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A Legal and Psychological Critique of the Present Approach to the Assessment of the Competence of Child Witnesses

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A Legal and Psychological Critique of the Present Approach to the Assessment of the Competence of Child Witnesses

Abstract

The Canada Evidence Act requires an inquiry to determine whether a child has the requisite moral and intellectual capacity to testify. Caselaw suggests that a child must demonstrate an understanding of abstract concepts like "truth" and "promise" to be competent to testify. This article reports on a survey of Ontario justice system professionals, revealing significant variation in how judges conduct competency inquiries. Children are often asked about religious beliefs and practices, and are frequently asked developmentally inappropriate questions. The authors also report on their experimental research which indicates that children's ability to explain such abstract concepts as "truth," "lie," and "promise" is not related to whether children actually tell the truth. Child competency inquiries are demeaning to children, do not promote the search for the truth, and result in unnecessary appeals. The child competence inquiry should be abolished, though a judge should give a child simple instructions about the importance of truth telling, and ask the child to promise to tell the truth.

Keywords

Child witnesses; Child witnesses--Psychology; Capacity and disability; Ontario

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A LEGAL & PSYCHOLOGICAL CRITIQUE OF THE PRESENT APPROACH TO THE ASSESSMENT OF THE COMPETENCE OF CHILD WITNESSES[©]

BY NICHOLAS BALA, KANG LEE, ROD LINDSAY, & VICTORIA TALWAR*

The *Canada Evidence Act* requires an inquiry to determine whether a child has the requisite moral and intellectual capacity to testify. Caselaw suggests that a child must demonstrate an understanding of abstract concepts like "truth" and "promise" to be competent to testify. This article reports on a survey of Ontario justice system professionals, revealing significant variation in how judges conduct competency inquiries. Children are often asked about religious beliefs and practices, and are frequently asked developmentally inappropriate questions. The authors also report on their experimental research which indicates that children's ability to explain such abstract concepts as "truth," "lie," and "promise" is not related to whether children actually tell the truth. Child competency inquiries are demeaning to children, do not promote the search for the truth, and result in unnecessary appeals. The child competence inquiry should be abolished, though a judge should give a child simple instructions about the importance of truth telling, and ask the child to promise to tell the truth.

La *loi sur la preuve au Canada* requiert une enquête afin de déterminer si un enfant a la capacité morale et intellectuelle exigée pour pouvoir témoigner. Afin d'avoir la compétence de témoigner, la jurisprudence suggère qu'un enfant doit démontrer qu'il ou elle comprend certains concepts abstraits tel que "vérité" et "promesse." Cet article décrit une étude faite parmi les membres de la profession juridique en Ontario, et fait voir des variations considérables dans la façon dont les juges font des enquêtes sur la capacité de rendre un témoignage. Les enfants sont souvent questionnés sur leurs pratiques et croyances religieuses et sont fréquemment demandés des questions qui ne correspondent pas à leur niveau de développement. Les auteurs décrivent que lors de la recherche expérimentale, il a été découvert que la capacité d'enfant de pouvoir décrire des concepts tels que "vérité," "mensonge" et "promesse" n'est pas une indication que ces enfants disent réellement la vérité. Les questions posées aux enfants pour évaluer leur compétence sont dérogatoires, ne favorisent pas la l'appel à la vérité et résultent à des appels inutiles. L'on devrait abolir les enquêtes sur la capacité de rendre témoignage et le juge devrait donner de simples instructions au sujet de l'importance de dire la vérité à l'enfant, et demander à l'enfant de promettre de dire la vérité.

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I. NEW PERSPECTIVES ON CHILD WITNESSES

Child witnesses were traditionally viewed by legal systems as unreliable—prone to lying and fantasizing, lacking the capacity to correctly perceive or comprehend events, unable to accurately describe their observations, and easily influenced.¹ Late in the twentieth century, legal systems in several jurisdictions began to appreciate the unique needs and capacities of child witnesses, and to realize that these unique qualities have often been misconstrued as unreliability. Nonetheless, many jurisdictions continue to have legislation that requires some type of special inquiry to assess the competence of children before they are permitted to testify.

In Canada, section 16 of the *Canada Evidence Act*² provides that a child under fourteen years of age can only testify after a judicial

¹ See, for example, N. Bala, "Double Victims: Child Sexual Abuse and the Canadian Criminal Justice System" (1990) 15 Queen's L.J. 3 [hereinafter "Double Victims"].

² R.S.C. 1985, c. C-5, as amended S.C. 1987, c. 24, s. 16 [hereinafter *CEA*].

inquiry establishes that the child has the requisite moral and intellectual capacity. This article considers the legal process for assessing child witness competency. We begin with a discussion of the historical evolution of the competency inquiry, and then compare the competency inquiries conducted in Canada with those in the United States and England.

This article reports on a survey, conducted by the authors, of Ontario judges, lawyers, and victim witness workers concerning practices and attitudes towards child witnesses. This survey reveals considerable variation in attitudes and practices, but generally shows that emphasis is placed on children demonstrating an understanding of concepts like "oath," "truth" and, "promise." It is not uncommon in Canada for judges to ask children questions about religious beliefs and practices. While in the United States there is less emphasis placed on assessing children's understanding of the oath, and less consideration of their religious education, there are reported American cases of children as old as eight years of age being ruled incompetent to testify because they could not answer questions about "the difference between the truth and a lie."³

Psychological research reveals that many children under age seven (as well as some older children) often have a good understanding of the difference between truth and lies, and yet are unable to "correctly" answer abstract questions concerning these concepts. The authors' recent laboratory research demonstrates that the ability of children to answer abstract questions about truth telling is not related to whether children actually tell the truth about their own wrongful acts. It also shows that problems experienced during the questioning of children at competence inquiries can often be attributed to developmentally inappropriate questions.

This research indicates that the present legal approach to assessing the competence of child witnesses does not promote the search for the truth. It is demeaning to them and results in unnecessary appeals. The authors recommend that Canada adopt the approach used in England, where the competency inquiry has been abolished: judges should give children simple instructions about the importance of truth telling and ask them to promise to tell the truth.

³ *Owens v. United States* (1996), 668 A. 2d 399 at 404 (D.C. App.) [hereinafter *Owens*].

II. THE HISTORY OF COMPETENCY INQUIRIES

Historically, the Canadian legal system was deeply suspicious of child witnesses. Until recently, there were no provisions to facilitate the testimony of children in the often hostile courtroom setting, and prior to 1893, the issue of competency of child witnesses was governed by the common law of England.

By 1779, common law judges had established that "no testimony whatever can be legally received except upon oath,"⁴ and that children could be sworn provided that they appeared "to possess a sufficient knowledge of the nature and consequences of an oath."⁵ In making such a determination, judges assessed whether children understood the spiritual consequences of lying under oath. Children were required to demonstrate not only knowledge of the concept of oath, but also a belief in a Supreme Being who would punish false oaths.⁶ The assumption was that although children might understand the nature of an oath, they could not appreciate its consequences without a belief in, and understanding of, God.⁷ In *R. v. Holmes*, the judge was satisfied that a child had the capacity to give sworn evidence when, after being asked "what becomes of a person who tells lies [under oath]," the child responded "if he tells lies he will go to the wicked fire."⁸

In 1893, Canada enacted its first statutory provisions dealing with child witnesses. Section 25 of the 1893 *CEA*⁹ allowed children of "tender years" (*i.e.*, under fourteen)¹⁰ who did not understand the nature of the oath to give unsworn evidence, provided that they "possessed sufficient intelligence" and understood "the duty to speak the truth."¹¹ However, this unsworn evidence was viewed with suspicion, and required corroboration or independent supporting evidence.

By the middle of the twentieth century, religious expectations for testimony under oath were relaxed. To be able to testify under oath,

⁴ *R. v. Braisier* (1979), 168 E.R. 202 [hereinafter *Braisier*].

⁵ *Ibid.*

⁶ *R. v. Antrobus* (1946), 63 B.C.R. 372 at 374 (C.A.) [hereinafter *Antrobus*].

⁷ *Ibid.* at 378.

⁸ (1861), 175 E.R. 1286 at 1286 (Winter Assizes).

⁹ This provision (now s. 16 of the *CEA*) remained in force until 1988: see *CEA*, *supra* note 2.

¹⁰ See *Antrobus*, *supra* note 6; *R. v. Bannerman* (1966), 55 W.W.R. 257 (Man. C.A.) [hereinafter *Bannerman*], *aff'd* without reasons (1966) 57 W.W.R. 736. (S.C.C.).

¹¹ "Tender years" was in the *CEA*, S.C. 1893, c. 31, s. 25.

children did not need to state that they believed in divine sanctions for failing to tell the truth, provided they demonstrated an understanding that they were calling on God to witness their evidence, and that the oath was a promise to God to speak the truth.¹² By the latter part of the twentieth century, in leading cases judges moved away from inquiring into a child's religious beliefs.

III. THE PRESENT SECTION 16 INQUIRY IN CANADA: PRECEDENTS & PRACTICES

On 1 January 1988, amendments to the *CEA* came into force providing:

16(1) Where a proposed witness is a person under fourteen years of age or a person whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine

(a) whether the person understands the nature of an oath or a solemn affirmation; and

(b) whether the person is able to communicate the evidence.

(2) A person ... who understands the nature of an oath or a solemn affirmation and is able to communicate the evidence shall testify under oath or solemn affirmation.

(3) A person ... who does not understand the nature of an oath or a solemn affirmation but is able to communicate the evidence may testify on promising to tell the truth.

(4) A person ... who neither understands the nature of an oath or a solemn affirmation nor is able to communicate the evidence shall not testify.¹³

The purpose of this inquiry is to determine whether children understand the moral obligation of making an oath or solemn affirmation, and are able to communicate the evidence in court. If a child cannot swear an oath, then the judge must assess whether the child is capable of testifying on a promise to tell the truth.¹⁴

¹² The decisions in *Bannerman*, *supra* note 10, and *R. v. Budin* (1981) 32 O.R. (2d) 1 (C.A.) [hereinafter *Budin*], were extremely influential in lowering the religious expectations on child witnesses, and continue to be cited by the courts today.

¹³ *Supra*, note 2. This was part of a package of reforms intended to facilitate children's testimony, for example, allowing children to testify from behind a screen or by closed circuit television. See also "Double Victims," *supra* note 1 and R. Bessner, "The Competency of the Child Witness: A Critical Analysis of Bill C-15" (1989) 31 Crim. L.Q. 481.

¹⁴ A child's out-of-court statement may be admitted even if the child is not competent to testify. The Supreme Court of Canada, in *R. v. Khan*, [1990] 2 S.C.R. 531 [hereinafter *Khan*], created a generalized exception to the hearsay rule, allowing for the reception of hearsay statements if they are considered "necessary" and "reliable."

See also B.P. Archibald, "The Canadian Hearsay Revolution: Is Half a Loaf Better Than No Loaf At All" (1999) 25 Queen's L.J. 1; D.M. Paciocco, "The Evidence of Children: Testing the

In an effort to understand the way the present section 16 inquiry is conducted, the authors conducted a written survey of professionals who work with child witnesses in the criminal courts in Ontario. The respondents were 20 child-victim workers, 44 Crown prosecutors, 194 defence counsel, and 91 provincially appointed judges.¹⁵ The survey covered all aspects of the section 16 inquiry: preparation of child witnesses; the extent to which children are asked questions about the nature of an oath; their ability to communicate; and their understanding of the difference between truth and lies and what a promise means.¹⁶ Some of the key findings of this survey are included in this article.

Section 16 presumes that children over the age of fourteen are competent to testify.¹⁷ The relevant age for the inquiry is the age at the time that he or she is testifying, rather than at the time of the events in issue.¹⁸ Judges and Crown counsel reported that the youngest children appearing in court were about four years old.

While the Ontario Court of Appeal held in *R. v. Krack*¹⁹ that a judge is obliged to hold an inquiry under section 16 for every child under fourteen, and the failure to conduct such an inquiry amounts to a procedural error. This error can be remedied by applying the curative provision in section 686(1)(b)(iv) of the *Criminal Code*,²⁰ provided the accused's right to a fair trial has not been prejudiced.²¹ In cases where defence counsel concedes that a child witness called by the Crown has

Rules Against What We Know" (1996) 21 Queen's L.J. 345.

¹⁵ The survey was conducted in Ontario in the summer of 1999. Approximately 725 surveys were sent out to defence counsel, 250 to judges, and 25 to victim witness workers. Surveys were distributed to Crown prosecutors at their summer education programs; the number distributed is not known. The full results are available online: Queen's University, <<http://www.qsilver.queensu.ca/law/witness/witness.htm>> (date accessed: 28 February 2001).

¹⁶ The survey also asked respondents questions about other issues related to the examination and cross-examination of children, including questions about use of videotapes and closed circuit television.

¹⁷ *CEA*, *supra* note 2, s. 16(5). Note, however, that the competence of all witnesses may be challenged if they suffer from a mental disability. See, for example, *R. v. Parrott*, [2001] S.C.J. No. 4, for a decision dealing with a competency inquiry for a twenty-five-year-old complainant with the mental age of a three- or four-year-old child.

¹⁸ *R. v. Donovan* (1991), 65 C.C.C. (3d) 511 (Ont. C.A.) at 518.

¹⁹ (1990), 73 O.R. (2d) 480 [hereinafter *Krack*].

²⁰ R.S.C. 1985, c. C-46.

²¹ This position has been approved by the Quebec and Ontario Courts of Appeal: see *R. v. Deyardin*, [1997] R.J.Q. 2367; *Krack*, *supra* note 19 at 485. However, in some cases the failure to conduct an inquiry has been a ground for ordering a new trial: see *R. v. D. (R.R.)* (1989), 72 Sask. R. 142 (C.A.) [hereinafter *D. (R.R.)*]; *R. v. G. (C.W.)* (1994), 88 C.C.C. (3d) 240 (B.C.C.A.).

the requisite competency, the court is not required to conduct an inquiry.²²

The competency inquiry requires a finding, based on a balance of probabilities, that the child is competent to testify.²³ In Canada, this type of *voir dire*²⁴ is usually conducted in the presence of the jury, as the inquiry may help the jury assess the child's credibility.²⁵

According to section 16(1), "the court" shall conduct the competency inquiry. Traditionally, the trial judge led the questioning, with counsel given the opportunity to ask supplemental questions.²⁶ However, there is a growing recognition by judges that the Crown prosecutor (usually the counsel calling a child witness to the stand to testify) may be the most suitable person to question the child, given the child's familiarity with the Crown and the child's lack of prior contact with the judge.²⁷ In *R. v. R.G.F.*, the Alberta Court of Appeal held that under section 16(1), a trial judge is not obliged to conduct the inquiry, but merely to control it.²⁸

The survey results indicate that in Ontario, judges take the lead in questioning in about three-quarters of the competency inquiries, leaving the Crown to take the lead in the other cases. Some judges are substantially more willing to allow the Crown to take on this role than other judges,²⁹ and responses revealed a range of opinions among judges

²² *R. v. Fong* (1994), 157 A.R. 73 (C.A.), leave to appeal to S.C.C. refused [1994] S.C.C.A. No. 523.

²³ *R. v. Ferguson*, [1996] B.C.J. No. 2617 [hereinafter *Ferguson*].

²⁴ A *voir dire* is a hearing within a trial to determine the admissibility of a particular piece of evidence. For most types of issues of admissibility, this hearing is conducted in the absence of the jury.

²⁵ R.E. Salhany, *The Practical Guide to Evidence in Criminal Cases*, 4th ed. (Toronto: Carswell, 1996) at 24. This line of reasoning was adopted in *Ferguson*, *supra* note 23 at para. 33, where the British Columbia Court of Appeal stated that "the questions of competence—to be determined by the judge—and of credibility—to be determined by the jury—are tightly entwined." The court indicated that although it is preferable for the jury to be present during the competency inquiry, its absence is not a reversible error.

²⁶ D. Paciocco & L. Stuesser, *The Law of Evidence* (Concord: Irwin Law, 1996). Cases in which this procedure was followed include: *D.(R.R.)*, *supra* note 21 and *R. v. Leonard* (1990), 37 O.A.C. 269 (C.A.) [hereinafter *Leonard*].

²⁷ *R. v. Peterson* (1996), 27 O.R. (3d) 739 (C.A.), leave to appeal to S.C.C. refused [1996] S.C.C.A. no. 202. See also *Ferguson*, *supra* note 23.

²⁸ [1997] A.J. No. 409 at 282-83 (C.A.).

²⁹ Crown prosecutors said the judge leads the inquiry 75 per cent of the time; victim witness workers said the judge leads 80 per cent of the time. Judges said they lead the inquiry 82 per cent of the time.

as to who should lead the inquiry. Some judges took a traditional approach: "All questions must be put by the judge," while others let their own experiences influence the way the inquiry is conducted in their courts: "Up to about ten years ago I did it all. In the last ten years I have allowed counsel who usually have had the benefit of going over the matter with the child allowing for a less stressful experience for the proposed witness."³⁰

A. *Sworn Testimony*

In determining whether children possess the legal capacity to give sworn testimony, judges are obliged to assess whether they understand the nature of an oath (or solemn affirmation).³¹ The focus of this inquiry is on whether children understand the moral significance of making a commitment to tell the truth, and appreciate the importance of telling the truth in court proceedings. A frequently cited formulation of the standard was enunciated by Mr. Justice Dickson, sitting ad hoc on the Manitoba Court of Appeal, in 1966 in *Bannerman*: "The object of the law in requiring an oath is to get at the truth relative to the matters in dispute by getting a hold on the conscience of the witness."³²

In 1982, Assistant Chief Justice MacKinnon, on behalf of the Ontario Court of Appeal in *R. v. Fletcher*, provided this gloss on the standard:

The important consideration, we think, when a judge has to decide whether a child should properly be sworn, is whether the child has sufficient appreciation of the solemnity of the occasion, and the added responsibility to tell the truth, which is involved in taking an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct.³³

A significant area of judicial disagreement is the appropriateness of questions regarding children's religious education and beliefs. The decision of the Ontario Court of Appeal in *Fletcher* clearly suggests that

³⁰ Judges Survey (on file with authors at Queen's University, Kingston, Ontario) at question 4 [hereinafter "Judges' Survey"].

³¹ In theory, those without religious beliefs relating to an oath or who choose not to testify under oath may solemnly affirm, which has the same legal effect as testimony under oath. Interestingly, it seems that judges rarely, if ever, ask children to affirm, and there appear to be no reported Canadian cases in which children have been asked questions about solemn affirmations.

³² *Supra* note 10 at 284.

³³ (1982), 1 C.C.C. (3d) 370 at 380, leave to appeal to S.C.C. refused (1983), 48 N.R. 319 [hereinafter *Fletcher*].

children are no longer required to demonstrate an awareness of God in order to be able to provide sworn testimony to the court. The court recognized that a decline in religious observance and changes in religious beliefs have given the oath a different significance for many Canadians than it may have had in the past.³⁴ The court stated:

It is recognized that as society has changed over the years the oath for many has lost its spiritual and religious significance. Those adults to whom the sanctity of the oath has lost its religious meaning, nonetheless have a sense of moral obligation to tell the truth on taking the oath and feel their conscience bound by it. That is the nature of the oath for many adult witnesses today. Nor do they object on grounds of conscientious scruples to taking the oath. In my view, a child of tender years is in the same position as an adult witness when the determination is being made whether the child understands the nature of an oath.³⁵

In a 1999 judgment in the Supreme Court of Canada, Madame Justice McLachlin commented on the “absurdity of subjecting children to examination on whether they understood the religious consequences of the oath.”³⁶

Despite these judicial pronouncements, it is still a common practice for judges or counsel to ask children questions regarding their religious education and beliefs to determine their moral capacity to testify under oath. This approach is presumably based on the assumption that children with religious training are less likely to lie, or, that only if they demonstrate a belief in God will their oath have a significant impact on the truthfulness of their testimony.

Eighty-six per cent of judges responding to the survey reported that children are still routinely asked questions relating to religious beliefs and observances as part of the competency inquiry. Crown prosecutors also reported that children are asked, during both preparation and the inquiry, such questions as: “Do you go to Sunday School?” “Is the Bible a special book?” “Is a promise made while holding the Bible different from other promises?” and “Do you understand the importance of God and why it is important not to lie to God?” Children are also asked if they have an understanding of the spiritual consequences of lying under oath, such as: “If you lied to God, would you go to heaven or hell?”

³⁴ The Canadian courts have long accepted that witnesses who are not Christians may give an oath on the holy book or a holy symbol of their faith. See, for example, *R. v. Lai Ping* (1904), 11 B.C.R. 102 (C.A.).

³⁵ *Fletcher*, *supra* note 33 at 377.

³⁶ *R. v. F. (W.J.) [W.J.F.]*, [1999] 3 S.C.R. 569 at 591 [hereinafter *F. (W.J.)*].

It appears most judges still construe the word “oath” strictly in the section 16 inquiry, focusing on the child’s ability to understand or make a “solemn appeal to God (or to something sacred) in witness that a statement is true.”³⁷ Judges ask children questions “about the Bible, church, who God is, and whether God cares if we’re good or bad and if we tell the truth; and ... if the child knows what God would do if a sworn witness lies.”³⁸ A victim witness worker said one child had been asked to explain the nature of “God” to the judge. One judge explained:

I ... build through attendance at church and religious education to see if [the] child understood [the] oath in that context—then move on to the oath as a special promise. In my experience, if there is no religious background training younger children (*i.e.*, under twelve) will not understand an oath.³⁹

It would appear that children are typically asked questions which presume that they are Christians, such as: “Do you go to church?” and “Do you go to Sunday school?” Some judges (often those in larger, more cosmopolitan urban centres) ask questions about religious beliefs in a more ecumenical fashion, recognizing that the children can have a range of religious backgrounds. One judge expressed it this way: “This can be a very sensitive area to explore in a multicultural environment where ‘God’ may mean many Gods and religious concepts may vary significantly from Judeo-Christian concepts.”⁴⁰

A typical example of an inquiry into religious beliefs and practice is found in the transcript of a 1994 Ontario case, where the judge asked a six year-old boy the following questions:

- Q: ... Just to change the topic for a moment because I have been ... you certainly have a very interesting and active life and I am learning a little bit about it but just to change the topic, do you know what an oath is? You do not eh? Okay, and do you go to church?
- A: No.
- Q: Do you go to Sunday School?
- A: No. Stewart.
- Q: No. Do you take any classes in school?
- A: Yeah, I am in Grade Two and One.
- Q: You are both in Two and ... both in Grade Two and Grade One?

³⁷ This definition is from the *Shorter Oxford English Dictionary*, 3rd ed., s.v. “oath”, approved by Mr. Justice Jessup in *Budin*, *supra* note 12 (Mr. Justice Arnup concurring).

³⁸ “Judges Survey,” *supra* note 30 at question 23.

³⁹ *Ibid.*

⁴⁰ *Ibid.* at question 24.

- A: Yeah.
- Q: Do you take any classes, or does the teacher at school ever tell you about God and that kind of thing?
- A: No.
- Q: There is no religious training of any kind?
- A: No.⁴¹

This child was not permitted to testify under oath, although he was permitted to give unsworn testimony.

The age and cognitive development of child witnesses usually determines the extent and nature of the inquiry. For younger children, the inquiry is usually lengthier, with questions broken down into age-appropriate language and format. For older children, due to their advanced language and cognitive development, this type of inquiry is usually quite brief. For children between the ages of ten and thirteen, questions regarding their ability to understand the nature of an oath often take the following form:

- Q: Now have you seen people take the Bible in their hand and swear to tell the truth?
- A: Yeah.
- Q: Now, if we were to have you swear on the Bible to tell the truth and then you lied, what do you think would happen to you?
- A: I would get into a lot of trouble.⁴²

There is disagreement evident both in the case law and in the survey about the extent to which children should be prepared for the competency inquiry, in particular as it relates to the oath. Children are usually prepared by the Crown prosecutor or a victim witness worker so that, at a minimum, the child knows what to expect from the court appearance.⁴³ This preparation will usually include a review of the competency inquiry. Child victim witness workers reported that they usually address the religious aspects of the oath in preparing children for

⁴¹ *R. v. Easton* (May 1994), Perth Cty. 18949 (Gen. Div.); see also, for example, *R. v. R. (M.E.)* (1989), 90 N.S.R. (2d) 439 at 43-44 (C.A.) [hereinafter (*R.*)*M.E.*].

⁴² These questions were taken from the competency inquiry of a 13 year-old girl in *R. v. Thomson* in the Ontario Court (Provincial Division) in Orillia on 15 August 1995 before Judge L. T. Montgomery (unreported). For another example of questioning of older children, see (*R.*)*M.E.*, *ibid.*

⁴³ In the authors' survey, 100 per cent of victim witness workers and 79 per cent of Crown prosecutors reported that, before the child appeared in court, they instructed the child about the oath or the promise to tell the truth.

court. They explain what an oath means (promise to God), how it is done (hand on the Bible), and discuss what the children believe will happen to them if they lie in a social situation as opposed to in court. One victim witness worker said:

[I] always inquire about the child's understanding of the oath and making a promise. If a child can communicate a reasonable explanation, I will then confirm their understanding. If the child has difficulty explaining or understanding, I will explain the oath and discuss the importance of keeping promises in court and telling the truth. [I] will ask [the] child to come up with potential consequences of not telling the truth under oath or promise.⁴⁴

In *Bannerman*, Mr. Justice Dickson said it was not only appropriate for children to be prepared in such a way, but that counsel calling a child had a duty to the child to do so:

A child to whom every aspect of the matter is new will almost surely give the honest but wrong answer to: "Do you know what it means to take an oath?" Why should he, if he has never heard of it? Those calling a child have a duty to inform and instruct, and, failing the performance of their duty, the court should do it. A child who does not know what an oath is may at once understand the import of the simple words of the common oath if someone has the kindness to let the child know what they are before starting an inquiry into his theological opinions.⁴⁵

As well, Mr. Justice Dickson supported the use of leading questions at the competency inquiry to bring out children's understanding. He cited Wigmore to support the view that a judge may properly impart any necessary theological or other instruction to children to "produce the necessary belief" to qualify them to testify under oath.⁴⁶ Mr. Justice Dickson also took issue with what he perceived to be a consistent "error" in Canadian courts that followed the *Antrobus*⁴⁷ decision in demanding that children demonstrate an understanding of the "consequences" of a lie under oath, meaning, "spiritual retribution."⁴⁸ He found such questions were unfair as they demanded a pat, yet perhaps untruthful, response, for "what are the

⁴⁴ Victim Witness Survey (on file with authors at Queens' University, Kingston, Ontario) at question 6 [hereinafter "Victim Survey"].

⁴⁵ *Supra* note 10 at 283. In *R. v. M.A.M.*, [2001] B.C.J. 18 (C.A.), (leave to appeal to the Supreme Court of Canada filed 16 February 2001) [hereinafter *M.A.M.*] the court accepted that the mother of a five-year-old child could instruct the child about the meaning of a "promise" before the child testified, though the majority held that her testimony about the child's apparent comprehension could not be used to establish the child's competence.

⁴⁶ *Bannerman*, *ibid.*

⁴⁷ *Supra* note 6.

⁴⁸ *Bannerman*, *supra* note 10 at 283.

spiritual consequences of telling a lie under oath? No human being can say."⁴⁹

A clear majority of judges (89 per cent) in our survey indicated that they approved of counsel, a parent, or a victim witness worker preparing child witnesses to testify by telling them about the oath. However, despite the clear endorsement in *Bannerman*, and the widespread use of this practice, some participants in the justice system are uncomfortable with such preparation and believe this process simply teaches children the answers necessary to testify.

Eleven per cent of judges disagreed with preparing child witnesses by explaining the nature of an oath. These judges expressed concern that the Crown, parents, social workers or victim witness workers' preparation taints the section 16 inquiry as the court simply hears prepared responses. This view is supported by 50 per cent of defence counsel who do not think the current section 16 inquiry is an appropriate assessment of child witnesses. Pre-trial preparation or coaching was of great concern to them, and some went so far as to ask for full disclosure of the course of preparation children went through. They thought, generally, that the standard might be too low to qualify children, and that judges "bend over backwards"⁵⁰ to permit children to testify. One defence counsel said that by the time child witnesses come to court they are well aware of "what to answer and how."⁵¹ Defence counsel advocate greater restrictions on child witnesses, some stating "no child under ten ought ever to be sworn"⁵² and others suggesting that no one under thirteen years should be sworn.⁵³

One of the problems with the current inquiry, said defence counsel, is that the court spends too much time on the oath and not enough on children's "ability to observe, their capacity to recollect and their capacity to communicate that recollection."⁵⁴ Some defence counsel felt the theological basis for the oath is incomprehensible to many young children, making it inappropriate for them to swear an oath.⁵⁵

⁴⁹ *Ibid.* at 282.

⁵⁰ "Judges Survey," *supra* note 30 at question 2.

⁵¹ Defence Counsel Survey (archived with authors at Queens' University, Kingston, Ontario) at question 9 [hereinafter "Defence Survey"].

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *Ibid.* at question 3.

⁵⁵ *Ibid.* at question 6.

It is apparent that children often find the inquiry into their religious beliefs embarrassing, especially if it looks like they do not appear sufficiently devout or knowledgeable about religious matters. Members of each group surveyed—judges, victim witness workers, Crown, and defence—expressed some degree of discomfort with this aspect of the inquiry.

One victim witness worker reported how a defence counsel in one case “humiliated” a child about her family’s beliefs. When the child wasn’t able to articulate the precise tenets of her family’s faith, defence counsel misconstrued her statements, mocked her, and suggested she had no reason to tell the truth because she believed the world would end soon anyway.

Some judges find religious questions embarrassing at times, and try to avoid any specific denominational or sectarian discussions in the inquiry. Others believe that any questions relating to religious beliefs are inappropriate in court.

The precedents provide trial judges with little guidance in assessing how in-depth the inquiry must be to satisfy the standard for testifying under oath. As one judge acknowledged: “I find this the hardest part of the inquiry—reducing to understandable language the nature and consequences of the oath.”⁵⁶

B. *Unsworn Testimony: The Promise to Tell the Truth*

Subsection 16(3) of the *CEA* permits children who are unable to demonstrate an understanding of the nature of an oath or solemn affirmation to testify “on promising to tell the truth.”⁵⁷

In interpreting this provision, Canadian judges have generally held that children should only be permitted to give unsworn testimony if the court is satisfied that the the promise is meaningful, and hence there must be an inquiry into their understanding of the nature of a promise and of the difference between telling the truth and telling a lie.⁵⁸ The courts have held that this requires children to demonstrate some understanding of the duty to speak the truth.⁵⁹ In *R. v. McGovern*, Mr. Justice Twaddle of the Manitoba Court of Appeal said:

⁵⁶ *Ibid.* at question 7.

⁵⁷ *Supra* note 2.

⁵⁸ *R. v. Farley* (1995), 23 O.R. (3d) 445 at 453 (C.A.) [hereinafter *Farley*].

⁵⁹ *Ibid.*

It is equally clear, in my view, that, in permitting a witness to give evidence “on promising to tell the truth”, the statute implicitly requires an understanding on the witness’s part of what a promise is and the importance of keeping it. Otherwise, the promise would be an empty gesture.⁶⁰

In *Ferguson*,⁶¹ the court conducted a competency inquiry for a five year-old girl, focusing on whether the child demonstrated an understanding of the significance of a promise. Questions were posed by the judge, Crown counsel, and the defence counsel. The child, K., could not say where she lived, the name of her school, or her teacher’s name. She was able to identify the colour of some books and responded appropriately when challenged to identify truths or lies told about the colours of those books. On the strength of her demonstrated knowledge and ability to differentiate between truth and lies, the Crown wanted her to testify on a promise to tell the truth. Part of the transcript reads:

Q [Judge]: Do you know what a promise is?

A: Yes.

Q: Can you tell me if you’ve ever promised something and then done it?

A: I promised that I wouldn’t lie.

Q: Anything else around your house? Did you ever promise your mom anything and then know that you had to do it and then do it?

A: No.

Q: Never?

A: No.

...

Q: Do you know what a promise is?

⁶⁰ (1993), 88 Man. R. (2d) 18 (C.A.) at 21 [hereinafter *McGovern*].

⁶¹ *Supra* note 23. In *M.A.M.*, *supra* note 45, the B.C. Court of Appeal (Justices Rowles and Newbury concurring) ordered a new trial after the trial judge convicted the accused based largely on the testimony of a five-year-old, ruling that she should not have been permitted to testify. The girl had demonstrated an understanding of the difference between the truth and a lie. What was at issue was the perceived inadequacy of her answer to abstract question like: “What is a promise?” Her response was “What you say when you have to do it,” and was considered inadequate to demonstrate that she understood “the moral obligation or duty to speak the truth.” It is submitted that the approach of Justice Hall (dissenting) was preferable, and more consistent with the Supreme Court of Canada in *R. v. Rockey*, [1996] 3 S.C.R. 829 [hereinafter *Rockey*]. Justice Hall observed that appeal courts should be reluctant to overrule a judge’s decision on a determination of a child’s competence, as well as recognizing a child’s understanding and answers to questions in a competency inquiry will inevitably be “simple” and “concrete.” As discussed more fully below, a child’s ability to provide an answer to abstract questions about the meaning of a “lie” and a “promise” is unrelated to whether a child will actually tell the truth.

A: Yeah.

Q: What is it?

A: I promise that I won't lie.

Q: But it's about something else other than lying. Do you know what, when you say promise, what you mean?

A: I promise what I mean.

...

Q: What do you think would happen ... if you told us about something and what you told us wasn't right, what would happen to you?

A: I don't know.

Q: Do you think it would matter?

A: No.

Q: It wouldn't matter if you didn't tell the truth? Nobody would say you've done the wrong thing?

A: No.⁶²

The judge said he was uncertain as to whether the child fully understood the nature of a promise and held she was not competent to testify. A second *voir dire* into the admissibility of her hearsay statements to her mother and a police officer was conducted. Afterward, the judge directed that the child be recalled as a witness:

THE CLERK: Should I ask her to promise to tell the truth?

THE COURT: I think you should.

THE CLERK: [K.], do you promise to tell the court the truth?

A: Yeah.

THE CLERK: Good girl.

THE COURT: And when you say that do you know what that means, promise?

A: No.

THE COURT: Are you going to tell any lies?

A: No.

THE COURT: And you know that when you're in here that you must tell the truth?

A: Yeah.

⁶² *Ferguson, ibid.* at 38-39.

THE COURT: And if you don't know you just say I don't know?

A: Yeah.

THE COURT: Okay.⁶³

The accused was convicted and launched an appeal in part on the grounds that the child did not understand what a promise was and, therefore, could not testify under section 16(3). The British Columbia Court of Appeal stated that section 16 requires not only an understanding of the difference between truth and lies, but an understanding of the nature of a promise. Specifically, the "requirement to promise to tell the truth is essential to the admission of testimony under section 16(3)."⁶⁴ The failure to establish that a child understands the nature of a promise was held to be a fundamental and not just a procedural error. In allowing the appeal and ordering a new trial, Mr. Justice Finch stated:

There was no evidence either from K.T. or from other witnesses on the *voir dire* that K.T. knew she had a duty to tell the truth in everyday social conduct. Her promise to do so, given in response to a leading question, was *meaningless*. The evidence does not support the conclusion that she knew what she was doing when she gave her promise.⁶⁵

The Court of Appeal ruled that the trial court must be satisfied not only that the witness can communicate the evidence, but that the child understands what a promise is.

While it is not uncommon for children to be asked to define "promise" in order to be able to testify based on a promise to tell the truth, leading Supreme Court of Canada precedents suggest that it is not necessary for a child to actually be able to do so. Madame Justice McLachlin, writing for a majority in *Rockey*, stated:

Two requirements must be met to establish testimonial competence under s. 16(3): the ability to communicate the evidence and the ability to promise to tell the truth ... it is not necessary that the witness be able to define the word "promise" in some technical sense; what is required is that the witness understand the obligation to tell the truth in giving his or her evidence.⁶⁶

The pre-1988 legislation explicitly required a judge admitting unsworn evidence to be satisfied that the child "understands the duty to

⁶³ *Ibid.* at 41.

⁶⁴ *Ibid.* at 49.

⁶⁵ *Ibid.* at 50 [emphasis added].

⁶⁶ *Supra* note 61.

“speak the truth.”⁶⁷ In interpreting this older statute, Mr. Justice Robins in *R. v. Khan* remarked:

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 related to whether the child understands the difference between the truth and a lie, knows that it is wrong to lie, understands the necessity to tell the truth, and promises to do so.⁶⁸

The present provision does not explicitly require judges to be satisfied that children understand the duty to speak the truth. However, many judges continue to inquire into whether children understand the difference between the truth and a lie as an aspect of ensuring that the “promise to tell the truth” is meaningful,⁶⁹ and the approach of Mr. Justice Robins in *Khan* is still frequently cited.⁷⁰ An example of this type of questioning can be found in the competency inquiry transcript for a six-year-old boy in the 1994 Ontario case of *R. v. Easton*:

- Q: Okay. Can you tell me whether you know the difference between the truth and a lie?
- A: The truth, you tell somebody what the matter and a lie is you don't tell nobody, so it is not a lie.
- Q: Yes. If I were to tell you that it was snowing outside right now, would that be a lie?
- A: Yeah.
- Q: Okay. If I were to tell you that it is raining outside now, would that be a lie?
- A: No.
- Q: It would be what?
- A: Right.⁷¹
- Q: The truth?
- A: Yeah, truth.
- Q: It would be right, the truth, eh? So for you what is right is the truth?

⁶⁷ *CEA*, *supra* note 2.

⁶⁸ *Khan*, *supra* note 14, quoted with approval by Madame Justice McLachlin at 7.

⁶⁹ *Ferguson*, *supra* note 23 at 50.

⁷⁰ *Farley*, *supra* note 58 at 451, where the Ontario Court of Appeal applied the standard enunciated in *Khan* in 1988 to the present s. 16(3).

⁷¹ As in this case, it is common for the child and questioner to confuse a lie (a deliberate falsehood with the intent to deceive) with an error (which is not intentional).

A: Yeah.

Q: And you ... do you understand that it is wrong to tell a lie?

A: A lie.

Q: Why is it wrong to tell a lie?

A: Because everybody want to know, or maybe.

Q: Everybody wants to know what? The truth?

A: Yeah, the truth.

Q: They want to know whether it is the truth or a lie?

A: Or a lie.

Q: Yeah. What happens if you tell a lie?

A: You tell a lie and then you ... everybody wants ... to know, because you asked what is the matter and then they say they tell a lie.

Q: Oh, do you think it is wrong to tell a lie?

A: Yeah, it is wrong.

Q: Okay. Do you think you should get in trouble if you tell a lie?

...

Q: Well if you were allowed to tell something today, would you promise me to tell the truth?

A: Yes.

Q: And only the truth?

A: Yes.

Q: Would you promise me that you would not lie?

A: I would not lie.⁷²

This child was allowed to testify on a promise to tell the truth, as the judge was satisfied that he was able to communicate whatever evidence he had and that he understood what was entailed in promising to tell the truth.⁷³

⁷² *Easton, supra* note 41 at 415-17. See also *Leonard, supra* note 26.

⁷³ There are appeal cases dealing with the problem that can arise if there is an inquiry into the child's understanding of the duty to speak the truth but fails to ask the child to explicitly promise to tell the truth. This type of oversight can occur since during the detailed competency inquiry the child will have already answered many questions about the importance of speaking the truth. A

The inquiry for giving unsworn testimony, especially for younger children, is often much longer than for children who demonstrate understanding of an oath. As the examples above illustrate, the questions tend to be longer than the answers. These brief and basic answers are not surprising, as children are likely to be nervous in the intimidating court environment and because they lack the cognitive capacity to give long answers about abstract issues.⁷⁴

Thirty-eight per cent of judges who responded to the survey said that in determining whether a child can give unsworn testimony, they often asked children if it was good or bad to tell a lie; 51 per cent often asked children whether they know it is very important to tell the truth in court; and 46 per cent always asked if children knew the consequences—to them—of telling a lie in court. Some judges also said that they tried to explain to children why it is important for them to tell the truth in court (*e.g.*, so the judge can “do my job and make decisions”⁷⁵ or to give them “an understanding of my *reliance* on their promise to tell the truth”⁷⁶).

Thirty-four per cent of judges reported that they sometimes ask children to define a promise, while another 34 per cent said they often do so. Thirty-five per cent of judges said that six was the youngest age at which children could articulate the meaning of a promise. To ascertain whether they have such an understanding, judges ask a variety of questions to learn what types of promises children have made (*e.g.*, to clean their room, eat their vegetables, brush their teeth or do their homework), and then explore the consequences that flow from breaking or keeping the promise.

Section 16 does not specifically provide a step-by-step test for assessing children’s ability to testify. Nor does the section attach any distinction in terms of the weight to be attributed to evidence given under oath or on a promise to tell the truth. As such, it has been left to the courts to interpret this section, resulting in varying approaches.

In *R. v. Marquard*,⁷⁷ Madame Justice L’Heureux-Dubé (dissenting) said that the test for admitting children’s testimony should

number of decisions have held that this is a procedural error to fail to have an explicit promise, but it may not be grounds for ordering a new trial since the questioning raises a commitment to tell the truth: see *R. v. Barosoum*, [1991] N.W.T.J. No. 171 (C.A.); and *R. v. Peterson*, [1996] O.R. (3d) 739 (C.A.).

⁷⁴ See N. Bala, K. Lee, & J.P. Schuman, “Developmentally Appropriate Questions for Child Witnesses” (1999) 25 Queen’s L.J. 251 [hereinafter “Appropriate Questions”].

⁷⁵ “Judges Survey,” *supra* note 30 at question 28.

⁷⁶ *Ibid.*

⁷⁷ [1993] 4 S.C.R. 223 [hereinafter *Marquard*].

be conducted in keeping with Parliament's intention in drafting the new section 16—that is, to make it easier for children to testify. To do otherwise would “subvert the purpose of legislative reform in this area.”⁷⁸ She concluded:

one of the main aims of the reform was to simplify the requirements for the reception of such evidence to facilitate its admissibility. ... [The Badgeley Committee] was set up specifically to examine the substantive and adjectival law affecting the prosecution of sexual offenses against children, On the basis of research which made clear that conventional assumptions about the veracity and powers of articulation and recall of young children are largely unfounded, the Committee recommended that children's evidence be heard and weighed in the same manner as any other testimony.⁷⁹

Judicial interpretations of the weight of sworn and unsworn evidence have varied. The Manitoba Court of Appeal in *McGovern* held that “the weight which should be given to a young witness's evidence is not affected by the form of the witness's commitment to tell the truth.”⁸⁰ Yet, in speaking for the majority in *Marquard*, Madame Justice McLachlin approved of the trial judge's treatment of the child's unsworn evidence in her charge to the jury. The trial judge warned the jury repeatedly that the child had not been sworn and “to convict on the unconfirmed and unsworn evidence of a child witness is fraught with dangers”⁸¹ Thus, the Supreme Court of Canada appears to support the view that the unsworn testimony of a child should be given less weight than sworn testimony.

Defence counsel who responded to the survey were evenly split on whether the current section 16 inquiry was appropriate, and they expressed a variety of opinions on the value of a child's unsworn testimony. One remarked:

All child witnesses end up being able to testify on a promise to tell the truth even when it's very questionable whether they know what promise or truth actually mean. That's very dangerous!

⁷⁸ *Ibid.* at 256.

⁷⁹ *Ibid.* at 257-58.

⁸⁰ *Supra* note 60 at 23. The court agreed with the following passage from *D. (R.R.)*, *supra* note 21 at 147:

The purposes of an oath, a solemn affirmation and a promise are the same: to put an additional impact on the person's conscience and to give further motivation for the person to tell the truth There is no reason in logic to treat one class of witness as belonging to a higher level than another class. Nor is there any reason in logic to treat differently from the standpoints of need and importance, the three prerequisites: an oath, a solemn affirmation and a promise.

⁸¹ *Marquard*, *supra* note 77 at 240.

Why not forego the charade of this inquiry and accept unsworn evidence—the remaining issue would simply be the weight accorded to the testimony. Judges almost always want to hear the child's evidence in any event.⁸²

One judge in the survey addressed the difference between sworn and unsworn testimony this way:

There is so little difference between the test for being sworn and for promising to tell the truth that the distinction should be dropped altogether. The ability to communicate is established, or not, in the giving of evidence itself. Why should it be a pre-condition to attempting to testify?⁸³

Sixty-seven per cent of victim witness workers felt that the present inquiry is inappropriate. One commented that lawyers appear not to understand section 16 and the distinctions within it, sometimes mistakenly assuming that if a child cannot be sworn, she is not capable of testifying.

C. *Ability to Communicate*

Section 16 of the *CEA* requires that children, whether giving sworn or unsworn testimony, must be “able to communicate the evidence.”⁸⁴ If they demonstrate an understanding of the oath, they are invariably regarded as having the ability to communicate. In practice, children's ability to communicate is an issue that arises only when the court is considering whether unsworn testimony should be permitted.

The Supreme Court of Canada in *Marquard* considered what aspects of testimonial competence are included in the phrase “able to communicate the evidence.”⁸⁵ The accused argued that Parliament's intention was to adopt all of the common law elements of testimonial competence expressed by the words “ability to communicate the evidence”—namely, the capability to perceive, recollect and communicate. The Crown argued that in choosing only the word “communicate,” Parliament intended to exclude all other aspects of testimonial competence (*i.e.*, that the witness's ability to perceive and to recollect the events are not part of this test).

Madame Justice McLachlin stated that the test for communicating the evidence means more than mere verbal ability to

⁸² “Defence Survey,” *supra* note 51 at question 3.

⁸³ “Judges Survey,” *supra* note 30.

⁸⁴ *Supra* note 2.

⁸⁵ *Ibid.*

communicate. It is communication specifically in reference to giving evidence in court and must include an assessment of the child's capacity to observe, recollect and communicate.⁸⁶ Madame Justice McLachlin called these qualities the "basic abilities" any individual needs to testify,⁸⁷ and ruled that section 16(1) was not as limited as the Crown argued, thus incorporating some elements of the common law approach into the legislative scheme:

The phrase "communicate the evidence" indicates more than mere verbal ability. The reference to "the evidence" indicates the ability to testify about the matters before the court. It is necessary to explore in a general way whether the witness is capable of perceiving events, remembering events and communicating events to the court. If satisfied that this is the case, the judge may then receive the child's evidence, upon the child's promising to tell the truth under s. 16(3). It is not necessary to determine in advance that the child perceived and recollects the very events at issue in the trial as a condition of ruling that her evidence be received. That is not required of adult witnesses, and should not be required for children.⁸⁸

In *Marquard*, the judge had initially asked the child, then about five years of age, about the name of her teacher, what she was learning at school, and how she got to school. Defence counsel said he was satisfied with the questions. The Crown prosecutor then asked the child a few questions regarding the distinction between a lie and the truth. The transcript continued:

Q[Judge]: It would be my ruling that the unsworn evidence of this youngster be accepted. I do not think she's capable of understanding an oath, and I would ask you to proceed on that basis. Now, Debbie-Ann, what we're going to do here now is Miss Creal [the Crown prosecutor] is going to ask you some questions, and you answer them to the best of your knowledge and your memory. Do you know what a memory is? Do you remember things that happened?

A[Child]: No.

Q: You don't? What did you do yesterday?

A: I went down to the donut shop, and I got a drink and bubble gum.

Q: Okay. That's what I am saying is remembering, okay, so when I ask you do you remember what you did yesterday, that was your answer. You went to the donut shop and got a drink and some bubble gum, okay.

A: I mean gum.

⁸⁶ *Marquard*, *supra* note 77 at 236.

⁸⁷ *Ibid.* at 237.

⁸⁸ *Ibid.* at 236-37.

Q: Plain gum, okay. Well that's good. It's important to be pretty exact. All right, now, Miss Creal is going to ask you some questions, and I know you know the difference between the truth and a lie, and you answer her questions as truthfully and as best as you can remember, okay?⁸⁹

This excerpt shows that a relatively modest inquiry should satisfy the "ability to communicate" test of section 16. The child could understand and respond to questions about past events in general, and was therefore qualified to testify about the case without any initial inquiry into her ability to testify about the specific events at issue. This passage also illustrates how inappropriate it is to ask a young child abstract questions about memory ("Do you know what memory is?" "Do you remember things that happened?"), and how specific concrete questions allow a child to demonstrate the ability to communicate.

As with the moral capacity component of the competency inquiry, the legislation provides little guidance to trial judges as to the appropriate extent of the inquiry and the type of questions that the child should be asked about the "ability to communicate." Madame Justice McLachlin in *Marquard* indicated that the standard is not high:

What is required is the basic ability to perceive, remember and communicate. This established, deficiencies of perception, recollection and communication of the events at issue may be dealt with as matters going to the weight of the evidence.⁹⁰

The questions asked during a competency inquiry to test children's ability to communicate vary widely. In *Marquard*, we see that at the competency inquiry, the court should ascertain that the child has the memory and communication skills to answer questions about past events in general, and should not focus on the specific allegations. However, there is never any attempt to verify the accuracy of what children say at these competency inquiries about past events, so that in fact the sole focus of the inquiry is on the child's ability to understand and respond to questions.

However, the "ability to communicate" means the ability to communicate evidence in a courtroom setting. While children as young as two years of age may be able to answer the simple investigative questions of a police officer or social worker in an out-of-court setting, actual courtroom testimony requires a higher level of self-confidence, verbal comprehension, vocabulary knowledge, memory skills, and conversational capacity.

⁸⁹ R.J. Delisle, "Children as Witnesses: The Problems Persist" (1994) 25 C.R. (4th) 39 at 40.

⁹⁰ *Marquard*, *supra* note 77 at 237. See also *Farley*, *supra* note 58.

In *R. v. Caron*,⁹¹ the accused was on trial for allegedly sexually abusing a five-year-old child. At the competency inquiry and during her testimony about the alleged abuse, the child, then five and one-half years old, was only able to provide the court with one or two word answers, inaudible answers or no answers at all. The trial judge concluded that the child understood the difference between the truth and a lie and permitted her to testify on her promise to tell the truth. The Ontario Court of Appeal ruled that the trial judge had erred in allowing the child to testify, as she lacked the ability to communicate. The court said that the child must have “a capacity and a willingness, limited as it may be in the case of a young child, to relate to the court the essence of what happened to her” in the “context of an adversarial trial.”⁹² This requires “the capacity to relate the contentious parts of her evidence with some independence and not entirely in response to suggestive questions.”⁹³ Merely agreeing to “a recital of events by counsel” is not sufficient.⁹⁴

In the survey of justice system professionals, 32 per cent of the Crown prosecutors reported that they often begin by asking children if they remember a non-contentious event, like a birthday party or Christmas holidays, and another 21 per cent always do. Typically, children are asked questions like:⁹⁵

When is your birthday?

What grade are you in? Who is your teacher? What do you like about school?

Do you have friends at school? What are their names?

Can you read? What is your favorite story? What is it about?

Do you like to draw? What do you like to draw?

Who brought you here today? How did you get here?

Have you been to court before? Was I here last time?

What is Barney? Is he a dog? An elephant? What colour is Barney?⁹⁶

This portion of the inquiry, according to the defence respondents, is best used to fully test the child’s “ability to observe, their capacity to recollect, and their capacity to communicate that

⁹¹ (1994), 19 O.R. (3d) 323 (C.A.) [hereinafter *Caron*].

⁹² *Ibid.* at 326-27.

⁹³ *Ibid.* at 326.

⁹⁴ *Ibid.* at 326-27.

⁹⁵ For examples see *Leonard*, *supra* note 26; and *R. v. Patterson*, [1993] O.J. No. 1767 (C.A.).

⁹⁶ Barney is a purple dinosaur from a very popular children’s television show.

recollection"⁹⁷ and distinguish fantasy from reality. As put by one defence lawyer:

An examination into the child's awareness and perceptions should also be endeavoured. How a child perceives objective realities matters more. Does the child exaggerate? Does the child understand the given reality? What is the child really recounting when the child describes a reality? No one can doubt the [ingenuousness] of a child, especially the very young, and thus the inability to manufacture lies. An inquiry into the 'truth' is therefore NOT the solution. Children lie (in the broadest sense) because they [inaccurately] believe a reality to be true either because of distorted perceptions, suggestion or whatever ...⁹⁸

Defence counsel who responded to the survey illustrated a number of approaches to this phase of the inquiry. Whereas some defence lawyers want to take the opportunity to follow up on questions that demonstrate children's ability or inability to remember details of even non-contentious events, some stated that they viewed this as an opportunity to "undermine the attempt to qualify," or to "either scare the child or get friendly with the child."⁹⁹

IV. CHILD WITNESSES IN THE UNITED STATES OF AMERICA

A. Introduction

As in Canada, the current competency inquiry procedures in the United States are a product of its common law tradition, with statutory reform modifying the more stringent expectations of the common law. Both countries use a similar approach in determining competency, with an inquiry into whether the child is able to demonstrate an understanding of the meaning of the truth and the importance of telling the truth in a court, as well as an assessment of the child's ability to communicate.

The 1895 decision of the United States Supreme Court in *Wheeler v. United States* developed the U.S. common law position¹⁰⁰ that the competency of a child witness "depends on the capacity and intelligence of the child, his appreciation of the difference between the

⁹⁷ "Defence Survey," *supra* note 51 at question 3.

⁹⁸ *Ibid.* at question 9.

⁹⁹ *Ibid.* at question 3.

¹⁰⁰ D. Whitcombe, *When the Victim is a Child*, 2d ed. (Washington D.C., U.S. Dept. of Justice, 1992) at 56.

truth and falsehood, as well as of his duty to tell the former.”¹⁰¹ This test involves assessing four fundamental elements, all of which must be present if a child is to be competent to testify:

- (1) Present understanding or intelligence to understand, on instruction, the duty to speak the truth, which includes an understanding of the difference between the truth and a lie or fantasy.
- (2) Mental capacity at the time of the occurrence in question truly to perceive and to register the perception.
- (3) Memory sufficient to retain an independent recollection of the observations made.
- (4) Capacity to translate into words the memory of such observations.¹⁰²

In general, the American courts appear to have been more flexible and realistic in their approach to the assessment of the competency of child witnesses than the Canadian courts. American decisions tend to focus on assessing children’s actual appreciation of the importance of telling the truth, rather than looking for answers to abstract questions about the nature of an oath, religious beliefs and the spiritual consequences of lying. American courts are prepared to consider not only children’s answers to questions testing their understanding of the importance of truth telling, but also their overall demeanor on the witness stand.¹⁰³ At least some American judges have recognized that because children may “have difficulty with abstract questions about truth and lying” during the first few “stressful” minutes in court does not necessarily make them incompetent to testify.¹⁰⁴ There are, however, cases in which American judges have refused to allow a child to testify because of a child’s inability to answer abstract questions to about the difference between the concepts of truth and lie.¹⁰⁵

B. *Federal Rules of Evidence*

Many American states and the federal Congress have modified the common law rules to facilitate the giving of evidence by children.

¹⁰¹ *Wheeler v. United States*, 159 U.S. 523, 525 (1895) [hereinafter *Wheeler*].

¹⁰² K. Broun, *et al.*, *McCormick on Evidence*, 5th ed. by J. Strong, vol. 1 (St. Paul: Westgroup Publishing, 1999) at 271.

¹⁰³ See, for example, *State v. Allen*, 647 So. 2d428 (La. Ct. App. 2d Cir. 1994).

¹⁰⁴ *Ibid.* at 429.

¹⁰⁵ *Owens*, *supra* note 3 at 404.

Under the *Federal Rules of Evidence*,¹⁰⁶ which govern proceedings in the Federal Courts such as violations of federal criminal laws, children are presumed to be competent witnesses. In practice it is relatively uncommon for children to be called as witnesses in these proceedings, though the *Federal Rules* are significant in that they serve as a model for many state laws.¹⁰⁷ Rules 601 and 603 are general provisions:

Rule 601: Every person is competent to be a witness except as otherwise provided in these rules.

Rule 603: Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.¹⁰⁸

Rule 601 reflects the modern trend of eliminating statutory presumptions of incompetency based on membership in a particular group, converting other competency issues into questions of witness credibility to be decided by the jury.¹⁰⁹ As a result of Rule 603, child witnesses must either affirm or swear an oath before they may testify, but the *Federal Rules* do not require any form of mandatory competency inquiry. A competency examination may be conducted if the court determines that "compelling reasons" exist for the inquiry, however, age alone is not considered a compelling reason.¹¹⁰ In practice, competency inquiries are most common with young children. Thomas Lyon and Karen Saywitz found that, from a representative sample of 600 prosecutors of child sex abusers, about half said the testimonial competence of child witnesses was an issue at trial in most or all of their cases.¹¹¹

In cases where the competency of a witness has become an issue, the courts have generally not followed a literal interpretation of Rule 601, which might suggest that any child can be a witness without

¹⁰⁶ 28 U.S.C.A. (Law. Co-op. 1999) [hereinafter *Federal Rules*].

¹⁰⁷ C.A. Wright & V.J. Gold, *Federal Practice and Procedure: Federal Rules of Evidence* (St. Paul: Westgroup Publishing, 1990). The competency of children to testify is frequently raised in the state courts.

¹⁰⁸ *Federal Rules*, *supra* note 106.

¹⁰⁹ "A Comparison and Analysis of the Federal Rules of Evidence and New York Evidentiary Law" (1996) 12 *Touro L. Rev.* 477; see also *United States v. Cook*, 949 F. 2d 289 at 293 (10th Cir. 1991).

¹¹⁰ 18 U.S.C.A. § 3509 (West 1999) [hereinafter *U.S. Code*].

¹¹¹ T.D. Lyon & K.J. Saywitz, "Young Maltreated Children's Competence to Take the Oath" (1999) 3 *Applied Developmental Science* at 16 [hereinafter *Maltreated*].

establishing competency. Rather, the courts have tended to apply the common law standard of requiring an assessment of a child's competence to testify.

In *Galindo v. United States*, the court stated that a child is competent to testify if he or she is able to "recall the events which are the subject of the testimony; and ... understand[s] the difference between truth and falsehood and appreciate[s] the duty to tell the truth."¹¹² The trial court's decision that a three-year-old was competent to testify was upheld by the District of Columbia Court of Appeal:

[T]he experienced trial judge conducted an extensive *voir dire* and she specifically found that while the complainant "doesn't know why she has to tell the truth ... it's quite clear from her repeated spontaneous insistence that she doesn't tell lies, that she does tell the truth, that she in her mind feels it was important to tell the truth and not to tell a lie."¹¹³

However, in 1996, the same court in *Owens v. United States* upheld the decision of a trial judge ruling that an eight-year-old child (called as a witness by the defendant) was not competent to testify because during the *voir dire* "the child was unable to *fully* recall the pertinent events. She specifically stated that she did not understand the difference between the truth and a lie."¹¹⁴

Rules 401 and 402 are also sometimes invoked to keep young children from testifying. Rule 401 defines relevant evidence as "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 402 simply states evidence which is not relevant is not admissible. It has been held that these Rules justify a court excluding "patently incompetent" child witnesses from testifying.¹¹⁵

¹¹² 630 A. 2d 202 at 206-207 (D.C. App. 1993), citing *Barnes v. United States*, 600 A. 2d 821 at 823 (D.C. App. 1991).

¹¹³ *Ibid.* at 207 [emphasis added].

¹¹⁴ *Owens*, *supra* note 3 at 404 [emphasis added]. In this case, a prosecution for possession of cocaine with the intent to distribute, it was the defendant who wanted to call the child as a witness. While in theory this should make absolutely no difference to competence of the child to testify, one might speculate that this was in fact influential.

¹¹⁵ J.E.B. Myers, *Evidence in Child Abuse and Neglect Cases*, 3d ed. (New York: Wiley Law Publications, 1997) vol. 1 at 210.

C. State Laws

Most children who testify in American courts do so in criminal proceedings governed by state law. While the statutory provisions dealing with the issue of child witness competency vary considerably from state to state, many state laws are modeled on the *Federal Rules*.¹¹⁶ A number of states provide that all witnesses, regardless of age, are competent to testify provided certain minimum statutory requirements are met.¹¹⁷ These minimum requirements vary from state to state, but usually require that the person possess the ability to communicate and an understanding of the duty to tell the truth.¹¹⁸

Typically, state courts require that children must have the "capacity of expression" and an "appreciation of the duty to tell the truth."¹¹⁹ In *State v. Walters*,¹²⁰ the Montana Court of Appeal concluded that the trial court did not abuse its discretion in determining that a four-year-old sexual assault victim was a competent witness when the court "methodically and carefully determined ... that [the victim] was capable of expressing herself and that she appreciated the duty to tell the truth."¹²¹ With regard to testimonial inconsistencies, the Supreme Court of Montana has held that any inconsistencies within a child's testimony is to be reflected in the determination of the child's credibility, rather than his or her competency.¹²² Even in a case where a child believed that the courtroom was a police station and that the judge was a karate expert (no doubt misled by the judge's robes), the court held that the child was a competent witness. The child's misconceptions could be assessed by the jury in determining the weight to be attached to the child's testimony, but did not result in the child being legally incompetent to testify.¹²³

¹¹⁶ See, for example, Arizona: Ariz. Rev. Stat. § 13-4061 (1999).

¹¹⁷ See, for example, Montana: Mont. Code Ann. tit. 26, ch.10, Rule 601 (1981).

¹¹⁸ In Washington, for example, the competency requirements require that a witness possess "sound mind and discretion." See Wash. Rev. Code § 5.60.020 (1999).

¹¹⁹ *State v. Eiler*, 762 P. 2d 210 at 213 (Mont. 1988), citing *State v. Phelps*, 696 P. 2d 447 at 453 (Mont. 1985) [hereinafter *Phelps*].

¹²⁰ 806 P. 2d 497 (Mont. 1991).

¹²¹ *Ibid.* at 500.

¹²² *State v. Newman*, 790 P. 2d 971 (Mont. 1990).

¹²³ See *Phelps*, *supra* note 119.

In contrast to the Canadian courts, the American courts do not seem to struggle with issues related to children's understanding of an oath or promise. They tend to focus on a more general understanding of the importance of telling the truth, often assessed by asking concrete rather than abstract questions. American judges do not appear to ask questions about religious belief or practice. This is likely due to the fact that American statutes do not require an inquiry into children's understanding of the "nature or consequences of an oath" or promise. It is a common practice to ask children to promise to tell the truth, without any concern about whether this differs from an oath. In many states children may testify even if they cannot define an oath, or are unable to explain the nature and purpose of an oath.¹²⁴ Nor are children necessarily required to state that the obligation to speak the truth is greater in court than in other situations.¹²⁵

In both countries, however, there is an initial assessment by the court of children's ability to remember the events at issue and to meaningfully answer questions. In *Lowe v. State*, a three-year-old witnessed his mother's murder in a convenience store. He told a family friend at the scene, "two peoples came in, argued with Mommy and bang, bang, bang."¹²⁶ The accused sought to introduce the child's statement to support his position that there were accomplices and he was merely the get-away driver. The state sought to exclude the child's statement on the grounds the child was incompetent at the time of the statement. At a hearing on this motion, the child's father testified that when the child said "peoples" it meant anybody, whether it was one or more people. At the child's competency hearing, he said he had only "one feet," and said counsel's tie was the colour "one." The court found the child's testimony could not be admitted because he was "[i]ncapable of expressing himself concerning the matter in such a manner as to be understood."¹²⁷

In some American states, legislation has been enacted to exempt children who are the victims of sexual abuse from the standard

¹²⁴ See *Strickland v. State*, 297 S.E. 2d 491 (Ga. App. 1982); *Lashley v. State*, 208 S.E. 2d 200 (Ga. App. 1974). In some states, legislation now allows a child to testify by promising to tell the truth. Section 710 of the *California Evidence Code* (1999) provides: "Every witness before testifying shall take an oath or make an affirmation or declaration in the form provided by law, except that a child under the age of 10, in the court's discretion, may be required only to promise to tell the truth."

¹²⁵ *State v. Meyer*, 113 N.W. 322 (Iowa 1907).

¹²⁶ 650 So. 2d 969 at 975 (Fla. 1994).

¹²⁷ *Ibid.* at 976, citing Fla. Stat. § 90.603(1) (1989).

competency requirements, requiring them to meet a specified lower standard or no statutorily announced standard at all.¹²⁸ However, the courts have interpreted these provisions as leaving a residual judicial discretion to preclude children from testifying, even in the face of legislation that provides that a child victim of an alleged sexual offence "shall be considered a competent witness and shall be allowed to testify without prior qualification."¹²⁹ In *State v. Fulton*,¹³⁰ the Utah Supreme Court held that this type of law did not mean the trial court may never prevent such a child from testifying. It was held that under Rule 403 of the *Utah (and Federal) Rules of Evidence*, the court may exclude any testimony where the "probative value is substantially outweighed by the danger of unfair prejudice ... or misleading the jury."¹³¹ The court further held that in considering a defendant's application to have a child's testimony excluded, the court should consider "the child's ability to function in the courtroom setting, *i.e.*, to understand the questions, to communicate ... facts to the jury, to distinguish truth from fantasy or falsehood, etc."¹³² This type of ruling continues to allow a form of competency inquiry for young children, albeit placing the onus on the defendant who seeks to prevent a child from testifying.

V. CHILD WITNESSES IN ENGLAND

Originally governed by the common law, in the late nineteenth century England enacted legislation to permit children who could not demonstrate an understanding of an oath to testify without being sworn. As the understanding of the capacities of child witnesses increased, legislators reformed Britain's competency provisions and have continued to do so in recent years. Section 33A of the *Criminal Justice Act 1988* now reads:

- (1) A child's evidence in criminal proceedings shall be given unsworn.

¹²⁸ See, for example, Utah: Utah Code Ann. § 76-5-410 (1999) [hereinafter *Utah Code*]. Special provisions also exist at the federal level for child victims of abuse. Subsection 3509 of the *U.S. Code*, *supra* note 110, provides that a child victim is presumed to be competent, and a competency examination may be conducted by the court only upon written motion and offer of proof of incompetency by a party.

¹²⁹ *Utah Code*, *ibid.*

¹³⁰ 742 P. 2d 1208 (Utah 1987).

¹³¹ *Ibid.* at 1218.

¹³² *Ibid.*

- (2) A deposition of a child's unsworn evidence may be taken for the purpose of criminal proceedings as if that evidence had been given on oath.
- (2A) A child's evidence shall be received unless it appears to the court that the child is incapable of giving intelligible testimony.
- (3) In this section a 'child' means a person under fourteen years of age ...¹³³

In *D.P.P. v. M.*,¹³⁴ the respondent was convicted of indecently assaulting a four-year-old girl based on the child's unsworn testimony. The respondent appealed, arguing that by reason of her age the child was too young to testify. The English Court of Appeal held that it was not open to the judge to exclude the evidence of the child based on her age alone:

The words of [the new provision] are mandatory. Care must always be taken where a question is raised as to whether a young child is capable of giving intelligible testimony. But where the child is so capable the court does not enjoy some wider discretion to refuse to permit the child's evidence to be given A child will be capable of giving intelligible testimony if he or she is able to understand questions and to answer them in a manner which is coherent and comprehensible.¹³⁵

In *G. v. D.P.P.*,¹³⁶ the trial court allowed two young children aged six and eight to give evidence-in-chief and refused to hear the defence's expert evidence that the children were incompetent to testify. The Court of Criminal Appeals affirmed that the trial court was right to refuse to hear the expert evidence as the competency inquiry now "is a simple test well within the capacity of a judge or magistrate."¹³⁷ "Intelligible testimony" was held by Lord Justice Auld to be "evidence that is capable of being understood."¹³⁸ Given the simpler test under section 33A(2A), the "courts must now listen to their evidence, for what it is worth, and young children's understanding of the difference between

¹³³ (U.K.), 1988, c. 33, s. 33A [hereinafter *Act*]. Section 33A (1), (2) and (3) were inserted into the *Criminal Justice Act 1988* by amendments in the *Criminal Justice Act 1991* (U.K.), 1991, c. 53, s. 52. Section 33A(2A) was inserted into the *Criminal Justice Act 1988* by the *Criminal Justice and Public Order Act 1994* (U.K.), 1994, c. 33, Sch. 9, para. 33. Some of the Australian states have similar legislation; see Tasmania: *Evidence Act*, 1910 (Tas.), s. 122C.

¹³⁴ [1997] 2 All E.R. 749 [hereinafter *M.*].

¹³⁵ *Ibid.* at 753, per Lord Justice Phillips.

¹³⁶ [1997] 2 All E.R. 755 [hereinafter *G.*]

¹³⁷ *Ibid.* at 759.

¹³⁸ *Ibid.* at 758.

the truth and falsehood and of the need to tell the truth are now just matters that affect its weight rather than its admissibility."¹³⁹

As was done in Canada in 1988, the English reforms of 1988 abolished the requirement of corroborating evidence in order to register a conviction based on the unsworn testimony of a child.¹⁴⁰

VI. NEW PSYCHOLOGICAL RESEARCH

Recent psychological research raises serious questions about the present legal requirements in Canada and the United States for assessing the competency of child witnesses.

In their study of 192 maltreated children, Lyon and Saywitz¹⁴¹ found that children who had been neglected or abused often showed developmental delays due to the treatment they suffered. These delays make it more difficult to qualify the very group of children who are most likely to be called as witnesses. Although these children present seriously delayed vocabulary skills, most maltreated children by age five have a basic understanding of the meaning and the immorality of lying. However, the capacity of children to demonstrate their understanding is dependent on the manner in which the children are questioned.

Lyon and Saywitz examined three ways of assessing a child's understanding of truth and lies. Children were asked to (a) define, (b) explain the difference between, and (c) identify in different short stories, truth and lies.¹⁴² The children experienced the greatest difficulty with the defining task as it required an abstract verbal formulation. However, they performed much better on the identification task, in which they could demonstrate their understanding by recognizing examples of truth and lies. In this study, 60-70 per cent of children aged four to seven clearly understood the difference between truth and lies in the identification task, yet failed to show adequate understanding of the same concepts when asked to define the terms or explain the difference

¹³⁹ *Act, supra* note 133, s. 2A. See J.R. Spencer, "Competency: Children and Witnesses with Learning Disabilities—Part 1" (1988) 148:6859 *New Law Journal* 1472; J.R. Spencer & R. Flin, *The Evidence of Children: The Law and Psychology*, 2d ed. (London: Blackstone Press, 1993) at 51-52.

¹⁴⁰ See *Act, supra* note 133, s. 34.

¹⁴¹ *Maltreated, supra* note 111.

¹⁴² *Ibid.* at 17. See also S.J. Ceci, M. DeSimone Leichtman & M. Putnick eds., *Cognitive and Social Factors in Early Deception* (Hillsdale, NJ: L. Erlbaum, 1992); S.J. Ceci & M. Bruck, *Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony* (Washington, D.C.: APA, 1995); D.A. Poole & M.E. Lamb, *Investigative Interviews of Children: A Guide for Helping Professionals* (Washington, D.C.: APA, 1998).

between them. The youngest participants (aged four) in their study were no better than chance at identifying statements that were false (*i.e.*, lies), but were very good at identifying the truth.

Lyon and Saywitz suggest that there was a motivational barrier arising from the way in which the questions were posed that made children reluctant to demonstrate an understanding of lying. In this study (as is often the case in court), the questions were phrased in a way that required children to identify the questioner as the one who has told a lie. As children may be reluctant to identify an authority figure as a liar or morally bad person, these motivational difficulties can be minimized by phrasing recognition questions so that children identify another child in a story as telling a lie instead.

The authors of this article have also recently completed laboratory research at Queen's University that more directly assesses whether the present legal test for the assessment of the competence of children has any validity for determining whether children are in fact telling the truth.¹⁴³ Empirical research suggests that there is no relationship between a child's performance on the cognitive assessment of their understanding of such concepts as truth and lies, and their actual behaviour. In the first study, 130 children aged four to seven committed a transgression by peeking at a toy while alone in a room, contrary to their instructions. Of these children, 74 per cent lied when asked about their transgression. The children were more likely to lie if they were older.¹⁴⁴ Before being asked about their transgression, they were asked questions about truth and lying. Even though 87 per cent could identify a lie in a story and 73 per cent said lying was bad, there was no statistically significant relationship between whether they actually lied and whether they could identify a lie and say it was bad. In fact, 72 per cent of the liars said it was bad to lie. This suggests that truth-telling behaviour is not related to knowing the "correct" answers to questions about truth

¹⁴³ The first two studies were conducted by V. Talwar & K. Lee; see V. Talwar & K. Lee, *The Relation Between Children's Moral Understanding of Lying and Their Truth Telling Behaviour* (American Psychology-Law Society, New Orleans, March 2000).

¹⁴⁴ There were a total of 158 children in the first study. The children were left in a room and asked not to peek at a hidden toy while the experimenter left. However, to create a strong temptation to peek, they were told that they would get a prize if they could guess what the toy was when the experimenter returned. The children were observed through a one way mirror while alone in the room. Out of the 158 children, 130 (82 per cent) peeked. When the experimenter returned, she asked the children who peeked if they peeked at the toy. Out of the 130 who peeked, 74 per cent lied by denying that they had peeked. In the lying group there was no statistically significant difference in whether the children actually lied based on whether child could identify a lie or say that lying is bad; 72 per cent of liars said that it is bad to lie while 81 per cent of confessors did so, a difference that is not statistically significant.

and lies, nor is truth-telling behaviour related to knowing that lying is "bad."

In the second study eighty six children aged three to seven lied about peeking at a toy, contrary to their instructions. Before being asked about their transgression, the children were questioned about truth and lying, and then asked to promise to tell the truth about their transgression (peeking).¹⁴⁵ The rate of lying dropped from 74 per cent (in the first study) to 57 per cent in the study in which children were asked to promise to tell the truth—a statistically significant drop. Interestingly, the effect of promising to tell the truth had the greatest effect of increasing truth-telling behaviour with younger children (aged four to five) who had the greatest difficulty in answering questions about truth and lying.

In order to examine the specific relation between promising and children's lie-telling behaviour, a third study was conducted. In this study there were 102 children between ages four and seven who peeked at the toy. Children were randomly divided into two conditions, or groups, where they were asked about their transgression. They were either asked to promise to tell the truth, or were questioned about truth and lying but not asked to promise to tell the truth.¹⁴⁶ A significant difference in the rate of lying was found between the two conditions. While 80 per cent of children lied in the condition where they were questioned about lies and truth, only 60 per cent lied when asked to promise to tell the truth. Thus, it seems that the cognitive assessment of their understanding of lies and truth bears little relation to their behaviour, while promising to tell the truth does decrease the rate of lie-telling but does not eliminate it. The results taken together suggest that the only component of the present

¹⁴⁵ One hundred and three children, aged three to seven years, participated in Study Two. Of these children eighty six (83 per cent), contrary to instructions, peeked at the toy while the experimenter was out of the room. They were then asked about lying, and asked to promise to tell the truth about their transgression. A weak inverse correlation was found between age and the effect of making a promise. That is, promising to tell the truth increases the likelihood that children will tell the truth, especially at younger ages (four and five years).

¹⁴⁶ One hundred and thirty children participated in Study Three. The children were divided randomly into two conditions. In the first condition, children were asked to promise to tell the truth before being questioned about their transgression. There were fifty two children in this condition who peeked. In the second condition, children were asked questions about the concepts of truth and lies before being questioned about their transgression. In this condition there were fifty children who peeked. A statistically significant difference was found in children's lie-telling behaviour between the two conditions: in the first condition only 60 per cent of children lied, while in the second 80 per cent of children lied. Thus, it appears that promising to tell the truth decreased lie-telling behaviour, while asking questions about truth and lies has no impact on the rate of children's lie-telling behaviour.

assessment process that is useful is asking the child to promise to tell the truth.

The present competence examination is based on the assumption that if children demonstrate an understanding of what a lie is and the negative moral implications of lying, they should be more likely to tell the truth in the court. The authors' studies fail to confirm this assumption. To the contrary, their research suggests there is no relationship between a child's performance on the cognitive assessment of their understanding of such concepts as truth and lies, and their actual lie—or truth-telling behaviour. Furthermore, this research is consistent with a larger body of psychological theory and research about child development and truth-telling behaviour.¹⁴⁷

A person's decision to lie in a situation is a function of an often complex interaction of the person's psychological motivations and the context of the situation. These psychological motivations are not linked to the cognitive development needed to "correctly" answer the types of questions asked at a competency inquiry. On the other hand, research suggests that very young children (aged two to three) lack the cognitive development to lie (deliberately tell a falsehood with the intent of deceiving the listener), and young children (aged three to five) generally lack the cognitive development and self awareness effectively to deceive. In other words, most young children's lies can be easily detected because they are unskilled at maintaining consistencies between their lies and other statements they make in the same context, or their lies lack logical consistency.

It is desirable to replicate and extend this type of laboratory research.¹⁴⁸ The results of these studies, however, are consistent with

¹⁴⁷ See, for example, K. Lee, "Lying as Doing Deceptive Things with Words: A Speech Act Theoretical Perspective" in J. W. Astington (ed.), *Minds in the Making: Essays in Honour of David R. Olson* (Oxford: Blackwell Publishers, 2000).

¹⁴⁸ The authors are engaging in further laboratory research about children, truth-telling and lying. This research includes more closely simulating court situations of the competency inquiry; creating situations where parents have children lie, rather than having children lie about their own transgressions; and assessing the effect of different types of inquiries on the ability of mock jurors to accurately decide whether a child is telling the truth.

In June 1999, Thomas Lyon and Joyce Dorado presented research findings to the American Psychological Association in Denver, Co. [unpublished]. Lyon and Dorado reported on two studies that also support the conclusion that honesty in young children is not related to the ability to "pass" the competence inquiry, but that making a child promise to tell the truth does increase honesty. In Study One, 109 maltreated children aged six and seven were asked about a transgression (looking for hidden toys while the experimenter left the room) and asked competency questions. One-third were asked to promise to tell the truth and one-third were given reassurance that transgression is common and that there would be no sanction for telling the truth. No relationship was found between how children performed on the competency test and their honesty. However, 83 per cent in

child development theory and strongly suggest that the present competency inquiries used in criminal proceedings in Canada and the United States do not serve the function of helping to exclude from testifying children who are less likely to tell the truth. There appears to be no relationship between whether a child can answer cognitive questions about truth and lying, and whether a child actually tells the truth. Expecting children to correctly answer questions about truth and lying may result in some children being precluded from testifying who may be accurate and truthful witnesses. While there appears to be some value (and likely no harm) in asking children to promise to tell the truth, there is no value in asking them to articulate why this is significant, or in expecting them to answer questions about what it means to promise.

VII. THE NEED FOR REFORM

Over the past twenty years, the Canadian legal system has developed a more flexible approach to child witnesses. A realistic appreciation of the capacities of children, coupled with a commitment to the further protection of children from criminal victimization and subsequent victimization in the court system, lead to amendments of the *CEA* in 1988.¹⁴⁹ These amendments rejected the historical perception of children as inherently unreliable witnesses, while recognizing that they are not adults and are entitled to treatment that accords with their needs and abilities. It is now recognized that children can provide reliable evidence.

In the recent Supreme Court of Canada decision in *F.(W.J.)*, Madam Justice McLachlin recognized that judicial questioning at the competence inquiry has often been inappropriate:

The law once refused to take cognizance of the special problems young witnesses face and the corresponding difficulties those who seek to prosecute crimes against young children consequently encounter. Child witnesses were treated like adults—indeed even more severely. Not only did they have to take the oath, but also, unlike adults, they were subjected to grilling on whether they understood its religious implications. If they failed this hurdle or the others that might appear down the road, like corroboration, their

the reassured group told the truth, whereas only 31 per cent of those in the promise group and 47 per cent of the control group told the truth. One hundred and nine maltreated children aged six and seven (excluding children who did not “pass” the competence test) participated in Study Two. A confederate played with the child and toy while the experimenter was gone, and then told the child that they might get into trouble if anyone found out. About 50 per cent of children in the control group told the experimenter the truth, whereas over 80 per cent of children in promise and reassurance conditions told the truth.

¹⁴⁹ *Supra*, note 2.

evidence was completely lost. The law, in recent decades, has come to realize that this approach was wrong.¹⁵⁰

While this type of judicial pronouncement from the Supreme Court of Canada should have some effect on how judges conduct competency inquiries, there is clearly a need for further legislative reform. Despite the 1988 amendments, section 16 of the CEA continues to render the competency inquiry artificial and overly complex.

The 1999 consultation paper of the Department of Justice Canada on *Child Victims and The Criminal Justice System*, suggested that:

The competency test, and its interpretation by the courts, appears to add unnecessary complexity. The unintended effects of [the 1988] reform may have made the experience of child witnesses more rather than less traumatic and made it more difficult for their evidence to be heard. Preliminary proceedings for child witnesses are becoming more common and complex. A stigma continues to attach to evidence that is unsworn or given on a promise to tell the truth.¹⁵¹

One problem with the present legislation is its emphasis on assessing the child's responses to questions about of the "nature of an oath." This is often interpreted as requiring a child to answer questions that would confound religious scholars.¹⁵² By delving into a child's religious understanding and beliefs, the inquiry has lost its true focus, which is not to determine whether a child is religiously trained, but whether the child is committed to telling the truth as a witness. This problem was considered by the Criminal Law Revision Committee in England:

The inquiry whether the child understands the nature of the oath, if carried out conscientiously, seems to us unrealistic; and the investigation sometimes made by the court as to whether the child believes in divine retribution for lying is really out of place when the question is whether he understands how important it is for the proceedings that he should tell the truth to the best of his ability about the events in question, in particular

¹⁵⁰ *Supra* note 36 at 591.

¹⁵¹ Department of Justice, *Canada Child Victims and the Criminal Justice System: A Consultation Paper* (Ottawa: November 1999) at 17, online: Department of Justice, <http://www.canada.justice.gc.ca/consultations/enfants/consul1_en.html#intro> (date accessed: 28 February 2001).

¹⁵² There is a broader argument that in an increasing secular society, the requirement for testimony under oath should be abolished for all witnesses; see for example, T. Matlow, "Let's Swear Off the Oath in Court" *The Globe and Mail* (14 March 2000) A15, where a judge of the Ontario Superior Court advocates abolition of the oath and replacement by a promise, with an admonition of the possibility of a prosecution for perjury if the witness lies.

that he should not say anything against the accused which he does not really believe to be true and that he should say if he did not see something or does not remember it.¹⁵³

The work of the English Commission resulted in the 1988 reforms in that country.

A second problem with the current inquiry is the distinction between sworn and unsworn testimony, and the effect that this has on the complexity of the inquiry. With the elimination of the corroboration requirement for unsworn evidence, a number of appellate decisions have held that the weight to be attached to the evidence of a child witness should not be affected by the "form of the witness's commitment to tell the truth"—*i.e.*, whether or not the child gives sworn or unsworn testimony.¹⁵⁴ While it is clear that some judges still place greater weight on sworn testimony, there is no justification for giving greater weight to a child's testimony merely because the child has demonstrated an understanding of the oath. If the weight accorded the evidence of a child witness is not affected by whether the witness is sworn, there is no value in engaging in the complex inquiry into whether a child understands the oath.¹⁵⁵

The core problem with the current competency inquiry is that the questions asked are essentially irrelevant to the issue of whether the child is actually committed to telling the truth. The psychological

¹⁵³ As cited in M. Howard, *Phipson on Evidence*, 14th ed. (London: Sweet and Maxwell, 1990) at 147. A similar position was taken in Canada in 1984 by the *Report of the Committee on Sexual Offences Against Children and Youth* [the Badgley Committee Report] (Ottawa: Supply and Services Canada, 1984).

Several provinces and territories in Canada have enacted legislation to eliminate or simplify the competency requirement for children to testify in civil proceedings, though it is rare for children to testify in these proceedings, and there is no reported case law interpreting these provisions. See, for example, Ontario *Evidence Act*, R.S.O. 1990, c. E-23, s. 18.1, (as amended S.O. 1995, c. 6, s. 6). These amendments were a response to the Ontario Law Reform Commission, *Report on Child Witnesses* (Toronto: OLRC, 1991).

¹⁵⁴ *McGovern*, *supra* note 60 at 307.

¹⁵⁵ Another issue in the competency inquiry is the apparent lack of opportunity afforded children to testify under affirmation. An affirmation is a solemn pledge to tell the truth. Unlike the oath, there are no religious connotations to the affirmation. However, a person of the age of criminal responsibility (twelve years or older in Canada) knowingly making a false statement under affirmation (or oath) can be convicted of perjury. Despite the courts' preoccupation with the moral connotations of the oath, child witnesses do not appear to be afforded the opportunity to affirm. In questioning a child witness, when the questioner believes that a child lacks a religious understanding of the nature of an oath, the questioner immediately refocuses the inquiry onto the child's ability to understand the nature of a promise to tell the truth, never exploring a child's understanding of a solemn affirmation. Children with insufficient or no religious education or understanding may be incorrectly presumed by the court to be incapable of understanding the obligations of "sworn" testimony, and should be permitted to affirm.

research discussed in this paper indicates that a child's commitment to telling the truth is unrelated to whether the child has the cognitive ability to answer questions about truth-telling or lying.

The concerns about the competency inquiry are an important illustration of the broader problem of asking children developmentally inappropriate questions.¹⁵⁶ There is a need for better training for judges and lawyers in questioning young children in general, not just for competency inquiries. Many of the questions typically asked of children in competency inquiries are developmentally inappropriate. As Walker points out:

studies showed conclusively that asking for a definition ("What is truth/a lie?") or explanation of the difference (the harder of the two tasks) failed to demonstrate the real competence of young children. Asking children to identify statements as true or false through use of hypothetical questions ("If I tell you x ...), however, allowed almost all of the 5-year-olds to demonstrate credibly their understanding of truth and lies ... to establish that children have an appreciation for telling only what really happened [This] can best be accomplished by first asking young children age-appropriate hypothetical questions which put the truth or lie in someone else's mouth.¹⁵⁷

Until the competency inquiry is legislatively reformed, those who are questioning children in this process need education and training to ask developmentally appropriate questions.¹⁵⁸ For young children, questions should *not* focus on abstract definitions. Young children should be asked to identify lies. Preferably children should be asked questions about hypothetical stories¹⁵⁹ in which a person is (or is not)

¹⁵⁶ Our survey data reveals that children are routinely asked confusing questions, inappropriate for their age and level of understanding. Questions lie buried in legal jargon, double negatives and adult vocabulary. Sixty-seven per cent of victim witness workers said children are almost always asked questions that are too complex in terms of both structure and content. At age four or five, children's vocabulary does not often include such words as: fellatio, cunnilingus, pedestrian, ascertain or affirmation. "Legalese" is just as confusing. Examples of parts of questions that are developmentally inappropriate for young children include: "I suggest to you," "Did you have occasion to" or "How sure are you — 90%, 80%?"

¹⁵⁷ A. G. Walker, *Handbook on Questioning Children: A Linguistic Perspective*, 2nd ed. (Washington: ABA Center on Children and the Law, 1999) at 58-59 [hereinafter *Handbook*].

¹⁵⁸ M. Mian et al., "The Child as Witness" (1990) 4 C.R. (4th) 359.

¹⁵⁹ Children may be reluctant to correctly answer a question in which a judge or other authority figure like a lawyer poses a question in which the speaker is telling a lie (or erroneous statement). Asking a child to identify another person in a story as telling a lie is preferable. See *Maltreated*, *supra* note 111; see also T.D. Lyon et al., "Reducing Motivational Barriers to Oath-Taking Competence," USC Working Paper Series, online: USC, <http://papers.ssrn.com/paper.taf?abstract_id=209609> (date accessed: February 28, 2001); and T. Lyon & K. Saywitz, "Qualifying Children to Take the Oath: Materials for Interviewing Professions" (revised, May, 2000) online: USC, <<http://www.hal-law.usc.edu.users/tlyon/comp/title.htm>> (last modified: May, 2000).

telling a lie, and the child is asked to identify whether another person is telling a lie, and whether this is good or bad.¹⁶⁰

Parliament should abolish the competency inquiry for child witnesses and make clear that they are competent witnesses who are to testify without being sworn.¹⁶¹ The experience with the 1988 reforms in Canada (and similar reforms in the United States) demonstrates that new legislation about child witnesses tends to be narrowly interpreted, with older notions of competency inquiries influencing how the new laws are applied. Thus, the explicit English legislation should serve as a model for reform, with provision that all children under fourteen should give evidence without being sworn, and that their evidence should be treated as if given under oath. Further, there should be explicit provision that a child's "evidence shall be received unless it appears to the court that the child is incapable of giving intelligible testimony."¹⁶²

Legislation (or judicial practice) should provide for an initial period of questioning and instruction by the judge (or the lawyer who has called a child as a witness) in order to prepare the child for testifying about the events in dispute, but it should be clear that this is not to serve as a legal requirement to establish competency to testify. Questions at this stage should focus on events unrelated to the proceeding, allowing the child an opportunity to become comfortable with the court setting. During this questioning, the judge should assess the child's ability to understand and answer questions, for example, relating to numbers, measurement and time. If, at this stage, the child demonstrates an inability to answer certain types of questions, such as those related to time, this should affect the types of questions that a judge allows counsel to ask the child.

During this initial phase of questioning, children should also be encouraged and instructed about the need to give responses that are as detailed as possible.¹⁶³ It would be a useful practice for judges to provide a child witness with simple instructions about the importance of telling the truth in court. The child should be assured that even if they may have said some different things in the past, this is the place to tell what really

¹⁶⁰ See, for example, *Handbook*, *supra* note 157 at Appendix D; and "Appropriate Questions," *supra* note 74.

¹⁶¹ While the main focus of the discussion in this paper has been on the legislative regime in Canada, other jurisdictions that have not reformed their child competency legislation would also benefit from this type of law reform.

¹⁶² *Act*, *supra* note 133, s. 33A(2A)

¹⁶³ "Appropriate Questions," *supra* note 74 at 280-84.

happened.¹⁶⁴ Children should also be instructed that if there are questions which they do not understand that they should indicate this, and if there are questions that they cannot answer, they should so indicate rather than guess.

Child witnesses should be asked to promise to tell the truth, but it should not be necessary for children to demonstrate an understanding of the meaning of the term “promise.” Most children as young as three years of age have a basic understanding of the concept of promising, but that does not mean they can answer questions from a judge or lawyer that clearly demonstrate this understanding. Further, legislation should specify that the failure of a child to make such a promise should not affect the child’s opportunity to testify.

If it becomes clear during this initial period of questioning that a child lacks the cognitive capacity, communication skills, or social development to meaningfully answer simple questions in a court room setting, the child should be excused from testifying. Similarly, it may become apparent at this initial stage that the child is too frightened or upset to testify, and needs to testify by closed circuit television or should be altogether excused from testifying. Even if a young child has sufficient communication skills to provide the courts with evidence, the child should not testify if it appears that the child would be traumatized by the experience of testifying. The welfare of the child should not be sacrificed for the sake of the criminal process. The fact that the experience of testifying is likely to traumatize a child is already considered a justification for excusing a child from testifying and finding it necessary to admit reliable hearsay evidence.

¹⁶⁴ Children, like adults, will have made prior statements to the police and others. There may be a “commitment effect” for any witness; the witness feels obliged to repeat the story they told earlier, even if they believe that it is not true. While the “commitment effect” can never be completely overcome, children can be reassured that the emphasis is on telling the truth, not repeating what they may have said earlier. We are grateful to Prof. Manson of Queen’s University for making this point.

