give full and candid account”
 - Allows for application before trial

Court Houses & Support Services

- A few 'child friendly' courts in Canada
 - built-in CCTV facilities
 - appropriate seating for children
 - appropriate waiting areas
- More victim witness support services needed, especially in rural & remote areas
- Better access to CCTV
- Special needs for disabled, aboriginal & ethnic minority child victims
- Need for support and referrals for children after proceedings, including if acquittal

Edmonton Child Friendly Court (non-jury)









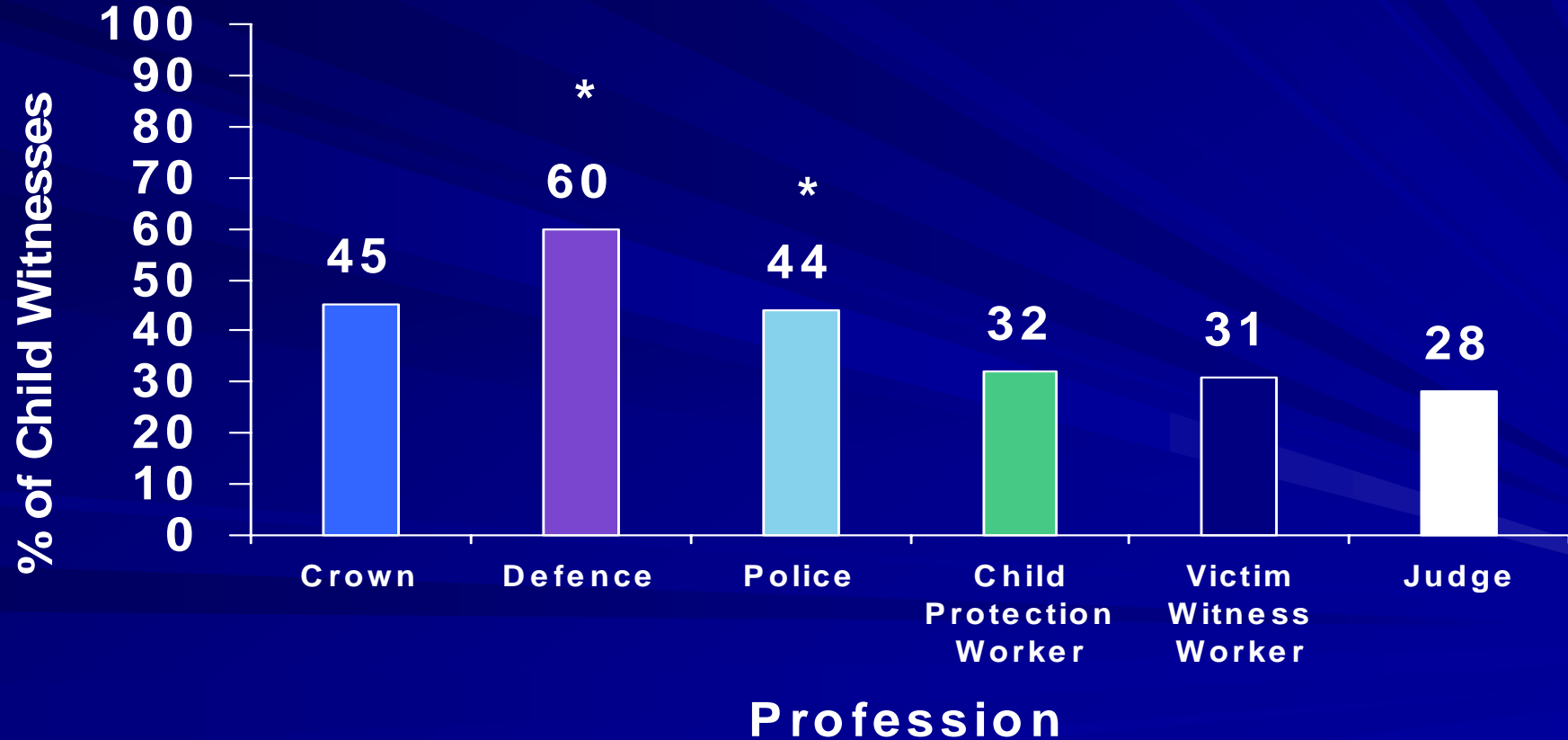
Developmentally Appropriate Questions

- Children are often asked questions by police, prosecutors, judges and lawyers that are NOT developmentally appropriate eg numeracy, motivation etc.
- Questions using inappropriate vocabulary, complex sentence structure. Questions that ask children about time, distance or frequency that a child of that age could not be expected to accurately answer
- Need for training for police, Crowns & judges
- Judges need to control defence counsel questions
- See eg. Anne Walker, *Handbook on Questioning Children* (1999) & Schuman, Bala, Lee (1999)

Inappropriate Questioning

- survey of Canadian judges (Bala et al 2005)

What % child witnesses are asked questions that they are incapable of answering due to confusion or inability to understand questions?



What is hearsay?

“Moose told Dog, and Dog told Frog,
and Frog told Kitty, and Kitty told me”



Hearsay

- Courts have become more flexible in allowing testimony about child's disclosures of abuse
- Hearsay rule modified – R v Khan (1990)
 - Necessary
 - too young
 - Would be traumatized
 - Reliable
 - circumstances of disclosure
 - person to whom statement made
 - recorded

Expert Evidence

- Considerable scope for psychologists and others to testify in 'best interests' proceedings (eg child protection & divorce)
- In criminal courts, much more restrictive approach to psychologists & other mental health professionals testifying in child abuse cases (*R v DD*, SCC, 1999). Concerns about (un)reliability, too influential with jurors, unfairness to accused without resources
- Still limited scope for experts
 - eg. Child too traumatized to testify, allow hearsay

Other legal proceedings

- Child Welfare
 - More flexible about hearsay of child
 - Child much less likely to be a witness
- Abuse allegations in context of parental separation
 - special challenges
 - Child less likely to be a witness
- Monetary damages
 - seeking compensation from abusers & institutions
 - more victim control, but more expense
 - very slow
 - mainly adult survivors

Suggested Guiding Principles: Child focus

- In deciding whether & how to prosecute, welfare of child must always be a paramount consideration.
- Co-ordination between systems & professionals is essential
- Adequate support for child & parents through criminal justice process, and afterwards
- Avoid delay & maintain case continuity
- Do not delay supportive services until completion of criminal trial
- In intrafamilial cases, recognize that the relationship of child & offender will continue

The Way Ahead

- Increase co-ordination at federal-provincial government level **and** at local level (protocols & programs)
- Resources for staff, training & equipment
- Training must be interdisciplinary
- Children need support throughout and after criminal process
- law reform: similar fact rule should be extended
- Offender issues
 - Bill C-2 provides “denunciation and deterrence” to be “primary considerations” in sentencing in child abuse cases
 - For some longer sentences, for all more community monitoring
 - Offenders need rehabilitation (if possible)
- Research into treatment of victims & offenders, investigations & prosecutions. (Implementation of Bill C-2 is to be monitored by the federal gov't.)

Some References

Bala et al, Child Witness Research:

<http://www.law.queensu.ca/faculty/bala/witness/witness.htm>

N. Bala, K. Lee, R. Lindsay & V. Talwar , "A Legal & Psychological Critique of the Present Approach to the Assessment of the Competence of Child Witnesses" (2000), 38 *Osgoode Hall Law Journal* 409 - 451.

N. Bala, K. Ramakrishna, R. Lindsay & K. Lee, "Judicial Assessment of the Credibility of Child Witnesses" (April, 2005), 42:4 *Alberta Law Review* 995-1017.

A. Leach, V. Talwar, K. Lee, N. Bala & R. Lindsay, "To Catch a Liar: Detecting Children's Deception," 29 *Law and Human Behavior* (in press, 2005).

N. Trocme & N. Bala, "False Allegations of Abuse When Parents Separate: Canadian Incidence Study of Reported Child Abuse and Neglect," accepted for *Child Abuse & Neglect* (in press, 2005).

UN Guidelines on Matters Involving Child Victims and Witnesses of Crime

http://www.unodc.org/unodc/en/crime_expert_group_meeting_2005-03-15_1.html

Questioning Children

Anne Graffam Walker, *Handbook on Questioning Children: A Linguistic Perspective*, 2nd edit (Washington, ABA Center on Children and the Law, 1999)

J. Schuman, N. Bala & K. Lee, "Developmentally Appropriate Questions for Child Witnesses" (1999), 25 *Queen's Law Journal* 251 -304.