Truth and the Reliability of Children's Evidence: Problems with Section 715.1 of the Criminal Code

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Section 715.1 of the Criminal Code reads:

> In any proceeding relating to an offence under section 151, 152, 153, 155 or 159, subsection 160(2) or (3), or section 170, 171, 172, 173, 271, 272 or 273, in which the complainant was under the age of eighteen years at the time the offence is alleged to have been committed, a videotape made within a reasonable time after the alleged offence, in which the complainant describes the acts complained of, is admissible in evidence if the complainant, while testifying, adopts the contents of the videotape.[1]

This provision (part of Bill C-15) was passed into law in January, 1988. With rare exception[2], the change was heralded as an important innovation that enhanced the pursuit of truth while accommodating the special needs of child witnesses[3].

Section 715.1 clearly helps reduce some of the stress and trauma for child and adolescent complainants. The primary purpose of the provision, however, is to allow the admission of probative evidence that would otherwise be unavailable (i.e., the witness has forgotten the events or is otherwise incapable of testifying). As explained by Justice Cory in *R. v. F. (C.C.)*[4], the section:

> …aids in the preservation of evidence and the discovery of truth. […] (C)hildren, even more than adults, will have a better recollection of events shortly after they occurred than they will some weeks, months or years later. The younger the child, the more pronounced will this be. […] It follows that the videotape which is made within a reasonable time after the alleged offense and which describes the act will almost inevitably reflect a more accurate recollection of events than will testimony given later at trial. Thus the section enhances the ability of a court to find the truth by preserving a very recent recollection of the event in question.[5]

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[1] Criminal Code, R.S.C., 1985, c. C-46, s. 715.1 [ad. R.S.C., c. 19 (3rd Supp.), s. 16].
[2] See Rauf, M. "Thompson: Charter Challenge to Videotaped Statements of Children – Two Views" (1989), 68 C.R. (3d) 331.

[3] See Bala, Nicholas and Hilary McCormack. "Accommodating the Criminal Process to Child Witnesses: L. (D.O.) and Levogiannis" (1994), 25 C.R. (4th) 341 and McGillivray, Anne. "R. v. Laramee: Forgetting Children, Forgetting Truth" (1991), 6 C.R. (4th) 325.

[4] (1997) 120 C.C.C. (3d) 225.
[5] *Ibid*., at 233.

On the face of it, this exception to what would otherwise be inadmissible hearsay seems to make good sense. It is axiomatic that memories deteriorate over time[6]. Section 715.1 attempts to compensate for memory loss by permitting an earlier account of the events to be put in evidence. The underlying assumption is that the search for truth – and, thus, justice – will be advanced through admission of the videotaped earlier account.

Despite such noble goals, there is a real basis for concern that s. 715.1 – as currently construed – leads to miscarriages of justice. The problem arises by virtue of the courts' overly liberal interpretation of the two statutory gatekeepers of admissibility: the timing of the videotape and the meaning of adoption. The approach to admission now sanctioned in Canada raises such significant threats to reliability as to call into question the utility of the section in advancing the truth-seeking function of the adversarial system.

Defining "Reasonable Time"

Section 715.1 mandates that the videotape be "made within a reasonable time after the alleged offence." Timing is important because memory strength decreases over time. Timing is also important because it is commonplace for contaminating interviews and judgmental expressions from influential figures to have occurred prior to the videotaped session.

The initial memory trace of a young child, routinely weaker than that of older children, may decay rapidly. Even without interfering experiences, the

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6 See Cowan N. (Ed.). (1997). The development of memory in childhood. Hove East Sussex, U.K.: Taylor & Francis; Howe, M. (2000). The fate of early memories: Developmental science and the retention of childhood experiences. Washington: American Psychological Association..

passage of time is associated with poorer recall[7]. The reliability of the testimony may be further compromised by suggestive questioning by parents, social workers, therapists, police, or Crown attorneys that precede the taking of a videotaped statement.

In *R. v Laramee*[8], four months was considered an unreasonable length of time by the Manitoba Court of Appeal. Noting that numerous adults had interviewed the victim prior to the taped interview, the Court ruled the tape inadmissible because of the delay. The original conviction was restored on a further appeal to the Supreme Court of Canada (*R. v. L. (D.O)*[9], the Court deciding that the trial judge had not committed reversible error in concluding that the videotape was made "within a reasonable time". Madame Justice L'Heureux-Dubé, in the course of her extensive and oft-cited review of the provision on behalf of a concurring minority, noted that "reasonableness" can only be determined by a case-by-case analysis. Regrettably, the factors to be included in such an analysis are not well developed.

There are numerous reasons for videotaping delays, including the fact that the complainant's initial disclosure itself may have been delayed. This initial delay is sometimes treated as if it provides an exception to the "reasonable time" requirement. In *R. v. S. M.*[10], for example, the Alberta Court of Appeal held that a delay of 17 months – a very significant delay in the life of any young child -- was reasonable. The delay was attributable to delayed disclosure. While the

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[7] Ornstein, P. A. (1995). Children's long-term retention of salient personal experiences. Journal of Traumatic Stress, 8, 581-605.

[8] (1991), 65 C.C.C. (3d) 465 (Man. C. A.)
[9] (1993), 85 C.C.C. (3d) 289 (S.C.C.)
[10] [1995] A.J. No. 415 (C.A.)

court acknowledged the possibility of memory loss, the impact of the delay was judged to be a matter of weight, not admissibility.

The time frame issue has been raised by other commentators[11] and it remains a concern for two reasons. First, delayed reporting is often assumed to characterize children's reports of sexual abuse[12] even though the empirical evidence is equivocal. Secondly, earlier suggestions of a stringent approach to the criteria for "adoption" have been eclipsed by the Supreme Court's recent decision in *R. v. F.(C.C.)* (discussed below), thereby rendering the "reasonable time" criterion more crucial than ever.

Should delayed disclosure be a mitigating factor in judging "reasonable time"? Recent pronouncements of the Supreme Court suggest an affirmative answer. As L'Heureux-Dubé , J. noted in *R. v. L.(D.O.)*:

> … courts must be mindful of the fact that children, for a number of reasons, are often apt to delay disclosure. As McLachlin J. wrote in *R. v. W. (R.)* [(1992) 2 S.C.R. 122], at p. 136: … victims of abuse often in fact do not disclose it, and if they do, it may not be until a substantial length of time has passed. *Studies abundantly confirm this fact as part of the child abuse syndrome*.[13] [Emphasis added.]

The assumption that disclosures of sexual assault are *invariably* delayed has never had strong empirical support. Summit, whose seminal 1983 paper[14] is cited by L'Heureux-Dubé, J. in support of this "fact", later recharacterized the Child Sexual Abuse Accommodation Syndrome (CSAAS) as a clinical opinion

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11 See Bala, N. "Thompson: Charter Challenge to Videotaped Statements of Children – Two Views" (1989), 68 C.R. (3d) 335; Fuerst, M. (1996). When Societal Interests Outweigh a Right to Confrontation: Charter Protection for Child Witnesses, in J. Cameron (Ed.). The Charter's Impact on the Criminal Justice System, Toronto: Carswell, pp.161 - 179.

12 Supra note 9; *R. v. W. (R.)* (1992) 2 S.C.R. 122; Renaud, Gilles. "Judicial Notice of Delayed Reporting of Sexual Abuse: A Reply to Mr. Rauf" (1993), 20 C.R. (4th) 383.

13 Supra note 9 at 323.

14 Summit, R. C. (1983). The Child Sexual Abuse Accommodation Syndrome. Child Abuse & Neglect, 7, 177-193.

rather than a scientific instrument[15]. More recent research has shown that incremental or delayed revelation (which Summit originally posited as symptomatic of childhood sexual abuse) is far from an inevitable hallmark of the disclosure process.[16] Moreover, over the past decade appellate courts in the United States, Australia, and New Zealand have expressly distanced themselves from the syndrome originated by Summit and endorsed by the Supreme Court of Canada.[17] Recently, the Ontario Court of Appeal, in the course of concluding that the very use of the term "syndrome" in this context can be prejudicially misleading, noted that Summit himself had come to recognize that his "theory had been inappropriately used as a diagnostic tool both in the field of behavioral sciences and in the courtroom".[18]

While delayed disclosure of childhood sexual abuse is not uncommon,[19] this fact alone is of little value unless we also know something about the strength of the relationship between delay and false disclosures. Unfortunately, no such reliable data exist at the present time. There is, however, ample evidence that delay increases children's susceptibility to suggestion and misinformation. Absent empirical evidence to the contrary, we should assume that false allegations may be delayed just as often as are true ones.

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15 Summit, R. C. (1992). Abuse of the child sexual abuse accommodation syndrome. Journal of Child Sexual Abuse, 1(4). 153-163.

16 See Bradley, A., &Wood, J. M. (1996). How do children tell? The disclosure process in child sexual abuse. Child Abuse & Neglect, 20, 881-891; Jones, D. P. (1996). Editorial: gradual disclosure by sexual assault victims – a sacred cow? Child Abuse & Neglect, 20, 879-880.

17 See Freckelton, I. (1997). Child sexual abuse accommodation evidence: The travails of counterintuitive evidence in Australia and New Zealand. Behavioral Sciences and the Law, 15, 247-283; Myers, J. E. B. (1993). Expert testimony describing psychological syndromes. Pacific Law Journal, 24, 1440-1464.

18 *R. v. K.(A)* (1999), 137 C.C.C. (3d) 225 at 274-5 (Ont. C.A.)

'Reasonable time' needs to be approached in view of the purpose of the provision and the competing but fundamental concern that critical incriminating evidence meet some reasonably safe threshold of reliability -- particularly given the risk that a distraught complainant or one who, by the time of trial, has forgotten the events in question may escape any meaningful cross-examination. Because the time period between the impugned event and the trial is invariably longer than the time period between the event and the videotaping, it is assumed that the videotape will capture a more complete account. But if the child's initial disclosure is delayed, then the videotape, perforce, is delayed as well. It is important to bear in mind that the clock starts ticking at the time of the event, not at the time of disclosure. There is substantial evidence that children become more susceptible to suggestions as memories for target events fade.[20] "Reasonable time", then, should be interpreted in light of the potential threats to reliability that inspired section 715.1. The opportunity to preserve an unpolluted version of the evidence has been lost if there have been prior interviews, reinforcing comments, exhortations, or other contaminating influences. A very long delay between the alleged event and its initial recital raises grave reliability concerns – irrespective of how soon thereafter a repeat recital is videotaped. Further delay between disclosure and videotaping creates the risk of an already weakened memory trace being tainted by suggestive interviewing (e.g*., R. v.*

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19 See Smith, D., Letourneau, E. J., Saunders, B. E., Kilpatrick, D. G., Resnick, H. S., & Best, C. (2000). Delay in disclosure of childhood rape: Results from a national survey. Child Abuse & Neglect, 24, 273-287.

20 See Bruck, M., Ceci, S. J., & Melnyk, L. (1997). External and internal sources of variation in the creation of false reports in children. Learning and Individual Differences, 9, 289-316; Loftus, E. F., Miller, D. G., & Burns, H. J. (1978). Semantic integration of verbal information into a visual memory. Journal of Experimental Psychology: Human Learning and Memory, 4, 19-31; Reyna, V. F. (1995). Interference effects in memory and reasoning: A fuzzy-trace theory analysis. In F. N. Dempster & C. J. Brainerd (Eds.), Interference and inhibition in cognition (29-61). New York: Academic Press.

Laramee[21]). In short, the reasons for the delay are less important than the fact of the delay.

Defining "Adoption"

The second contentious issue with respect to 715.1 is how the term "adopt" is to be interpreted. In *R. v. Toten*[22], Doherty J., writing for the Ontario Court of Appeal, required that the complainant acknowledge making the videotaped statement, and, as well, "verify the accuracy of the contents of the statement *based on a present memory of the events referred to in the statement* (emphasis added)". The Alberta Court of Appeal applied a less demanding test in *R. v. Meddoui*[23] where "adopt" was taken to mean that the witness testifies that she believes the taped statements to be true because she recalls giving the statement and remembers trying to be honest and truthful at the time, "whether or not she recalls the events discussed on the tape." This important debate was resolved in *F.(C.C.)* where the Supreme Court clearly favoured the approach taken in *Meddoui* over that advanced in *Toten*.

The inevitable problem raised by *F.(C.C.)* is that of how to cross-examine a complainant about the contents of her videotaped statement when she claims to have no present memory of the events. Four years earlier, in *L.(D.O.)*, L'Heureux-Dubé , J. appears to have contemplated both content-adoption (as held in *Toten*) and a complementary right of cross-examination as essential procedural protections:

> ..the child victim must testify at trial and attest to the truth of the statements made earlier as recorded by videotape. The child may then be subjected to cross-examination on the *contents* of the taped evidence and

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21 Supra at note 8.
22 (1993), 83 C.C.C. (3d) 5 (Ont. C.A.) at 8.
23 (1990), 61 C.C.C. (3d) 345 (Alta. C.A.) at 351.

> making of the tape.[24] [Emphasis added.]

Indeed, L'Heureux-Dubé, J. held that the reliability of what could otherwise constitute inadmissible hearsay arises, *inter alia*, from

> ...the presence of the child, at trial, the adoption under oath of her videotaped statements, the opportunity to observe the child in the videotape and in court *and the accused's ability to cross-examine the child.*[25] [Emphasis added.]

Once the meaning of "adopt" is re-defined in *F. (C.C.),* so too are the indicia of reliability:

> There are several factors present in s. 715.1 which provide the requisite reliability of the videotaped statement. They include: (a) the requirement that the statement be made within a reasonable time; (b) the trier of fact can watch the entire interview, which provides an opportunity to observe the demeanor, and assess the personality and intelligence of the child; (c) the requirement that the child attest that she was attempting to be truthful at the time that the statement was made. As well, *the child can be cross-examined at trial as to whether he or she was actually being truthful when the statement was made. These indicia provide enough guarantees of reliability to compensate for the inability to cross-examine as to the forgotten events*. Moreover, where the complainant has no independent memory of the events there is an obvious necessity for the videotaped evidence.[26] [Emphasis added.]

Accordingly, an opportunity to cross-examine the complainant about the contents of the videotape – that is, about the actual events that ground the charge – is no longer a condition of reliability. This approach contrasts sharply with that taken by the Ontario Court of Appeal in *R. v. Tat*[27] and *R. v. Conway*[28] to the problem of establishing the reliability – and therefore admissibility – of out-of-court statements of events for which the witness claims no present recall. As was said in *Conway* :

> How does cross-examination of the witness at trial afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement when the evidence of the witness at trial is "I don't remember"? Cross-examination becomes, to a large extent, an exercise in futility, and does not serve as a

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24 Supra note 9 at para. 65.
25 Ibid at para. 54.
26 Supra note 4 at para. 44.
27 (1997), 117 C.C.C. (3d) 481 (Ont. C.A.).
28 (1997), 121 C.C.C. (3d) 397 (Ont. C.A.).

> substitute for contemporaneous cross-examination on the prior statement, as it does in most cases[29].

Is the erasure of a right to cross examine as to the content of a prior statement admitted for the truth of its contents any less grave simply because the complainant is a child? Is there any reason to consider a child's out-of-court statement inherently more reliable than that of any other witness?

Credibility v. Reliability

In *F.(C.C.)* the Supreme Court alludes to the problem of cross-examining on forgotten events by preserving a right to question a complainant as to her truthfulness at the time of the making of the videotaped statement, as opposed to the truth of events described in the tape. Implicit here is the assumption that the complainant's present memory of her own state of mind at the time of the videotaping is superior to her present memory of the recorded events. Further, the witness is being asked to appraise her own truthfulness.

There are numerous empirically-demonstrated problems with this procedure. In the first place, the demand characteristics associated with "adopting" prior statements are powerful. Guidelines for conducting forensic interviews often recommend establishing the importance of telling the truth[30]. Consequently, the witness may have heard herself say that she was being truthful prior to being asked if she remembers being truthful. Even if this latter cue is not present there exist other contextual influences that could predispose

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29 Ibid at para. 410.

30 See American Academy of Child and Adolescent Psychiatry (1997). Practice parameters for the forensic evaluation of children and adolescents who may have been physically or sexually abused. Journal of the American Academy of Child and Adolescent Psychiatry, 36 (10 supplement):37S-56S; Bull, R. (1996). Good practice for video recorded interviews with child witnesses for use in criminal proceedings. In G. Davies, S. Lloyd-Bostock, M. McMurran, & C. Wilson (Eds.). Psychology, law and criminal justice: International developments in research and practice. New York: de Gruyter; Yuille, J. C., Hunter, R., Joffe, R., & Zaparniuk, J. (1993). Interviewing children in sexual abuse cases. In G. Goodman & G. Bottoms (Eds.). Child victims, child witnesses: Understanding and improving testimony. N.Y.: Guilford.

the child to "adopt" her statements. These include the authority status of the person posing the question (in this case, the Crown attorney) and the accusatory context of the courtroom. Such demand characteristics implicitly specify what the appropriate response should be.

Moreover, quizzing the witness about the "truthfulness" of her prior statements is probably an exercise in futility. Children's understanding of mental verbs like "remember" and "know" is poorly developed until at least age 7[31]. Thus asking young children about prior intents is either fruitless or fraught with risk of error. Similarly, the concept of lying develops gradually and is often incomplete until adolescence[32]. In any case, as a result of repetitive and/or suggestive interviews, children may come to believe and incorporate nonexperienced events into their memories. Consequently, they are not "lying" when they report these events – they believe them to be true. If memory has been tainted or contaminated as a result of manipulative or leading interviewing procedures, false reports may be disclosed during subsequent non-suggestive interviews. For this reason, the issue of "reasonable time" between the alleged event and the taping of the statement is crucial. Careful, conscientious use of open-ended, non-leading questions cannot guarantee accuracy when child witnesses have previously been exposed to misinformation or the expectations of an influential adult, no matter how well-intended.

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31 See Gopnik, A., & Graf, P. (1988). Knowing how you know: Young children's ability to identify and remember the sources of their beliefs. Child Development, 59, 1366-1371; Johnson, C. N., & Wellman, H. M. (1980). Children's developing understanding of mental verbs: Remember, know, and guess. Child Development, 51, 1095-1102.

32 See Ceci, S., Leichtman, M., & Putnick, M. E. (1992). Cognitive and social factors in early deception. Hillsdale, NJ: Erlbaum.

Social science research has long established that leading, misleading, suggestive, and repeated questions can produce fictitious accounts[33]. During the Martensville, Saskatechewan sexual abuse scandal[34], Travis Sterling, his parents, and his sister, as well as some police officers were charged with engaging in various acts of child abuse, including oral and anal sex; locking a naked child in a cage; and anal penetration with an axe handle. One child testified that he had seen Mrs. Sterling cut off a boy's nipple and eat it. Eventually, all but one of over a hundred charges were dismissed. The Saskatchewan Court of Appeal noted that:

> …the use of coercive or highly suggestive interrogation techniques can create a serious and significant risk that the interrogation will distort the child's recollection of events, thereby undermining the reliability of the statements and subsequent testimony concerning such events[35].

Controlled laboratory studies have produced abundant evidence of the effects of suggestions on children's false reports of various events that involved touching, including genital and anal touching. For example, researchers have led young children to produce false reports of silly events (e.g., "Did the nurse lick your knee?"[36]), events that could be construed as abuse ("Did Mr. Science put something yucky in your mouth?"[37]), "fantastic" claims (e.g., being taken on a helicopter ride[38]), and explicitly sexual contact (e.g., removing children's clothes

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33 See Bernet, W. (1997). Case study: Allegations of abuse created in a single interview. Journal of the American Academy of Child and Adolescent Psychiatry, 37(7) 966-970.

34 *R. v Sterling* [1995] S. J. No. 612 (C.A.) at para. 277.
35 Ibid at para. 277.
36 See Ornstein, P. A., Gordon, B. N., & Larus, D. M. (1992). Children's memory for a personally experienced event: Implications for testimony. Applied Cognitive Psychology, 6, 49-60.

37 See Poole, D. A., & Lindsay, D. S. (1995). Interviewing preschoolers: Effects of nonsuggestive techniques, parental coaching, and leading questions on reports of nonexperienced events. Journal of Experimental Child Psychology, 60, 129-154.

38 See Garven, S., Wood, J. M., & Malpass, R. S. (in press). Children's mundane and fantastic allegations or wrongdoing: The effect of social reinforcement. Journal of Applied Psychology.

or kissing their friends on the lips[39]). Other studies have shown that combining suggestive questions with anatomically detailed dolls can lead 3- to 5-year-old children to produce false enactments of abusive genital contact (e.g., that a pediatrician touched or inserted a stick into their genitals[40]). (For reviews of the various techniques used to produce such reports, see Ceci & Bruck[41], and Poole & Lamb[42].)

In light of the social science evidence, it is worth emphasizing that concerns about deliberate deception on the part of young witnesses are probably both moot and beside the point. In *R. v. Khan*[43], the Supreme Court alludes to "a special stamp of reliability" attaching to the evidence of a child of tender years. Quoting approvingly from the judgment of the court below[44], the Court noted that

> [Y]oung children … are generally not adept at reasoned reflection or at fabricating tales of sexual perversion. They, manifestly, are unlikely to use their reflective powers to concoct a deliberate untruth, and particularly one about a sexual act which in all probability is beyond their ken[45].

These jurists are not wrong, but they risk confusing credibility with reliability, honesty with accuracy. It is precisely because of young children's relatively undeveloped understanding of deception, intent, and truth, that their accounts can sometimes be both sincere *and* incorrect. The last decade of

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39 See Lepore, S. J., & Sesco, B. (1994). Distorting children's reports and interpretations of events through suggestion. Journal of Applied Psychology, 79, 108-120.

40 See Bruck, M., Ceci, S. J., Francoeur, E., & Renick, A. (1995). Anatomically detailed dolls no not facilitate preschoolers' reports of a pediatric examination involving genital touching. Journal of Experimental Psychology: Applied, 1, 95-109.

41 Ceci, S., & Bruck, M. (1995). Jeopardy in the courtroom. Washington, DC: American Psychological Association.

42 Poole, D., & Lamb, M. (1998). Investigative interviews of children. Washington: APA.

43 (1990), 59 C.C.C. (3d) 92 (S.C.C.) at 100.
44 (1988), 42 C.C.C. (3d) 197 (Ont. C.A.).
45 Ibid at p. 210.

research has demonstrated that the reliability of young children's reports has more to do with the skills of the interviewer than any inherent memory limitations[46]. It appears that Canadians can be convicted on the basis of unsworn video statements of children, made many months, if not years, after the events narrated, and immune from meaningful cross-examination. If so, it is crucial that the original videotaped interview be conducted as objectively and neutrally as possible.

There exist standards of good practice that spell out the do's and don't's of a proper forensic interview[47]. Unfortunately these guidelines are often ignored[48], sometimes egregiously. For example, in *Meddoui*, which was effectively approved by the Supreme Court in *F.(C.C.)*, the tape in question "had been made on the occasion of the second long interview with the police"[49], thereby seriously jeopardizing its value to any court's truth-seeking function. What transpired during the first long interview of the child? What kinds of questions were asked, and how and how often were they posed? Without a record of the first interview, confidence in the integrity of the second is seriously undermined.

Similarly – and again contrary to the reasoning in *F. (C.C.)* -- the ability of a court to scrutinize the demeanour of a witness during the taping of her testimony does little to establish the reliability of the statements. The U. S.

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46 See Bruck, M., & Ceci, S. J. (1999). The suggestibility of children's memory. Annual Review of Psychology, 50, 419-439.

47 Supra at note 41 and 42.

48 Sternberg, K. J., Lamb, M. E., Hershkowitz, I., Esplin, P. W., Redlich, A., & Sunshine, N. (1996). The relationship between investigative utterance types and the informativeness of child witnesses. Journal of Applied Developmental Psychology, 17, 439-451. Lamb, M. E, Hershkowitz, I., Sternberg, K. J., Esplin, P. W., Hovav, M., Manor, T., & Yudilevitch, L. (1996). Effects of investigative utterance types on Israeli children's responses. International Journal of Behavioral Development, 19, 627-637.

49 Supra note 23 at page 349.

Supreme Court recognized this a decade ago in *Idaho v. Wright*[50], noting that: "if there is evidence of prior interrogation, prompting, or manipulation by adults, spontaneity may be an inaccurate indicator of trustworthiness." Subjective ratings of the credibility of children subjected to suggestive interviews show that the children appear highly credible to various trained professionals, including child psychologists and forensic specialists.[51] While many 'experts' believe that they can make reliable judgments between true vs. false accounts, there is no evidence that such expertise exists.

Conclusion

The factors said to justify the need for 715.1 are the same as those that compromise its utility when the provision is applied without sufficient appreciation of the effect of lengthy delays or potentially contaminating influences on the reliability of the child's statements. Videotaped allegations of sexual impropriety can have extremely powerful impact, particularly when coupled with a complainant who presents as too traumatized to endure cross-examination and a defendant whose testimony – even when entirely truthful – amounts to no more than bald denials. Our courts only invite mischief in too frequently concluding that the question is one of weight rather than admissibility.

Given the enormous risk of prejudice flowing from improvident admission, the gate-keeping function should occur at the front end, rather than through limiting instructions as to the proper use of such evidence. By that time the harm

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50 497 U.S. 805 (1990) at para. 66.

51 See Leichtman, M. D., & Ceci, S. J. (1995). The effects of stereotypes and suggestions on preschoolers' reports. Developmental Psychology, 31, 568-578; Ceci, S. J., Huffman, M. L. C., Smith, E., & Loftus, E. F. (1994). Repeatedly thinking about a non-event: Source misattributions among preschoolers. Consciousness and Cognition, 3, 388-407; Ceci, S. J., Loftus, E. F., Leichtman, M. D., & Bruck, M. (1994). The possible role of source misattributions in the creation of false beliefs among preschoolers. International Journal of Clinical and Experimental Hypnosis, 42, 304-320.

is already done. *R. v Scott*[52] provides an example of dubious admissibility. The interview in question was conducted (using anatomically detailed dolls) by a therapist after several weeks of play therapy – therapy whose purpose was to treat the child for the sexual abuse that was assumed to have occurred. The tape was held admissible. *R. v. E. J.*[53] in which a videotape of an interview described as "insensitive, confrontational, and leading" was nevertheless admitted, provides another example of inherently unreliable but highly prejudicial evidence being left for the trier's consideration.

However well-intended, it is not at all clear that the court's truth-seeking function has been advanced by 715.1. Without closer scrutiny of the conditions under which it is invoked, the truth is as likely to suffer as it is to be enhanced.

[52] (1993), O.J. No. 3040 (C. A.).
[53] (1998), B.C.J. No 3083.

Notes

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