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CARSWELL

Memories Are Made of This

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I

Legal and behavioural and social science disciplines have, lately, exhibited heightening concern about reliability of professed child mistreatment. Professional practice experience, anecdotal narrations, clinical studies and reports, and judicial proceedings and decisions evidence enhanced sensitivity to, and understanding of, this dilemma. "... [O]n the one hand," states *Wigmore on Evidence*, "[there obtains] the childish disposition to weave romances and treat imagination for verity, and on the other the routed ingenuousness of children and their tendency to speak straightforwardly what is in their minds ... ."[1]

Central to the concern of the disciplines is reliable authentication of suspected and of alleged child mistreatment stored in memory; which John N. Kotre describes as the "keeper of archives."[2] Crucial to verifying (or discounting) child abuse suspicions and allegations are (i) reliable observation/hearing/experiencing, interpretation, and recording in memory, of events; (ii) memory retention; (iii) memory exploration methods; and (iv) memory recall and communication — both by children who profess subjection to physical, psychological, sexual, or other species of mistreatment, and among children who claim to have witnessed, or been told by other children about their having professedly suffered, child mistreatment.

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1 *Wigmore on Evidence* (Chadbourne Revision) at s. 509.

2 *White Gloves: How We Create Ourselves Through Memory* (New York: The Free Press 1995) at 159.

Dependability of recall, concerning abuse, that Gabriel Garcia Marquez might have characterized as "torments of memory," is a legal and a behavioural and social science dilemma of many mansions. "[R]embering and imagining aren't easily untwined," reflects British author Blake Morrison in *as if [:] A Crime, A Trial, A Question of Childhood*.[3] His countryman, poet John Keats, wrote that he was "certain of nothing but ... the truth of the imagination." In his review of *Cries Unheard [..] The Story Of Mary Bell* (convicted in the early 1970s at age 11 of having murdered two boys), Bryan Appleward writes that the author's interviews with Bell for the book involved:

> ... the epistemologically dubious realm in which the fraught and all-to-familiar issues of recovering memory, exact interviewing technique and suggestion combine with the pre-suppositions of the interviewer to produce a version that, as we all now know, must be treated with the most extreme care.[4]

Crown testimony in successful criminal prosecutions that depends on psychiatric theory "known as repressed memory to its supporters and false memory syndrome by its detractors ... has taken a drubbing in scientific and legal circles" concludes law journalist Kirk Makin.[5] The Minister of Justice for Canada responded positively, in May 1998, to a request by the Criminal Lawyers' Association to inquire into whether convictions resulting from such prosecutions are safe; by promising to determine whether, and the extent to which, the Toronto-based Association's concerns are warranted.[6]

Whether, in specific instances, child mistreatment occurred, is perceived to have occurred, or did not occur, usually has no witnesses beside alleged abuser and alleging accuser. Reliance (which is to say, weight), if any, that law and the behavioural and social sciences (and concerned other disciplines) accord to professed mistreatment, particularly alleged child mistreatment, usually turns on the credit and credibility of those who avow or disavow direct involvement (and of those who attest to or dispute having been indirectly responsible or accountable for) mistreatment. "[H]owever," writes Green J. (as he then was) in *R. v. D.O.S.*:[7]

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3 (Picador USA, New York, 1997 at 26).

4 *The Sunday Times*, 10 May 1998 (reviewing: Gitta Sereny, *Cries Unheard [:] The Story of Mary Bell* (London: MacMillan, 1998).

5 "False memory's victims languish in jail" *The Globe and Mail* (09 May 1998) A1.

6 Kirk Makin, "McLellan to look into recovered-memory debate" *The Globe and Mail* (20 May 1998) A3.

7 [1992] N.J. No. 280 (Nfld. T.D.) (Quicklaw), at p. 5.

> . . . one is not, in the last analysis, faced with having to choose which of two mutually contradictory stories is correct. Obviously if the accused is believed, he must be acquitted; however, even if there is some doubt as to the accused's version, the court must nevertheless acquit if it is not satisfied beyond a reasonable doubt that the crown's version of the facts (or any version of the facts within the wording of the Indictment as originally framed or as amended) is correct: *D.W. v. R.* (1991), 3 C.R. (4th) 302 (S.C.C.).

Still, painstaking penal and protection investigations (if competent, adequate resources permit and are deployed) sometimes yield supporting evidence. In *R. v. D.O.S.*, Green J. (as he then was) maintains[8] that

> . . . if on questioning, a person says he or she cannot recall an incident, to assume that that person has nothing of value to add to the investigation and to discount that person's further involvement [is perhaps natural]. There is, however, a great danger in this. .... The fact that a person does not recollect may of course mean that he or she has forgotten but it could also mean, in circumstances where the witness had an opportunity to observe and would normally be expected to have seen something, that the incident did not happen. The Crown (and I use that term compendiously to include the police) have a duty in investigating an alleged crime, to attempt to uncover all reasonably available evidence that may have the effect of confirming the charge or exonerating the accused.

Determination of the bedevilling issues of credit (that is, reliability) and credibility (that is, believability) in abuse cases may be bridges too far. Or they may prove to be bridges crossed with assistance only of purported common sense, encumbered with its inherent frailties. Illustrative of these frailties is the recent conclusion of a Canadian trial judge that a person accused of physical and sexual assault lacked "the sense of outrage," while testifying about the accusations, which "one would expect from a person who, if we believe him, is caught in a quagmire of either fabricated allegations or innocently distorted memories."[9] Traveled trial counsel know, all too well, that many innocents do not field accusations against them with testimonial outrage and, equally, that denials of some naysayers sworn with shrill intensity are not warranties of innocence. (Granted, the Supreme Court of Canada has approved of jurors considering witnesses' "movements, glances, hesitations, trembling, blushing, surprise or bravado"[10] and "the overall, perhaps intangible, effect of"

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8 See above note 7 at 9.

9 *R. v. Kenny* (1992), (sub nom. *R. v. Kenny (No. 3)*) 298 A.P.R. 181 (Nfld. T.D.), affirmed (1996), 445 A.P.R. 250 (Nfld. T.D.), leave to appeal refused (1997), 467 A.P.R. 182 (note) (S.C.C.).

10 *Laurentide Motels Ltd. c. Beauport (Ville)*, [1989] 1 S.C.R. 705 (S.C.C.), per L'Heureux-Dubé J. at p. 799.

witnesses' demeanor.[11] However, "[d]emeanour alone" writes Finlayson J.A. in the Ontario Court of Appeal, "should not suffice to found a conviction where there are significant inconsistencies and conflicting evidence on the record ..."[12])

II

Memories of abuse, often from far away and long ago, may be faithful recollections, accurately perceived, recorded, retained, and articulated, of what happened. Or, they may not. Consider these lately published opinions:

(1) At St. John's Memorial University of Newfoundland, Professor of Psychology Dr. Carole Peterson, in the 1996 *Canadian Journal of Behavioral Science*,[13] writes:

> The accuracy of ... memory [of young children who are between two and five years of age] for traumatic injury six months after their injury has implications for children's testimony in court. Unfortunately, if children make commission errors in testimony it is often assumed that their memory abilities are suspect. However, we maintain that not all errors should be treated as equivalent. Errors on details such as the time of the injury, who responded to them when they were hurt, or [the presence or identity of] secondary bystanders, should not be equated with errors about what happened to CAUSE the injury. Children are surprisingly accurate on the latter type of information.
>
> In conclusion, the information provided by pre-school-aged children [between two and five years of age] about events that are traumatic, frightening, and cause bodily damage has a high degree of accuracy.

(2) Cory J. for the Court, in the December 1997 Supreme Court of Canada decision in *R. v. F. (C.)*, writes[14] (in addressing the issue of what constitutes the adoption by a child, in *viva voce* testimony, of a prior video-taped investigative statement, under *Criminal Code* section 715.1):

> It will be self-evident to every observant parent and to all who have worked closely with young people that children, even more than adults, will have a better recollection of events shortly after they occurred than they will

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11 *R. v. Lifchus* (1997), 9 C.R. (5th) 1 (S.C.C.).

12 *R. v. S. (W.)* (1994), 90 C.C.C. (3d) 242 (Ont. C.A.), at p. 250, leave to appeal refused (1994), 93 C.C.C. (3d) vi (note) (S.C.C.).

13 "The Preschool Child Witness: Errors in Accounts of Traumatic Injury" (January 1996) Canadian Journal of Behavioural Science at 28:4.

14 (1997), (sub nom. *R. v. F. (C.C.)*) 154 D.L.R. (4th) 13, 120 C.C.C. (3d) 225 (S.C.C.).

some weeks, months or years later. The younger the child, the more pronounced will this be. Indeed to state this simply expresses the observations of most Canadians. It is a common experience that anyone, and particularly children, will have a better recollection of events closer to their occurrence than he or she will later on. (See, *e.g.*, Rhona Flin & J.R. Spencer, "Do Children Forget Faster?" [1991] Crim. L.R. 189 at 190.) It follows that the videotape which is made within a reasonable time after the alleged offence and which describes the act will almost inevitably reflect a more accurate recollection of events than will testimony given later at trial.

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.... Any kind of assault on a child may be traumatic. Assaults of a sexual nature are still more likely to have a serious deleterious effect. This traumatic effect will be greater still when the perpetrator is a parent, guardian or person in authority. Recalling the events will be extremely difficult for every child and the more sensitive the young person, the greater will be the difficulty experienced. It follows that anything that can be done to ease the traumatic effect upon a child should be encouraged. Thus a record of events made in more informal and less forbidding surroundings than a courtroom will serve to reduce the likelihood of inflicting further injury upon the child witness.

(3) At Montreal's McGill University, Professor of Psychiatry Dr. Joel Paris, in the first of his two papers about memory reliability in the May 1996 *Canadian Journal Of Psychiatry*,[15] concludes:

Memory does *not* function like a tape recorder: we do not record in detail every memory in our lives ... . There are, in fact, good reasons why memories are inaccurate. The brain is faced with constant environmental input; received data require screening. In spite of the brain's enormous storage capacity, recording all input would be highly inefficient. Instead, memory systems are selective. There are separate systems for short-term and long-term memory, so that the long-term system need not keep permanent records of every event. When long-term memories are laid down, only their most salient elements are encoded. Memories are therefore overall impressions that are rarely factually precise and that include elements of imaginative reconstruction in which some degree of confabulation is normal.

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To summarize the findings of memory research, most experiences are not recorded, the mind remembers events *selectively*, and even these memories are not necessarily factually accurate. The assumption that *all* experiences are recorded in the mind and can be accessed through therapy, therefore, is quite contrary to what is known about memory.

There is no objective method, short of corroborating data, which can determine whether any memory is true or false. In fact, research on experimentally implanted false memories ... shows that, once accepted as

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[15] "A Critical Review of Recovered Memories in Psychotherapy: Part I – Trauma and Memory" (May 1996) at 41:201-202, 203-204.

true by subjects, these "memories" are reported with enormous conviction and that subjects will gradually add details that might suggest their veracity to a naive observer.

. . . .

Breuer and Freud, who stated that "hysterics suffer mainly from reminiscences" ... anticipated most of the current ideas about repressed memory. Freud ... hypothesized that when traumatic events cross a stimulus barrier, they cause painful anxiety and that repression is an attempt to defend against this anxiety. This model suggests that defence mechanisms influence access to memories. These mechanisms might include *suppression* — a conscious or semiconscious decision to control and conceal unacceptable impulses, thoughts, feelings, or acts; *repression* — an unconscious mechanism that banishes unacceptable ideas, fantasies, affects, or impulses from consciousness; or *disassociation* — the splitting of clusters of mental contents from conscious awareness ... In suppression, memories are available, but the individual makes an effort not to think about them; in repression, memories are unavailable; while in disassociation, not only memories, but entire segments of the personality become inaccessible.

. . . .

The evidence reviewed ... [in this paper] provides no support for the idea that "recovered memories," appearing for the first time in adult life, usually during the course of psychotherapy, represent accurate descriptions of childhood experiences. In both children and adults, traumatic events are *not* readily forgotten, even if attempts are made to subject them to conscious suppression.

It remains possible that in exceptional cases, memories of trauma do become repressed and that such memories might be recovered in psychotherapy. In the vast majority of cases, however, recovered memories are more likely to be *false* memories. The presence of false memories in a patient does not, of course, mean that *all* reported memories are necessarily false, because false and true elements can be blended inseparably.

. . . .

.... The present empirical evidence suggests ... [:]

- Adults lack precisely accurate memories of their childhood.
- There is little evidence that negative childhood experiences cause repression or disassociation.
- The more severe the trauma, the more likely it is to be remembered.
- Psychotherapy and hypnosis do not provide any special access to repressed memories.

These conclusions are, of course, subject to change as further data emerge. Clearly, we need much more research to determine the precise relationship between trauma and memory.

(4) Dr. Daniel L. Schacter, in *The Memory Wars,*[16] writes:

> ... We need to recognize that memories do not exist in one of two states — either true or false — and that the important task is to examine how and in what ways memory corresponds to reality.
>
> Contrary to what some have said, there is a middle ground in the recovered-memories debate; the problem is to identify it. I believe that this is our best hope for resolving the bitter and divisive arguments that continue to rage among patients, families, and professionals. Political posturing and grand generalizations on both sides of this debate should come to an end. Risky therapeutic practices need to be stopped. Better techniques must be developed that allow us to distinguish between accurate recovered memories and illusory memories that arise in response to suggestion. Achieving these objectives should help to minimize the possibility that those who were not abused come to embrace the psychologically devastating belief that they were, reduce (and, one hopes, end) false accusations that shatter lives and families, and also maximize the credibility of the memories reported by genuine survivors of sexual abuse. Sadly, legitimate concerns about pseudomemories have probably helped create doubts about the accurate recollections of some survivors of actual abuse, an outcome that should not be tolerated by therapists, researchers, or society.

(5) Jennifer J. Freyd, in *Betrayal Trauma[:] The Logic of Forgetting Childhood Abuse*[17] accepts, with some reservations, the 1994 results of the working group of the American Psychological Association (interim report) that (i) abuse, long forgotten, can be remembered; (ii) pseudomemories, capable of being convincing, for events that never happened can be constructed; and (iii) most adults who were sexually abused as children remember all or, at least, part of the abusing event.

(6) In *R. v. H. (E.F.)*, in 1996, the Ontario Court of Appeal concludes:[18]

> At trial, the defence [the appellant] did not challenge the honesty or sincerity of the complainant's belief that she had been sexually abused by her father. Instead, it was contended that her memories were the fictional product of a false memory disorder.
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> The reasons for judgment reveal that the learned trial judge was alive to this issue and fully aware of the evidence surrounding it. Indeed, he spent a considerable amount of time reviewing and analyzing the relevant evidence before concluding that the complainant had in fact suffered memory repression of childhood sexual abuse which she was now able to recall. He

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16 (New York: Basic Books, A Division of HarperCollins Publishers, Inc., 1996), at 277-279.

17 (Cambridge: Harvard University Press, 1997).

18 (1996), 105 C.C.C. (3d) 233, at p. 235 (Ont. C.A.), leave to appeal refused (1997), (sub nom. *R. v. E.H.*) 224 N.R. 238 (note) (S.C.C.).

> engaged in the same careful analysis before rejecting the notion that such memories were the product of faulty therapy or that they were internally or externally induced.

In dismissing the conviction appeal, however, the Court adds:[19]

> .... we are mindful of the fact that this type of case, perhaps more so than any other, carries with it the potential for a serious miscarriage of justice. Our uneasiness in this case has been heightened due to a number of concerns, including the complainant's apparent ability to recall in detail repressed memories of events which allegedly occurred when she was less than two years old; the bizarre nature of certain of the events described, including the murder of the hitchhiker, the appellant's act of slitting the family dog's stomach and then engaging in bestiality with the animal followed immediately by anal intercourse with the complainant, the appellant's act of fellatio with the complainant while she was recuperating from a tonsillectomy, the complainant's apparent repression of an abortion which the appellant caused her to undergo when she was 12 or 13 years old, and others.
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> None the less, in view of the constraints which inform our powers of review, we can see no basis for interfering with the decision of the trial judge.

Leave to further appeal to the Supreme Court of Canada and to adduce new evidence on the appeal were refused by that Court, notwithstanding evidence offered to the Court that defence counsel learned, following trial, that the complainant, had, before her trial testimony, altered her recollections of where she claimed the hitchhiker was buried, after a purported psychic suggested to her a different burial location.[20]

(7) Anthony Storr, in reviewing *Victims Of Memory[:] Incest Accusations and Shattered Lives* by Mark Pendergrast[21] in the 06 March 1997 issue of *The Times* (London), is left with the impression that

> [t]here is evidence to show that it is not difficult to implant false memories into the minds of normal people. Memory is more unreliable than is generally realized. For example, many people recall striking or amusing incidents from childhood. But do they really remember them, or do they remember what their parents told them? It is often impossible to be sure. As one psychologist wrote: "In the final analysis, memory isn't like reading a book; it's like writing a book from fragmentary notes."
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> Yet "recovered memory" therapists claim that detailed, accurate memories of traumatic sexual events are hidden from the conscious mind,

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19 See above, note 18 at 239.

20 See above, note 5 at A8; *Supreme Court of Canada Bulletin*, 1997, p. 1554 (18 September 1997).

21 (London: HarperCollins, 1997).

preserved intact by the mechanism of repression and can be disinterred by a variety of therapeutic measures. There is no evidence that such massive repression ever takes place. In fact, those who have been sexually abused as children usually recall their experiences only too vividly, and often wish that they could forget them.

(8) P. Susan Penfold, Clinical Director of the Child Psychiatry Inpatient Unit at British Columbia Children's Hospital, and a Child Psychiatry Professor, raised these questions in her 1997 commentary on "Questionable Assumptions About Child Sexual Abuse Allegations During Custody Disputes"[22]:

> To what extent do stereotypes and myths about male and female behavior inform beliefs about false allegations? Are the mothers considered to be archetypal bad women; vindictive, deceitful and destructive? Are the fathers judged to be suffering from irresistible biological impulses that compel them to molest their offspring? Are mothers' claims considered to be selfish, and fathers' claims laudatory?

(9) In April 1998, *The British Journal of Psychiatry* published the conclusions of a working group of four British psychiatrists on behalf of the Royal College of Psychiatrists. They concluded:[23]

> Memory is constructive and reconstructive rather than reproductive. It is fallible, altered by the passage of time and subject to error and distortion. Individual autobiographical memory is unreliable and people are often unable to remember considerable parts of their past experiences. Experiments have shown that expectations and beliefs can colour people's recollections, and that gaps in memory will be filled to create a satisfying narrative. Confidence in one's memory does not correlate with the accuracy of the memory... No autobiographical memory can be relied upon without some external corroboration but the frequent denial, even by proven abusers, and the secrecy surrounding child abuse often make such corroboration difficult to obtain.

Fueling the conclusions of the working group was evidence the group summarized as follows:[24]

(a) There is no empirical evidence to support either repression or dissociation, though there is much clinical support for these concepts. Evidence does not support the existence of 'robust repression.'

(b) Events are constantly forgotten and remembered on a daily basis.

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22 Unpublished paper, Vancouver, 1997 (a draft of which is published in: (1997) 14 Can. J. Fam. L. 11).

23 S. Brandon, D. Boakes, D. Glaser, and D. Green, "Recovered Memories of Childhood Sexual Abuse [:] Implications for clinical practice" (1998) 172 The British Journal of Psychiatry 296 at 299.

24 See above, note 23 at 304.

(c) There is abundant evidence, both clinically and experimentally, that memory can be distorted and that false memories do occur.

(d) Illusory memories can arise during the course of any psychological treatment, whether or not it is designated as 'recovered memory therapy.' Their creation seems to depend upon the conviction of the therapist or the patient that child sexual abuse underlies adult psychopathology.

(e) Memory-enhancing techniques do not improve the quality of remembering. They do increase the conviction with which memories, true or false, are held. They appear to be dangerous methods of persuasion.

(f) More research is needed into the reported associations between childhood sexual abuse and later adult psychopathology. At present we can only conclude that there is no pathognomic post-sexual abuse syndrome.

(g) There is no means of determining the factual truth or falsity of a recovered memory other than through external evidence, difficult though this is to obtain. Some reported events are so incredible that they could not have occurred and should not be believed.

Although the Supreme Court of Canada, in *M. (K.) v. M. (H.)*,[25] recognized academic findings that a person alleging sexual mistreatment may partially or fully repress memories of the alleged mistreatment and of suffering associated with the alleged mistreatment, M. (K.)'s successful appellate counsel, James W. W. Neeb and Shelly J. Harper, in *Civil Action for Childhood Sexual Abuse*,[26] concluded as follows:

> The debate between repressed vs. false memories will never fully be resolved. The research psychologists do not believe in the repression of memory because they cannot establish repression in their research studies. The clinicians argue that laboratory studies cannot replicate the kind of traumatic events that lead to repression and, furthermore, just because it cannot be proven in a laboratory does not mean it does not exist. The issue for the courts will then be whether the anecdotal proof offered by clinicians is sufficient or if more empirical evidence is required.
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> For lawyers, the resolution of this dilemma is not easy. One intuitively believes that the recovered memories of the thousands of individuals reporting repressed memories of abuse cannot all be false. In some cases, there are admissions or evidence supporting the allegations but proof beyond the word of the survivor is rarely available. The seriousness of the abuse and the very real pain of the survivors cannot be ignored.
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> However, vulnerable individuals may be subject to suggestions by therapists who may be acting with the best of intentions. Some of the recent child abuse cases in the U.S. have demonstrated that the interviewing techniques used to establish allegations of abuse can have the effect of leading children to develop certain beliefs—to create rather than elicit memories. [For example, see *People v. Buckey*, No. A750900 (Los Angeles Super. Ct., 1990). For a further discussion of

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25 [1992] 3 S.C.R. 3 at 38.

26 (Markham: Butterworths, 1994) at 55.

the legal concerns with respect to the investigation of child abuse allegations, see Lee Coleman and Patrick E. Clancy, "False Allegations of Child Sexual Abuse: Why is it Happening? What Can We Do?" (Fall, 1990) Criminal Justice 14.] While it is difficult to believe that any therapist deliberately sets out to convince a patient that he or she was sexually abused, the analysis of memories is subjective and it may be possible for a patient to be led to "believe" that certain events occurred.

Perspectives on memory reliability, such as these, lend credence to the viewpoint attributed to Dr. Daniel L. Schacter,[27] that "memory is both complicated and fragile. It is less a video-tape than a mosaic configured from a heap of coloured fragments."

III

Initiatives abound — including computer programs, video instruction, published research, literature, and judicial decision-making — to enhance prospects of interlocutors, counsel, and courts eliciting reliable memory of mistreatment allegations from children. Not least is the Macinterview computer program.[28]

In response to the experiences of children and child interviewers (including psychologists and police) in Britain, that children find it difficult talking "one-on-one" to another person about their allegations of mistreatment, the Department of Health funded a project during the past seven years that has produced a computer program called Macinterview.

The project was undertaken by a team of professionals including psychiatrists and psychologists who relied on their experiences from practice, clinical studies, and computer research. The resulting Macinterview computer program software underwent trials in 1996 and was introduced to potential users in 1997. Users include investigators of alleged child mistreatment; pediatricians seeking to identify the causes of children's aches and pains that cannot otherwise be explained; teachers helping adults who have learning difficulties; and social workers assessing children to determine where best to place them in foster care.

Macinterview relies on images, sound, speech, and video to de-emphasize the "one-on-one" interviewing relationship and to serve as an intermediary; fostering rapport between child and interviewing

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27 Philip J. Hilts, "Unscrambling the Mosaic of Memory" *The Globe And Mail* (13 July 1996) at D8 (New York: The New York Times Co, 1996).

28 *The [London] Sunday Times* (15 September 1996) at 3.11.

adult and preserving detailed accurate records of the computer-assisted interview.

At commencement of the computer program, a child interview subject chooses representations of him- or herself and of his/her family members and other real-life persons from a computer-generated multi-ethnic display. Next, the child is instructed on using the computer to select and affix facial expressions on the chosen computer representations of the real-life persons to convey feelings and emotions that the child identifies with those persons to the extent those persons figure in the subject matter of an interview. The child's own feelings and emotions, in relation to those persons, may be ascertained by instructing the child on use of a computer palette of pain sensations.

(Beyond this commentary's scope are issues, requiring judicial scrutiny, of the reliability of memory identified by use of this software if a result of the software's employment is criminal or penal charges, protection proceedings, or civil actions for compensation for alleged mistreatment or defamation.)

Another initiative, which focuses on judicial proceedings — particularly criminal proceedings — is "A case for balance," a 45-minute video cassette published on 31 January 1997 by The National Society for the Prevention of Cruelty to Children[29] and approved of by Britain's Judicial Studies Board. The video cassette demonstrates "not best practice but good practice, drawn from around the country [Great Britain], which continues to evolve."[30]

While the "judge's duty [is] to protect the interests of the defendant [in a penal proceeding], who is presumed in law to be innocent until proven guilty," begins the introduction to a companion booklet, "[j]udges also have a responsibility to ensure that all witnesses, including children, are enabled to give their evidence."[31] Although the context for the video is criminal proceedings, much of the video's content will serve courts and counsel in other types of actions.

Likewise instructive, both in civil and criminal proceedings, are "When Children are Witnesses" a video cassette made in the United States by Dr. Laurie Braga and Dr. Joseph Braga of the National

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29 42 Curtain Rd., London, EC2A 3NH. (The video cassette is not available in North American format, although the copyright holder may grant, to purchasers of the cassette in European format, consent to conversion to North American format for non-commercial use.)

30 The National Society for the Prevention of Cruelty to Children, "A case for balance" 31 January 1997 at (i).

31 See above, note 28.

Foundation for Children[32] and a series of video cassettes, produced by the Chesapeake Institute, Washington, D.C., styled "Investigative Interviewing Techniques In Child Sexual Abuse Cases" and marketed by Sage Publications Inc.[33]

Sage has also published *Memory And Testimony In The Child Witness*,[34] comprising the results of research by psychology practitioners, teachers, and academics. An editor of this publication, Maria S. Zaragoza, writes:[35]

> there is increasing evidence that children have better memory for events that are significant to them and that their memory is better for events in which they have participated than for those they have simply observed ... even very young preschoolers are capable of remarkably accurate long-term recall of naturally occurring but meaningful events, thus supporting the idea that laboratory studies with artificial stimuli may well underestimate children's memory abilities in real-world testimony situations.
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> ... studies of the effects of question repetition on children's recall ... of the effects of suggestive questioning ... and the use of anatomical dolls and other props as cues ... all ... highlight the circumstances under which young children's memories might be disproportionately susceptible to error and distortion.
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> ....
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> ... efforts to develop improved procedures for interviewing child witnesses and to validate these techniques are on the rise ...

Besides research results, pertinent published material includes literature such as books and journal entries, and judicial decisions; a selection of which are incorporated in Additional Readings at the end of this commentary.

IV

Whether one or numerous allegations, accusers and accused are involved, appropriate interviewing about alleged child (or adult) mistreatment will be tainted — sometimes spannnered — by undertrained, mistakened, overzealous, insensitive, undisciplined, or partial investigators and lawyers, or by complainants pre-occupied with retribution, publicity, advocacy, or compensation at the expense of faithful recollection. Legally and personally devastating consequences

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32 National Foundation for Children, Washington, D.C.

33 Sage Publications, Inc., P.O. Box 5084, Thousand Oaks, CA 91359-9924.

34 Maria S. Zaragoza; John R. Graham; Gordon C.N. Hall; Richard Hirschman and Yossef S. Ben-Porath, eds., (Thousand Oaks, C.A.: Sage Publications, Inc., 1995).

35 See above, note 32 at x, xi.

can result — for those wrongly accused or for accusers falsely expectant, or both. Not least of these misadventures occurred in Martensville, Saskatchewan: 180 charges covering the period 01 May 1988 to 31 July 1991 against nine persons (one of them a young offender) involving 13 children resulted in two convictions of one person. A decision of the Saskatchewan Court of Appeal on 02 May 1995 in *R. v. S. (T.)*,[36] upholding one conviction, offers some explanations for the collapse of the criminal prosecutions:

- Many complainants did not raise allegations until their parents, at police insistence, began questioning them.
- Initial denials by children were met by repeated questioning, by parents, and then by police.
- Questioning did not comply with the techniques recommended by experts to get accurate responses from children. For example, questioning was leading and suggestive. The questioning encouraged children to make allegations (by questioners referring to some suspects with hostility). Children were encouraged to confirm the locale of suspected abuse by showing them photographs of the site before the children indicated any knowledge of it.

These concerns were reinforced by a further decision of the Saskatchewan Court of Appeal in *R. v. S. (T.)* released 08 November 1995, upholding a second conviction of the same person.[37]

Less well-known than Martensville was another trial deriving from similar, although unrelated, allegations in Saskatoon, Saskatchewan. As reported (in part) by David Roberts of *The Globe And Mail* on 17 June 1995:

> The [three] kids said they were cut with knives, forced to take part in sex acts with as many as 40 adults, with dogs and flying bats. They were regularly made to eat a mixture of "poop" and raw fish shaped like Easter bunnies. Once, between sessions of eating eyeballs, their parents forced them to watch the neighbours' baby being skinned, buried, dug up, then roasted and eaten.
>
> One of the traumatized youngsters admitted in a Saskatchewan Court that the neighbours at first were very angry when their baby was eaten, but later decided to forget about it.
>
> But the Saskatoon police didn't forget.

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[36] (1995), 131 Sask. R. 1 (Sask. C.A.). Also, see Frann Harris, *Martensville: Truth or Justice* (Toronto: Dundurn Press, 1998).

[37] Ibid. at (1995), 131 Sask. R. 1.

> Despite the fact that police found no bodies (they didn't look) and received no reports of missing infants, some 40 men, women, and children (almost anyone who had contact with the three children) were investigated.

Eventually 16 people were charged with more than 60 counts of sexually mistreating the children. The Crown was later forced to abandon the case against 12 of them for lack of evidence, while four were convicted and sentenced. At least three of the four persons who were convicted later appealed to the Saskatchewan Court of Appeal and, from dismissal of their appeals to that Court, to the Supreme Court of Canada, which, on 20 June 1996, allowed the appeals of the three persons, entered an acquittal in the case of one of them, and ordered new trials for the other two.[38]

No convictions were upheld on an appeal of child mistreatment convictions by Kelly Michaels, a daycare worker in New Jersey. She had been employed as a teacher in Wee Care Nursery School, which operated from St. George's Episcopal Church in Maplewood, State of New Jersey. The School, usually staffed by five teachers and two assistants or aides, provided services for approximately 50 families with children aged three to six years old. She began employment there in September 1984 as an assistant and, commencing three weeks later, continued her employment there as a teacher. She was arrested in the Spring of 1985.

On 22 June 1987, Ms. Michaels went to trial on three indictments containing, in total, 235 charges of criminal offences allegedly committed by her from September 1984 to April 1985 against children attending the School. (The offences primarily alleged (i) physical and sexual assaults — including rape and assault with knives, forks, a wooden spoon, and Lego blocks; (ii) endangering the welfare of children; and (iii) making terroristic threats.)

On 15 April 1988, a jury found Ms. Michaels guilty of 115 of the charges. On 02 August 1988 the trial judge sentenced her to 47 years imprisonment (without eligibility to apply for parole until she had served 14 years) and to a fine of $2,875.00 payable to the Violent Crimes Compensation Board of New Jersey.

In 1994 (nine years after Ms. Michaels was first arrested) as a result of a series of appeals that set aside all convictions of Ms. Michaels, the State of New Jersey decided not to retry her on any of the charges.[39] At the heart of the State's decision was considerable evidence that the child complainants were improperly questioned by investigators.

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38 *R. v. R. (D.)* (1995), 98 C.C.C. (3d) 353 (Sask. C.A.), reversed (1996), 107 C.C.C. (3d) 289 at 296 (S.C.C.), additional reasons at 107 C.C.C. (3d) 289 (S.C.C.).

39 (1993), 264 N.J. Super. 579, 625 A.2d 489 (N.J. Sup. Ct. (App. Div); (1994) 136 N.J. 299, 642 A.2d 1372 (N.J. Sup. Ct.).

In comparison, no material shortcomings were evident in interviewing conducted by the "Mount Cashel Inquiry" from 1989 through 1991, of 453 former residents of Mount Cashel Boy's Home and Training School in St. John's, Newfoundland (who had lived at Mount Cashel for varying periods from 1941 through 1989), or by the Royal Newfoundland Constabulary during criminal investigations of complaints that about 15 per cent of those former residents to date have made.[40] Some Christian Brothers of Ireland, who had served at Mount Cashel, were charged as a result of the Constabulary criminal investigation. All Brothers and former Brothers charged were found guilty of all or some of the charges against them (save one, whose first trial ended in a "hung jury" on 3 October 1998). However, two of the former residents whose complaints resulted in criminal charges against the Brothers were, judicially, not found reliable in trial testimony they gave against one of the former Brothers charged criminally.[41]

V

No copyright or patent obtains on effective technique for interviewing children. Technique is a constantly altering function of the interviewer, informed by (i) the developmental stage, life experience, and reactions of the questioned child; (ii) the questioning circumstances; (iii) the nature of professed mistreatment; and (iv) any prior taint of a child's memory of alleged mistreatment. A competent child evidence procurer will strive to be acutely sensitive to subject, circumstances, and substance of mistreatment detection. S(he) will permit the child interview subject to define the timing of disclosure (whether entirely or partially, if at all) of the child's memory content about alleged mistreatment. Effectiveness of an interviewer's technique skills are governed, generally, by formal training, practical experience and the interviewer's personality, and, in particular cases, by cardinal command of available pertinent information about a particular matter before commencement of an interview. Whatever technique is utilized, the interviewer should present, to the child interviewee, a *persona* that is consistently neutral in appearance and

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[40] Royal Commission of Inquiry Into The Response Of The Newfoundland Criminal Justice System To Complaints, under The Public Inquiries Act, R.S.N. 1970, c. 314, by Letters Patent pursuant to Order in Council dated 01 June 1989. The difficult and painstaking task of interviewing former residents of Mount Cashel was adroitly performed principally by retired R.C.M.P. officers Weldon H. ("Buc") Orser from Newfoundland and Frederick W. Horne from Nova Scotia.

[41] *R. v. Burke*, [1996] 1 S.C.R. 474 (S.C.C.), reconsideration refused (May 23, 1996), Doc. 24071 (S.C.C.).

body behavior; judgment-lacking in verbal language; emotionally patient, restrained, and serene; and unswervingly respectful of both the criminal presumption of innocence and civil protections from liability enjoyed by whoever a child accuses, absent proof satisfying the criminal or civil burden (as the case may be).

For the interviewee, the interview may, and often does, require several hours or numerous meetings over days, weeks or months. This is because interview subjects, before disclosing and amplifying disclosures of alleged mistreatment, require time with an interviewer to permit trust and rapport to flourish between them; to enable confidence to develop; and to provide the interviewee, so far as her or his intellectual and emotional maturity allows, to understand the processes and purposes for which the interview is being conducted.

Like considerations are integral to preparing the interviewee to testify. Among factors impairing prospects of the interview subject, especially a child, giving comprehensive and complete testimony from relevant and probative memory within the child's reach, even if interview techniques were competent, are these: (i) substitutions for the familiar, trusted, confidence-engendering counsel between preliminary inquiry and trial in criminal proceedings and between pre-trial procedures and trial in civil proceedings; (ii) inadequate—sometimes woefully insufficient—allocations of time by counsel to prepare complainants and plaintiffs and other witnesses for pre-trial procedures and trial; and (iii) unqualified or inexperienced counsel attempting to prepare a child witness for pre-trial procedures and trial without assistance from a child psychologist qualified and experienced for those purposes.

Essential goals of the child inquirer's technique are impartial interviewing, cautious supervision of downloading from the child's hard drive to operating memory, and careful interviewer hard-copying; all without implanting viruses in the recollection of the child subject that may spanner the subject's credit or credibility.

(As to the primary systems of memory — sensory memory, short-term memory (commonly referred to as "working memory"), and long term memory, see: Dr. Emmanuel Stip, "Memory and Clinical Psychiatry" in the *Canadian Journal of Psychiatry*.[42])

Stephen J. Ceci and Maggie Brouck, in *Jeopardy In The Courtroom: A Scientific Analysis Of Children's Testimony*, a decidedly important contribution to the subject, write about techniques for eliciting a child's memory:[43]

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[42] Supp. 1 (Sept. 1996) 41 Can. J. Psychiatry at S3 – S4.

[43] (Washington, D.C.: American Psychological Association, 1995) at 295-296.

> ... Techniques that induce the child to image scenarios that might not have occurred, that encourage children to think repeatedly about fictional events, or that provide negative stereotypes that are paired with repeated suggestions can result in a substantial diminution of children's testimonial accuracy. Furthermore, when an interviewer selectively reinforces certain elements of a child's report, or when she induces the child to make a disclosure through the use of peer pressure and through the aggrandizement of her own authority over the child, the interviewer runs the risk of eliciting inaccurate and false reports. Each of these techniques are especially suggestive when they are paired with repeated interviews that occur long after the alleged event.
>
> Although there is scientific evidence that the use of any one of these techniques may usurp the child's memory, we do not conclude that the presence of any one of these techniques in a single forensic or therapeutic interview necessarily renders all of the child's reports suspect if these are used by a neutral unbiased interviewer in a single interview. This should not be taken to mean that we endorse the use of suggestive interviewing techniques, because we do not. But we realize how difficult it is, for even the best-trained neutral interviewer, to refrain from using any of the techniques that we have termed suggestive and to conduct an interview in which there is an element of spontaneity and support.
>
> We believe that suggestive techniques exert their greatest toll on testimonial accuracy when they are used by interviewers with a strong *confirmatory bias*: Confirmatory bias is the major mechanism that drives the intensity and number of suggestive techniques used. When an interviewer avoids confirmatory biases by posing and testing alternative hypotheses, the suggestive techniques do not seem to result in serious problems. Although we have no systematic data on this point, [relying on] only our casual (uncontrolled) observations of the many videotaped interviews we are sent, it does appear that if interviewers remain open to alternative hypotheses, the isolated use of a suggestive technique may not be that deleterious.

Fundamental child interview methods, appropriately implemented in practice, minimize resort to suggestive techniques. After rapport building with, and assessment of developmental level of, a child interview subject, the interviewer should attempt, usually in the following order, to elicit information from the child:[44]

(a) by inviting a free narrative (*e.g.*, "Do you know why you were brought to talk to me today?");

(b) by cue questioning (*e.g.*, "You said something happened to you in the washroom; tell me about it.");

(c) by direct questioning (*e.g.*, "You said he put his pee-pee in your bottom but everyone had their clothes on. Tell me how that happened?" or "Did she take off your clothes?");

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[44] See: David C. Day, Q.C., *et eux. A Police Reference Manual for Cases of Child Sexual Abuse*. Dr. Joseph P. Hornick and Joanne J. Paetsch, eds. (Calgary: Canadian Research Institute for Law and the Family and Ottawa: Solicitor General of Canada, 1995) at chapter 5.

(d) by probing questions (*e.g.*, "You told me he did that when you were only two, but you said you don't remember it. How do you know what happened?"); and

(e) by leading, suggestive questions (as a final resort).

Child interviewing techniques that hold potential for distortion of answer accuracy include, in the opinion of University of Ottawa Professor of Law David A. Paciocco, pursuit of a single hypothesis — that the child interview subject was sexually mistreated — especially where the interviewer is perceived by the child to have status; conveying to the child the impression the accused person is bad or mischievous; incessant use of leading questions; suggestive techniques (such as praising or criticizing the child's interview responses); multiple interviews; and delay between alleged mistreatment and interview.[45]

Cautions that must be respected, in the conduct of child interviews, are offered by Queen's University Professor of Law Nicholas Bala and Ontario Assistant Crown Attorney Hilary McCormack, in "Accommodating the Criminal Process to Child Witnesses." They include refraining from complex, obscure, or unclear questions; abstract concepts; legal vernacular; and double negatives.[46]

Unless videotaped, the interview should be documented by note-making that is comprehensive and is as precise and contemporaneous as the interview circumstances allow. Such notes may be employed by the interviewer, if a witness, to refresh, or in substitution for, memory.[47]

Priorities in any child interview will be attempting to ascertain the child's credit — capacities to perceive (*i.e.*, observe and interpret), retain, understand, and recall, and to intelligently answer questions — and the child's credibility; *i.e.*, sense of moral responsibility. These considerations will be central to assessment of, and apportionment of weight (if any) to, a child's subsequent testimony, if the child serves as a witness.[48]

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45 "The Evidence of Children: Testing the Rules Against What We Know" (1996) 21 Queen's L.J. 345 at 366-367.

46 (1994), 25 C.R. (4th) 341, at p. 346.

47 See: Sopinka, J.; S.N. Lederman and A.W. Bryant, *The Law Of Evidence In Canada* (Toronto: Butterworths, 1992), at pp. 849-857; Christopher Bentley, "Child Witnesses: Successful Impeachment Strategies" in *Witness For The Prosecution: Successful Impeachment Strategies* (Toronto: Criminal Lawyers' Association, 1997).

48 See: *R. v. Kendall*, [1962] S.C.R. 469 (S.C.C.).

An imperative of dealing with child complainants and other child witnesses is counsel's disciplined intellectual and emotional capacity for, and commitment to impartiality. Counsel (or investigators) given to spontaneous ocular gyrations or rude condemnations in reacting to complainant allegations, made either during interview or litigation, should vacation or abdicate from, or avoid, engagements involving this subject.

Understanding dynamics of child mistreatment is critical to conducting interviews with children. Although an interviewer must, for example, be judgment neutral in approaching and conducting child complainant and child witness interviews, the interviewer must, concurrently, be sensitive to the contradiction of the potential impact of *mistreatment*, even as the interviewer seeks to identify or discount *alleged mistreatment*, on a child's willingness to submit to interview and the reliability of answers provided by the interviewed child.

Frequently, initial mistreatment allegations from a child are not elicited in a formal interview. Rather, the allegations may first be disclosed casually, by an allegedly violated child, while that child is occupied, in a home, school, or recreational setting, with activity having no truck with professed past trespasses of the child. (The point is abundantly made by *Three Years After The Verdict[:] A Longitudinal Study Of The Social And Psychological Adjustment Of Child Witnesses Referred To The Child Witness Project* by the London (Ontario) Family Court Clinic.)[49] How accurately the unforewarned, hence unprepared, recipient of these spontaneous disclosures records what the child has said, how that recipient reacts, and what that recipient says to or asks the disclosing child, *if* that recipient responds to the disclosures, will bear materially (i) on an interviewer's approach, subsequently, to questioning the child about the disclosures; and (ii) on the evidentiary value of the disclosures.

Not least of a child interviewer's fears is inadvertently causing a child to misspeak and, thus, contradict or appear to be inconsistent with the child's initial spontaneous disclosure(s). Multiple, incongruent (or apparently contradictory) child statements deriving from several interviews can be a staple of cross-examining counsel. Antagonistic (or apparently discordant) statements, properly utilized in cross-examination, may jeopardize the weight otherwise deserved by, or may entirely impeach, the child's mistreatment allegations. On the other hand, "[b]ecause repetition elicits additional information and is a relatively innocuous procedure when appropriate questions are used,

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[49] (London, ON: London Family Court Clinic, 1993.).

sweeping recommendations to avoid repetition are not warranted" conclude Debra Ann Poole and Lawrence T. White in their contribution, "Tell Me Again and Again" in *Memory And Testimony In The Child Witness*.[50]

Most important features of children's evidence are (i) appropriately and accurately eliciting a child's memory; and (ii) maximizing the prospects of a child's elicited memory being deservedly and fairly received and depended on as evidence.

VI

Language choices — especially the terms "survivor" or "victim" and the term "offender" — are not appropriate, except in the event of a criminal verdict of guilt or a civil finding of responsibility. Globally, language used in searching a child mistreatment accuser's memory may materially affect admissibility of, or weight granted, the accuser's proposed testimony. (End Table 1 furnishes illustrations of legally desirable and legally inappropriate language use.)

In *R. v. Millar*, Morden, J.A., for the Court, wrote:[51]

> . . . I do think that it lies within the discretion of a trial judge to rule that the evidence be given in a less emotional but just as accurate form — in terms of intentional force rather than "child abuse": see *State v. Best*, 232 N.W. 2d 447 at p. 454 (S. Dak. S.C.).

VII

Whether, ultimately, the harvest of the interviewer's inquiries of a child is received in evidence in a legal proceeding — criminal, child protection, custody or compensatory — often depends on answers to these questions. First, is the child complainant competent to testify either on oath or affirmation or, alternatively, without taking an oath or affirming? (End Table 2 outlines Canada's legislation governing witness — that is, testimonial — competence that involves, principally, the issue of whether a child possesses capacity to — and not whether in fact a child did — perceive (*i.e.*, observe, hear or experience, and interpret), records, retain, understand, recall, and communicate about the information relevant as evidence. Secondly, if a child lacks competence to testify, may out-of-court statements the child made to a third party — in other words, hearsay — be received in

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[50] See above, note 32 at 42.

[51] (1989), 49 C.C.C. (3d) 193 (Ont. C.A.).

evidence from the third party, in court, in place of testimony from the child, on the basis of being necessary and reliable; standards enunciated in *R. v. Khan*[52] and other decisions[53] of the Supreme Court of Canada?

If the evidence of professed mistreatment is received by a court in a legal proceeding as direct evidence from a child or as hearsay from a third party (to whom the child spoke out-of-court), the court must, thirdly, decide what weight to accord the received evidence.

In *R. v. F. (C.)*, Cory J., for a unanimous Supreme Court of Canada, writes,[54] in addressing the issue of the effect on weight of inconsistency between a child's video-taped statement contemplated by *Criminal Code* section 715.1, made shortly after alleged sexual abuse, and the child's later *viva voce* trial testimony:

> If, in the course of cross-examination, defence counsel elicits evidence which contradicts any part of the video, this does not render those parts inadmissible. Obviously a contradicted videotape may well be given less weight in the final determination of the issues. However, the fact that the video is contradicted in cross-examination does not necessarily mean that the video is wrong or unreliable. The trial judge may still conclude, as in this case, that the inconsistencies are insignificant and find the video more reliable than the evidence elicited at trial. In *R. v. B. (G.)*, [1990] 2 S.C.R. 30 at p. 55, Wilson J. stated that:
>
> > . . . a flaw, such as a contradiction, in a child's testimony should not be given the same effect as a similar flaw in the testimony of an adult . . . While children may not be able to recount precise details and communicate the when and where of an event with exactitude, this does not mean that they have misconceived what happened to them and who did it.
>
> She concluded that, although each witness' credibility must be assessed, the standard which would be applied to an adult's evidence is not always appropriate in assessing the credibility of young children. This approach to the evidence of children was reiterated in *R. v. W. (R.)*, [1992] 2 S.C.R. 122 at pp. 132-34. There McLachlin J. acknowledged that the peculiar perspectives of children can affect their recollection of events and that the presence of inconsistencies, especially those related to peripheral matters, should be assessed in context. A skilful cross-examination is almost certain to confuse a child, even if she is telling the truth. That confusion can lead to inconsistencies in her testimony. Although the trier of fact must be wary of any evidence which has been contradicted, this is a matter

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52 [1990] 2 S.C.R. 531 (S.C.C.).

53 Considered in: (i) Josiah Wood Q.C., "Hearsay - Necessity And Reliability" (1997) 20 Prov. Judges Jo. 5-26, and introductory remarks in the Editor's Journal by Journal editor Hon. Garrett A. Handrigan, Judge of the Provincial Court of Newfoundland at Grand Bank; and (ii) His Honor Judge Norris Weisman, "The Admissibility of Hearsay Evidence: Defining and Applying Necessity and Reliability since *R. v. Khan*" (1995-96) 13 C.F.L.Q. 67.

54 See above, note 14 at paras. 47-48.

which goes to the weight which should be attached to the videotape and not to its admissibility.

In his pragmatic and comprehensive analysis of children's evidence, "The Evidence of Children: Testing the Rules Against What We Know," Professor David A. Paciocco rightly decries claims that evidence of children is generally as reliable as, if not more reliable than, that provided by adults: [55]

> Statements like this are troubling for two reasons. First, even the experts know less about the evidence of children than we like to believe. Second, what we do know makes it palpable nonsense to make the *general* claim that the evidence of children is as reliable as the evidence of adults. This is an inaccurate and potentially dangerous assertion that has the potential to inflate artificially the value that testimony is given in particular cases. Even if it was accurate, it would still be dangerous because it constitutes a generalized endorsement of reliability. ... we believe that the problem with the traditional rules was that they assumed unreliability. We believe that the same problem existed with the way we evaluated the evidence of children: we started with an assumption of unreliability. It would be an odd way to improve this if we were to start now with a predisposing belief in reliability. As McLachlin J. said in *R. v. W.(R.)*: "protecting the liberty of the accused and guarding against the injustice of the conviction of an innocent person require a solid foundation for a verdict of guilt, whether the complainant be an adult or a child." ([1992] 2 S.C.R. 122 at p. 134.)

What common law developments and legislative reforms affecting children's evidence have, generally, sought to achieve, especially over the past dozen years, include, principally, the following:

(a) Enhancement of processes to facilitate judicial reception of children's evidence.

(b) Elimination of perfunctory depreciation of the probative value of children's evidence that resulted from application of negative stereotypes.

(c) Admission of expert opinion evidence, in limited, defined — although as yet not entirely clear — circumstances, to assist triers of fact to understand children's evidence[56] (such as regards the Child Sexual Abuse Accommodation Syndrome to explain why a child who makes delayed, contradictory

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55 "The Evidence of Children: Testing the Rules Against What We Know" (1996) 21 Queen's L.J. 345 at 349.

56 *R. v. P. (C.)* (1992), 74 C.C.C. (3d) 481 (B.C. C.A.); *R. v. B. (F.F.)*, [1993] 1 S.C.R. 697 (S.C.C.); *R. v. Marquard*, [1993] 4 S.C.R. 223 (S.C.C.); *R. v. B. (R.H.)*, [1994] 1 S.C.R. 656 (S.C.C.); *R. v. Mohan* (1994), 89 C.C.C. (3d) 402 (S.C.C.); *R. v. R. (D.)*, [1996] 2 S.C.R. 291 (S.C.C.); *R. v. Terceira*, [1998] O.J. No. 428 (Ont. C.A.) (Quicklaw).

> statements may, nonetheless, be reliable in allegations of mistreatment).[57]

Nonetheless, such common law and legislative changes do not influence the obligation of the trier of fact to treat, with caution, a child's evidence "where," concludes McLachlin J. in *R. v. W.(R.)*, "such caution is merited in the circumstances."[58] Caution is merited in the view of the Supreme Court of Canada, reports Professor Paciocco, (i) in circumstances such as where children "may have difficulty recounting details"; and (ii) having regard for the "experience" of children's "clear and accurate memories of the time of the [alleged] occurrence" fading "faster than those of adults."[59] Reinforcing this judicial counsel is the conclusion of researchers that:[60]

> Extensive investigation into the completeness and accuracy of children's memory performance has produced a complex network of outcomes, none of which allows for a sweeping, general conclusion regarding the veracity of children's memory as witnesses.

Evidence subject to judicial scrutiny may not be restricted to what a *child* testifies about in court or what a *third party* testifies in court about what a child has said out of court. The child's *interviewers* (or *witnesses to the interviewing* of the child) — parent or other caregiver, police officer, social worker, counselor, therapist, teacher, camp owl/akela, lawyer — may also be required to testify: (i) as to matters relevant to admissibility and weight (including credit and credibility), such as circumstances of the making, and nature, of the child's mistreatment allegations or, where a third party is offered as a witness to repeat in court what a child has said elsewhere; or (ii) as to matters pertinent to why the child is not competent to testify personally about the allegations.

Absent corroboration, however, judicially proving allegations of child mistreatment — in criminal and civil proceedings, alike — often is, at best, difficult. Although not legally mandated, corroboration is,

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57 Roland Summit, "The Child Sexual Abuse Accommodation Syndrome" (1983) 17 Child Abuse and Neglect 177.

58 [1992] 2 S.C.R. 122 (S.C.C.), at pp. 132-133, reconsideration refused (November 18, 1992), Doc. 21820 (S.C.C.).

59 David M. Paciocco, "The Evidence of Children: Testing the Rules Against What We Know" (1996) 21 Queen's L.J. 345 at 352.

60 R.E. Geiselman, K.J. Saywitz, and G.N. Bornstein, "Effects of Cognitive Questioning Techniques on Children's Recall Performance" in G.S. Goodman and B.L. Bottoms, eds., *Child Victims, Child Witnesses: Understanding and Improving Testimony* (New York: Guilford Press, 1993) at 71 (quoted in: David M. Paciocco, "The Evidence of Children: Testing the Rules Against What We Know" (1996) 12 Queen's L.J. 345 at 385).

practically, desirable, if not privotal. In dismissing a sexual assault criminal charge in *R. v. Brooks* on 25 March 1998, Mr. Justice David Humphrey of Ontario Court (General Division) stated (in part):[61]

> ... perhaps for the second time the complainant has been victimized. Any experienced counsel would know that the Crown had no chance of a conviction in this case. It is simply too dangerous to convict on the unsupported evidence of a young child describing an event that took place years ago.
>
> The child, ... is a delightful child. She is bright, articulate, charming and ... probably telling the truth. But why is she put through this ordeal?
>
> ....
>
> Every one wants to be politically correct. We are out to protect the child. Nonsense, I say. ... The conviction rate for cases like this is close to zero, and if a conviction is registered, the Court of Appeal, wisely, in my opinion, would not uphold the conviction.
>
> . . . .
>
> I wish that somebody in authority with a modicum of common sense would put a stop to this nonsense and would make the well-being of the child the paramount issue. Tell the child, the parents, the therapists and the social worker the facts of life in the real world. Tell the child that they are believed, but there simply is not enough evidence to prosecute. That way, the child, as I say, will not be victimized probably for the second time, and will be able to maintain [her or his] dignity and integrity, and not be led to believe that our justice system is, in fact, unjust.

VIII

What this commentary states about interviewing children may, in most respects, be maintained about adults alleging childhood mistreatment or asserting adulthood mistreatment or acknowledging they were witnesses to alleged perpetration either when they were children or as adults. Due to developmental considerations, however, children (and, even more so, mentally-challenged adults and children) usually require, of interviewers seeking information from them — especially about alleged mistreatment — considerably greater investments of interviewer time and tolerance, persistence and patience, and energy and innovation than are ordinarily necessary.

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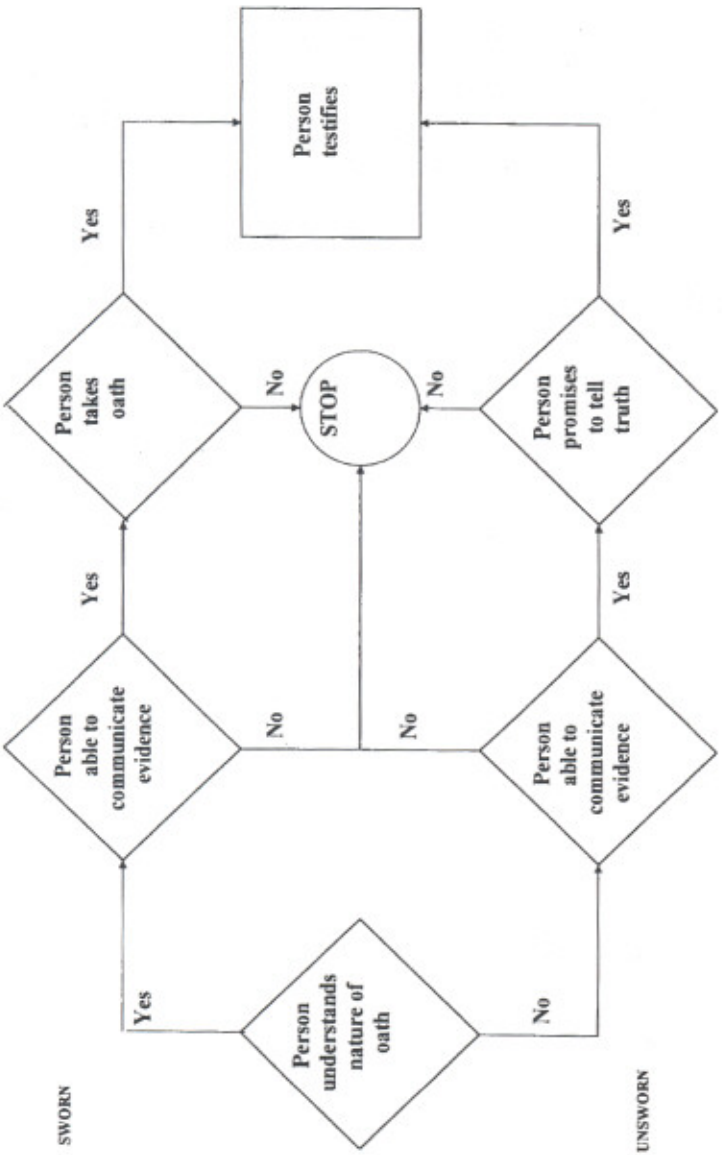
61 [1998] O.J. No. 1726 (Ont. Gen. Div.) (Quicklaw).

Table 1

Inappropriate usage (before judicial determination)	*Appropriate usage (before judicial determination)*
[1] child abuse	alleged intentional or deliberate force; alleged child mistreatment
[2] battery	alleged mistreatment
[3] getting a conviction; impaling the bastard	determining guilt or innocence
[4] offence; crime;	allegation; alleged offence charge; complaint
[5] perpetrator suspect;	accused; defendant suspect
[6] survivor	person struggling to cope
[7] rape	alleged aggravated sexual assault
[8] victim	accuser; alleged victim; client; complainant

Table 2
Canada Evidence Act, Section 16



Note to Table 2: This table is based on an outline originally prepared by Dr. Joseph P. Hornick, Executive Director, Canadian Research Institute For Law and the Family, Calgary and Dr. Margaret A. Clarke, pediatrician, Childrens' Hospital, Calgary.

Comparable provincial/territorial legislative provisions are as follows. Alberta: *Evidence Act*, s. 20; British Columbia: *Evidence Act*, s. 5; Manitoba: *Evidence Act*, s. 24; New Brunswick: *Evidence Act*, s. 24; Newfoundland: *Evidence Act*, s. 18; Northwest Territories: *Evidence Act*, ss. 19, 25; Nova Scotia: *Evidence Act*, s. 63; Ontario: *Evidence Act*, ss. 18, 18.1; Prince Edward Island: no statutory provision; retains the common law rule that a "child" witness, unless sworn, is testimonially incompetent; Quebec: *Quebec Civil Code (Book Seven)*, Art. 2844; Saskatchewan: *Evidence Act*, s. 42; and Yukon: *Evidence Act*, ss. 16, 22.

Additional Readings

Following are some readings — published research results, literature, and judicial decisions — useful (i) for preparing to interview and interviewing children; (ii) for preparing to examine or cross-examine children and persons recalling purported childhood memories; and (iii) for making argument as to assessment of admissibility and weight deserved by resulting testimony.

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