

TITLE: Developmentally Appropriate Questions for Child Witnesses

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SOURCE: Queen's Law Journal

CITED: (1999), [25 Queen's L.J. 251-304](#)

ABSTRACT:

Recent legislative reforms have made it easier for courts to receive the testimony of children and for children to endure the experience of testifying. However, both lawyers and judges, unaware of the fundamentals of child development, often fail to question children effectively.. Subjecting children to confusing and developmentally inappropriate questioning makes them unable to communicate accurately what happened to them and what they observed. Not only does this make the witnesses' experience upsetting, it makes it difficult to determine the truth.

The authors explore ways in which justice system professionals' interactions with children may be improved: lawyers and judges can learn to ask questions appropriate for the age and capacity of the child witness, and judges can play a larger role in monitoring and assessing the questions children are asked in court. First, the authors argue that effective questioning of child witnesses requires an understanding of child development in three critical domains (linguistic, cognitive and emotional) and the use of appropriate questions for children's specific levels of development. With education, practice and sensitivity, justice system professionals can effectively question a child witness. Second, they suggest that the courts have a role to play in monitoring and assessing a child's ability to testify. Judges may choose to give less weight to the evidence of children if it was extracted by confusing or aggressive cross examination. Lawyers may also have an obligation to call expert evidence on child development to assist the courts in assessing the evidence of children.

When children are questioned properly, most of them can be very effective witnesses. By learning to ask developmentally appropriate questions, lawyers and judges can improve the utility of children's testimony as well as reduce the likelihood that children will be traumatized by their courtroom experiences.

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Developmentally Appropriate Questions for Child Witnesses

Introduction - Children in the Courts

¶ 1 Until quite recently, the courts in Canada were a hostile and unreceptive environment for children. Children rarely testified in court, and when they did their evidence was viewed with suspicion. Gradually, the legal system's lack of accommodation for children came under attack. Psychologists and other mental health professionals challenged the belief that children are inherently unreliable, and critics of the legal regime argued that the difficulties that children faced in the courts left child victims unprotected and contributed to child abuse. In the late 1980's, a major process of law reform began, fuelled by a desire to have the Canadian legal system deal more effectively with child abuse. [See Note 1 below] Legislatures and judges changed the law to make courts more receptive to the testimony of children, and to make the experience of testifying less traumatic for children. It is now not uncommon for some children, as young as young as four, to testify in Canadian courts.

Note 1: See e.g. N.Bala, "Double Victims: Child Sexual Abuse and the Canadian Criminal Justice System" (1990) 15 Queen's L.J. 3.

¶ 2 While the legal regime has changed, judges and lawyers still too often lack the education, training and sensitivity to work effectively with children. There continue to be many problems that children face in the courts, including neglect of their needs while

waiting for court, failure to make sufficient use of screens or closed circuit television and inadequate preparation of children for court. [See Note 2 below] A major problem that children face, that goes to the heart of the trial process and its truth-seeking function, is that they are often questioned inappropriately.

Note 2: See e.g. L. Sas, *I'm Trying to Do My Job in Court - Are You? Questions for the Criminal Justice System* (London, Ont.: London Family Court Clinic, 1999) [hereinafter Sas]; and Child Abuse Prevention & Counselling Society of Greater Victoria, *Children As Witnesses* (Victoria, British Columbia, 1999) [hereinafter *Children as Witness* (1999)]; and L. Park & K.E. Renner, "The Failure to Acknowledge Differences in Developmental Capabilities Leads to Unjust Outcomes for Child Witnesses in Sexual Abuse Cases" (1998) 17 *Can. J. of Community Mental Health* 5.

¶ 3 Lawyers and judges frequently fail to adjust their questioning for children. They tend to use inappropriate vocabulary, double negatives and confusing sentence structure, even when questioning adults. The confusing use of language is always a concern in court, but is especially pronounced when children are questioned. Too frequently, legal professionals seem unaware of the fundamentals of child development. Too often a child is asked questions that no child of that age could be expected to understand or answer meaningfully. Yet, the fact that the child fails to answer, or provides an answer that seems confused or contradictory, is used to discount the child's credibility. In some cases, inappropriate questions counsel cross-examining the child (almost always defence counsel in a criminal trial) are the result of a desire to confuse or discredit the child. However, it is frequently the lawyer who called the child, or even the judge, who asks the child developmentally inappropriate questions. One Ontario judge remarked, "[v]irtually all questions posed by lawyers are incomprehensible to a young child, even when the lawyer is not trying to outwit them. Young lawyers are worse than experienced ones." [See Note 3 below]

Note 3: We include in this paper some quotations and preliminary data from the Competence of Child Witnesses Survey [hereinafter Survey] of criminal justice system professionals in Ontario that was conducted in the summer of 1999 by the Child Witness Project research team at Queen's University (unpublished data and survey results on file with authors). These references are included for illustrative purposes. A fuller analysis of the Survey will be undertaken in subsequent papers. The Child Witness Project research team at Queen's University is Prof. Nicholas Bala (Law), Prof. Kang Lee (Psychology), Prof. Rod Lindsay (Psychology), Prof. John Leverette (Psychiatry) and Ms. Janet Lee (Kingston Victim Witness Program). Much of the work on the Survey was undertaken by Mandy Ayles, LL.B candidate 2000, Queen's Faculty of Law. The Survey was based on a written instrument and largely conducted by mail. Similar questionnaires were sent to judges (88 respondents), Crown prosecutors (53 respondents), defence lawyers (193 respondents) and victim witness workers (21 respondents).

¶ 4 In a recent survey [See Note 4 below] of Ontario judges, 48 per cent said that defence counsel often or always asked questions that a child would not be capable of answering because of sentence structure, vocabulary, or conceptual complexity, and another 41 per cent of judges reported that defence counsel sometimes asked such questions. The judges rated Crown attorneys slightly better at questioning children. Twenty per cent of the judges reported that the Crown lawyers often or always ask child witnesses questions that they are incapable of answering, and another 47 per cent of the judges reported that Crown attorneys sometimes ask such questions. The better performance of Crown attorneys in questioning children may reflect better training as well as differences in role. It is almost always the Crown that calls a child witness, and hence these lawyers generally have the opportunity to meet a child witness before court and establish a rapport that allows for more appropriate questioning. While most of the questions that children are asked during a trial are posed by lawyers, judges often take the lead in asking questions at the inquiry into the competence of a child to testify, held pursuant to section 16 of the Canada Evidence Act. [See Note 5 below] Similarly judges also ask children questions that are inappropriate.

Note 4: Ibid.

Note 5: R.S.C. 1985, c. C-5 s. 16 [hereinafter Canada Evidence Act].

¶ 5 Children are not just short adults; [See Note 6 below] they have different reasoning and communication skills. For them, words and ideas often have different meanings. Children also have more limited life experience than adults and often do not understand the reasoning or motives of adults. Additionally, they do not understand the legal system. For example, some children believe that they can go to jail if they give the wrong answer or do not answer a question. [See Note 7 below] Further, children do not have the same language skills as adults. As a result, complex questions are often beyond children's ability to comprehend. These factors affect how they understand the questions they are asked as witnesses.

Note 6: A.G. Walker, Handbook on Questioning Children: A Linguistic Perspective (Washington, D.C.: ABA Center for Children and the Law, 1994) at 5 [hereinafter Handbook].

Note 7: Children have a very limited understanding of the legal system. They often do not understand the roles of the people in the courtroom, the purpose of testifying or that they will not go to jail for making mistakes. See J.E.B. Myers, K.J. Saywitz & G.S. Goodman, "Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony" (1996) 28 Pacific L.J. 3 at 69 [hereinafter Myers et al.].

¶ 6 Children who are subjected to confusing and inappropriate questioning are unable to communicate accurately what happened to them and what they observed. This type of questioning can make the experience of being a witness deeply upsetting for a child. Some lawyers or judges may claim that a traumatic questioning process is justified to get at "the truth", but there are certain types of questions that may actually obscure the truth. Children have not yet developed the necessary language, observational and reasoning skills to answer such questions meaningfully. If a child is expected to answer a question that he has not understood, the answer will likely not be accurate. Children are reluctant to acknowledge that they do not understand a question or to ask for clarification. [See Note 8 below] Often, children do not even appreciate that they have not understood a question and as a result, they may give incorrect answers. Children want to be helpful and will often try to provide answers to questions that they do not understand, even if doing so results in misleading information. They will often answer the question based on the parts that they think they have understood. If the ultimate goal of the legal system is to find truth, then lawyers and other questioners should only put questions to a child witness that a child of that age can understand and answer meaningfully.

Note 8: K.J. Saywitz, "Improving Children's Testimony: The Question, the Answer and the Environment" in M.S. Zaragoza et al. eds., *Memory and Testimony in the Child Witness* (Thousand Oaks: Sage Publications, 1995) 113 at 124. Also, see generally M. Hughes & R. Grieve, "On Asking Children Bizarre Questions" (1980) 1 *First Language* 149.

¶ 7 This paper explores one aspect of the questioning of children in court: asking questions that are appropriate for the age and capacity of the witness. [See Note 9 below] The first section of this paper explores the concepts and language that children at different levels of development find difficult to understand. This section also discusses the types of questions that children at different levels of development should not be asked. We offer specific suggestions with respect to age-appropriate questioning of children.

Note 9: Another significant concern about questioning children, especially complainants, are questions that are intimidating or unnecessarily embarrassing. This issue is touched on in this paper, but it is not a central topic.

¶ 8 The second section of the paper considers the role that courts should play in assessing the level of development of child witnesses and the impact that such findings should have on the way children are questioned. We argue that judges have a duty to intervene when a child is questioned in a manner inconsistent with that child's level of development. Such an intervention would ensure that the child is asked questions that she can answer.

¶ 9 The main focus of this paper is the questioning of children in courts, especially in criminal proceedings, which is the context in which children most frequently testify in Canada. However, the courtroom is not the only forensically significant setting in which children may be asked questions. Investigators, physicians, social workers and mental health professionals frequently question children about abuse allegations. In cases in which a court is making a "best interests" decision (such as a parental dispute over custody or access), it is common for an assessor to question a child. In these situations, the child's out-of-court answers may form the basis of an opinion offered by the questioner in court. A child's out-of-court statements may also be admissible as hearsay [See Note 10 below] or if they are videotaped the video may be admissible in court if the child is also a witness. [See Note 11 below] Concerns about age-appropriate questioning of children are also highly relevant to the investigative and assessment processes, as are related issues of suggestibility. Issues related to non-court questioning of children, however, are beyond the scope of this paper. [See Note 12 below]

Note 10: See e.g. R v. F.(W.J.), [1999] S.C.J.No. 61, online: QL (SCJ) [hereinafter F.(W.J.)]. A child's hearsay statement may be admitted if the court considers it "necessary" to do so and the statement is considered "reliable". "Necessity" may be established if the child is too young to testify or would be emotionally traumatized by testifying, or can testify but cannot provide a full account of the events. In criminal cases, concerns about "reliability" often preclude the admission into evidence of a child's statements to investigators.

Note 11: These videotapes can be admitted in criminal trials if the child testifies and adopts the statements on the tape: Criminal Code, R.S.C. 1985, c. C-46, s. 715.1. In civil cases, such as child protection hearings, a videotape may be admissible even if the child does not testify: Children's Aid Society (Brant) v. E.R., [1993] W.D.F.L. 1521 (Ont. Prov. Div.).

Note 12: See K. Saywitz & L. Camparo, "Interviewing Child Witnesses: A Developmental Perspective" (1998) 22 Child Abuse and Neglect 825.

I. Child Development and Questioning of Child Witnesses

¶ 10 Effective questioning of children is a challenging task. A careless questioner may not connect with a child. When this happens, the two may carry on a conversation with neither one understanding what the other is saying, with neither aware of the problem in communication. The effective questioning of a child requires an understanding of the child's development in three critical domains: linguistic, cognitive and emotional.

¶ 11 Linguistic development refers to children's acquisition of language skills. It involves acquiring an understanding of the meaning of words (semantics), grammatical and sentence structure (syntax) and the rules of language used in different social contexts (pragmatics). Cognitive development refers to the acquisition of the ability to perceive and store information, to form concepts and to reason about various ideas. This development determines how well children function as eyewitnesses in court, because the

court often requires children to make accurate observations, recollect past events, understand such concepts as space, time and size, handle abstractions and make inferences. Emotional development refers to a child's emotional maturity, including such issues as reactions to separation from parents and ability to deal with intimidation and frustration. A child's emotional development also affects the capacity to answer questions.

¶ 12 When dealing with child witnesses, it is useful to remember that there are essentially four periods of childhood development: (1) infancy, the period from birth to approximately age two; (2) early childhood, from about age three to age six; (3) middle childhood, from about age seven to age ten; and (4) adolescence from about age eleven to approximately age eighteen. The ages for the periods of child development are approximate because there are individual differences. Children develop at different rates and do not move from one stage to another at a specific age. Also, not all aspects of their development enter a new period simultaneously. For example, a child may develop a school-age linguistic ability a few months before developing some essential characteristics of school-age cognitive ability. In addition, gender, different cultural backgrounds, languages spoken at home, home environments and qualities of education may affect how fast and in what manner children develop. Some children have significant development delays due to injury, illness or genetic factors. There are, nonetheless, some general linguistic, cognitive and emotional characteristics shared by children within the same age bracket. The discussion that follows focuses on these general characteristics for each period of development.

A. Infancy (birth to about age 2)

¶ 13 Infancy describes the period between birth and approximately the child's third birthday. It is extremely rare for children in infancy to be called as witnesses in court because they are generally unable to communicate effectively in court, [See Note 13 below] although two-year-olds are sometimes interviewed by police or social work investigators. Canadian courts have admitted hearsay statements from children as young as two, and used such statements to convict in abuse cases, especially if some corroborative evidence exists. [See Note 14 below]

Note 13: See *C.R.K. v. H.J.K.*, 672 S.W. 2d 696 (E.D. Mo., 1984) which held that a two-and-a-half-year-old child was "presumed incompetent but could have been qualified." See also a critical comment on that case by G. Blowers, "Should a two-year-old take the stand?" (1987) 52 Mo. L. Rev. 207.

Note 14: See *R. v. Khan*, [1990] 2 S.C.R. 531; and *R v. P.(J.)*, [1993] 1 S.C.R. 469.

¶ 14 By the age of one, most children can comprehend a dozen words and have already learned to make a few sounds that convey specific information to their caregivers. Their vocabulary develops very rapidly and by two years of age they know

approximately 400 words. Comprehension also increases rapidly between the ages of two and three. [See Note 15 below] However, infants tend to over-extend the meaning of some words. For example, they may call any man "daddy" until they learn that "daddy" refers to a specific man. They also under-extend the meaning of some words. For example, they may only call their own dog "doggie".

Note 15: R.S. Feldman, *Development Across the Life Span* (Upper Saddle River: Prentice Hall, 1997) at 172 and 236.

¶ 15 Infants have yet to learn many grammatical structures of English. For instance, they generally have difficulty with past and future tenses and plurality. The ability to make a simple sentence is generally achieved towards the end of infancy. Given the limitations in infants' linguistic ability, it is important to use great caution when asking them questions or interpreting their answers.

¶ 16 Recent research shows that infants' cognitive abilities develop rather rapidly. [See Note 16 below] By the end of infancy, children are able to remember events, understand basic physical principles, and even have some basic form of "theory" about others' emotions, desires, intentions and thoughts. Such knowledge, however, is generally procedural in that they are only able to apply it in their day-to-day interactions with the environment. [See Note 17 below] Infants cannot yet articulate this knowledge, nor are they even conscious of it. Therefore, asking them to recall a precise piece of information will be fruitless, and also the ability to verbalize cognitive skills develops during the pre-school years.

Note 16: See generally J.H. Flavell, P.H. Miller & S.A. Miller, *Cognitive Development* (Englewood: Prentice Hall, 1993).

Note 17: Feldman, *supra* note 15 at 169.

B. Early Childhood (ages 3 to 6 years)

¶ 17 Children as young as four testify in Canadian courts, and it is not uncommon for children who are five or six to testify. [See Note 18 below] Children in the early childhood, or "pre-school" stage, can provide clear accounts of events they have witnessed. However, children at this period of development are associated with some of the most notorious cases involving child witnesses. In several of these cases, such as the infamous nursery school cases, the evidence of pre-schoolers has been used to wrongfully convict an adult of child abuse. [See Note 19 below] However, it remains true that

children of this age can clearly provide reliable evidence as long as they are questioned in a manner sensitive to their level of development and they have not been subjected to suggestive interviews. [See Note 20 below]

Note 18: There is no statutory minimum age for children testifying in Canada. There is an individualized assessment of competence to testify, with some children as young as four being found competent. By the age of seven, most children who are proposed as witnesses are ruled competent. The Canada Evidence Act, *supra* note 5, permits a child under fourteen to testify under oath if the child "understands" the oath. If the child is able to communicate, the child may testify "on promising to tell the truth."

Note 19: See e.g. *State v. Michaels*, 642 A.2d 1372 (N.J. 1994) [hereinafter *Michaels*]; and *R. v. Sterling* (1995), [102 C.C.C. \(3d\) 481](#) (Sask. C.A.) [hereinafter *Sterling*] (note these children were pre-schoolers during the abuse, but were school aged when they testified at trial). See also S.J. Ceci & M. Bruck, *Jeopardy in the Courtroom* (Washington, D.C.: American Psychological Association, 1995); and F. Harris, *Martensville: Truth or Justice? The Story of the Martensville Daycare Trials* (Toronto: Dundurn Press, 1998).

Note 20: See generally Myers et al., *supra* note 7.

(i) Linguistic Development of Pre-schoolers

¶ 18 When questioning pre-schoolers, it is important to appreciate that there are many words and grammar rules that they do not understand. In particular, it is safe to assume that pre-schoolers will not understand even the simplest legal terms. A study by Karen Saywitz reported that some children she questioned thought that "court" was a place to play basketball. [See Note 21 below] Many legal terms have other, more familiar, non-legal meanings. Some of these words include: appear, court, hearing, swear and statement. [See Note 22 below] Children will likely use these words in their non-legal sense. Legal terms should never be used when questioning children of any age, unless the questioner has verified that the child understands the word in the legal context.

Note 21: *Ibid.* at 55.

Note 22: Handbook, *supra* note 6 at 28.

¶ 19 Pre-school children may also confuse legal terms with similar sounding non-legal terms that they know. This is known as an "auditory discrimination error". For example, a child may misinterpret the word "jury" as "jewellery" or "journey". [See Note 23 below] Simply asking a child whether she understands a word is insufficient to avoid confusion. The child may give the word a different meaning from that used by the questioner. A misunderstanding along these lines caused a girl's crucial evidence to be excluded in one

Canadian case. The girl refused to "swear" to tell the truth because "swearing" meant saying bad words and thus she was not permitted to testify. [See Note 24 below] Children often do not use technically correct terms for various parts of the body, especially the genitalia. Anyone questioning a child of any age about sexual abuse should clearly establish the child's vocabulary for different parts of the body, and should try to use the child's terminology during questioning.

Note 23: Saywitz, *supra* note 8 at 116.

Note 24: A.G. Walker, "Children in the Courts: When Language Gets in the Way" (January 1999) 35 *Trial* 50 at 51 [hereinafter "Children in the Courts"].

¶ 20 To ensure that the questioner and child witness are using the same definition of a word, the questioner should ask the child to use the word in a sentence. [See Note 25 below] Doing this will ensure that the child witness and the questioner are giving the same meanings to words. The fact that a child may have had "instruction" about the technical meaning of a word on a previous occasion does not mean that the child recalls the definition. Many non-legal terms also cause pre-school children difficulty. As children develop, they will increasingly understand words with more syllables. Pre-schoolers are most likely to understand words that have only one or two syllables. [See Note 26 below]

Note 25: M. Cole & S.R. Cole, *The Development of Children* (New York: W.H. Freedman, 1996) at 54.

Note 26: Saywitz, *supra* note 8 at 116.

¶ 21 During this stage of development, children frequently confuse the meaning of prepositions. They will mix up the meanings of "before" and "after", or "above" and "below", or "ahead of" and "behind". [See Note 27 below] A father was investigated for sexual child abuse because his daughter said "My bottom hurts, daddy put his hand in my bottom." What the child meant to say was that her daddy had put his hand on her bottom. He had spanked her and that is why her bottom hurt. [See Note 28 below]

Note 27: Handbook, *supra* note 6 at 22, 24.

Note 28: "Children in the Courts", *supra* note 24 at 50-51.

¶ 22 Young children also have difficulty with "pointing" words. They may not understand the difference between "this" and "that", or "give" and "take". Pre-school children have difficulty with these words because they do not understand that the object referred to changes depending on the speaker. [See Note 29 below] For example, who is coming and who is going depends on where the speaker is situated. The ambiguity in the meaning of these words is difficult for children to grasp. It is better to replace "this" and "that" with descriptive nouns and "here" and "there" with place names. [See Note 30 below]

Note 29: Ibid. at 22.

Note 30: Ibid.

¶ 23 Pre-schoolers understand words that refer to concrete objects better than words that refer to categories or abstract concepts. It is better to ask a young child if a person had a "gun" or a "knife" than to ask if that person had a "weapon". In the same way, children may not understand that they were "abused", but may understand that they were "hit" or "beat up". [See Note 31 below]

Note 31: Saywitz & Comparo, *supra* note 12 at 828-829.

¶ 24 Young children may interpret words literally and very narrowly (under-extension) or very broadly (over-extension). This can cause several problems for questioners. One such problem is associated with the word "touch". Adults understand that "touch" can include many types of contact. However, children may understand "touch" as something they do only with their hands. If someone made contact with the child using another part of his or her body, the child may say they were not "touched". [See Note 32 below] Since children may under-extend the meaning of words, it is important to choose words carefully. A frequently cited example that highlights this is the girl who denied being in her abuser's "house" because she had been to his "apartment". [See Note 33 below] Conversely, young children with limited vocabularies may over-extend the meaning of a word. A child may call a "tractor" a "car" because both have wheels and the child does not know the term "tractor". [See Note 34 below] Literal interpretation of words can also cause confusion when a child does not understand the words in the first place. Consider the following example from a court transcript:

Note 32: Handbook, supra note 6 at 27.

Note 33: Ibid. at 11.

Note 34: Ibid. at 53.

Q: And lastly, Gary, all your responses must be oral. O.K.? What school do you go to?

A: Oral.

Q: How old are you?

A: Oral. [See Note 35 below]

Note 35: M.L. Gilman, Courtroom Bloopers, online: Electronic Law Library <<http://lectlaw.com/files/fun14>> (date accessed: 19 February 1997).

¶ 25 Pre-schoolers have difficulty with pronouns. They may not understand sentences where the pronoun precedes the noun to which it refers. For example, "When he got to school, was John late?" might not be understood by a pre-schooler. However, the same child would probably understand "When John got to school, was he late?" It is even better to avoid using pronouns and ask: "When John got to school, was John late?" [See Note 36 below]

Note 36: Handbook, supra note 6 at 22.

¶ 26 Young children expect sentences to come in the subject-verb-object sequence. They will expect the first noun to be the subject. They will frequently misinterpret the passive voice because it places the subject after the verb. A question that uses the passive voice, such as "Were you chased by him?" may be interpreted as "Did you chase him?", because the child thinks the first noun is the subject. [See Note 37 below] Questions with embedded phrases which disrupt the subject-verb-object order will be difficult for children to understand. [See Note 38 below] A confusing question of this type is: "Was the man wearing the red coat the man who chased you?" The "man wearing a red coat" phrase is embedded in another question. Making that question into two questions would be better: "Did a man chase you? Was he wearing a red coat?"

Note 37: Ibid. at 30.

Note 38: Ibid. at 31.

¶ 27 Children of all ages have difficulty with negatives and pre-schoolers find it particularly hard to interpret sentences that include negatives. Such sentences only produce "correct" answers about half the time, even when children know the facts. However, if the same question is rephrased to omit negatives, children are much more likely to answer correctly. [See Note 39 below] When questioning children, one should avoid phrases such as: "isn't it true that", "do you deny that", or "wouldn't you say". If these phrases are replaced with "did", the question is more likely to receive an accurate response.

Note 39: Ibid.

¶ 28 Pre-schoolers have difficulty expressing degrees of certainty. Many young pre-schoolers do not have a good grasp of the different level of certainty expressed by "know", "sure", "think" and "guess". [See Note 40 below] They also have difficulty with "some" and "all". Pre-schoolers may deny knowing "some" of the alphabet because they know "all" of it. [See Note 41 below] Young children are also not good at comparing quantities or events. The words that adults use for comparative purposes may have different meanings for pre-schoolers. Young children, for example, may not correctly understand "more" in the "more than" context. Instead, young children are likely to use "more" as a synonym for "again". "Give me more milk" is likely to mean "Give me milk again" not "Give me more milk than I have".

Note 40: Ibid. at 25.

Note 41: Ibid. at 27.

¶ 29 "Before" and "after" cause a similar problem. A child who is asked if one event happened before another may interpret the question as asking whether the event happened at all. Asking what happened first usually provides a more accurate response. [See Note 42 below] Young children have not developed the mental ability to sequence or compare objects and events.

Note 42: Ibid. at 24-25.

(ii) Cognitive Development of Pre-schoolers

¶ 30 Young children think differently than adults because they have not developed the reasoning skills and mental strategies required to interpret the world around them. It is wrong to assume that something which makes sense to an adult makes sense to a young child. Also, simply because a child is able to use specific words, it is wrong to assume that he or she understands the concepts behind them.

¶ 31 Children learn the names of numbers before they understand what specific numbers represent. Initially, counting for children is just repeating words they have memorized in order. [See Note 43 below] Asking a young child for specific numbers in a question will probably not result in a meaningful answer. Although the child is likely to respond with a specific number, the answer is probably not significant to the child and should not be relied upon by the questioner.

Note 43: Saywitz, *supra* note 8 at 121.

¶ 32 Asking young children about the number of times they have been abused is not likely to be meaningful. Such children may answer "five" on one occasion and "twenty" on another occasion. To a pre-school child (and even to school aged children) the specific number is not a meaningful concept. The difference in responses signifies only that the child does not understand the concept of numbers and is communicating that the abuse happened more than once, not that the child is lying or even simply mistaken. For example, a four-year-old was asked in court how many times her father "had done this". She said "two times" and held up ten fingers. However, the same girl could recite the numbers from one to ten. [See Note 44 below]

Note 44: *Ibid.*

¶ 33 Pre-schoolers also have difficulty accurately comparing quantities. They probably cannot discern that two rows of objects of equal length may have a different number of objects. They frequently assume that when water is poured into a taller, narrower, glass it becomes greater in volume. This is because young children use only the most striking characteristics to estimate quantity. [See Note 45 below] For this reason, they assume that a longer line has more in it, taller people are older [See Note 46 below] and bigger objects are heavier. [See Note 47 below]

Note 45: Feldman, *supra* note 15 at 227, 229.

Note 46: Handbook, *supra* note 6 at 41.

Note 47: Feldman, *supra* note 14 at 231.

¶ 34 This quantification problem manifests itself in other areas as well. Pre-school children cannot tell time and do not understand the concept of time measurement. They cannot specify the duration of an event in terms minutes or hours, nor can they distinguish days of the week or seasons of the year. [See Note 48 below] A child will learn the names of the hours, days and months before she is able to use them accurately. She may answer a time question in a way that has no meaning to her but which may appear quite precise to a questioner.

Note 48: Saywitz, *supra* note 8 at 121.

¶ 35 To a young child, any event that occurred in the past is likely to be referred to as "yesterday". Similarly, "morning" might mean anytime before the child takes a nap, whether the child naps at 11:00 a.m. or 3:00 p.m. [See Note 49 below] Young children cannot tell whether an event occurred over a long or a short time. [See Note 50 below] However, pre-school children can usually identify whether two events happened simultaneously. [See Note 51 below] For example, children may be able to say something happened while they were watching Sesame Street. That information can be used to pinpoint times. While attempting to clarify dates and times, investigators should be careful not to ask a young child: "When did X happen?" "When" questions are too abstract. Young children need more cues about what type of answer is expected. "What" and "where" questions provide those cues. [See Note 52 below] To fix the time that an alleged event occurred one should ask questions such as: "What was on T.V.?" or "What were you wearing?" or "Where was Mommy?".

Note 49: Handbook, *supra* note 6 at 28.

Note 50: Park & Renner, *supra* note 2 at 10-12.

Note 51: See Handbook, *supra* note 6 at 43 and Saywitz & Camparo, *supra* note 12 at 829.

Note 52: Saywitz & Camparo, *ibid.* at 839.

¶ 36 Pre-school children have difficulty putting events into chronological order. [See Note 53 below] Since children might mix up the sequence of events, asking a child if X happened before Y may not lead to an accurate response. They may only be able to remember what happened first and what happened last. [See Note 54 below] However, just because a young child does not remember the order of events, it cannot be assumed that his memory of those events is inaccurate. [See Note 55 below]

Note 53: Handbook, *supra* note 6 at 24-25.

Note 54: *Ibid.*

Note 55: Saywitz, *supra* note 8 at 122.

¶ 37 Physical dimensions pose similar difficulties for pre-schoolers to those caused by time estimations. Young children can say whether something is big or tall but often they cannot be any more precise than that. Although a child at this period of development may use units of measurement when speaking, it should not be assumed that the child is using those terms with any degree of precision. A pre-schooler might say someone is "seven feet tall" but that phrase only means "tall" or "big" in a generic sense and is not necessarily an precise estimation of size. Young children will not be able to compare accurately an object with another to say whether it is bigger, taller or longer. [See Note 56 below]

Note 56: See generally Park & Renner, *supra* note 2.

¶ 38 Young children reason differently from adults and this can lead to answers that seem strange or inaccurate. These answers, however, are rarely due to a young child's attempt to deceive. [See Note 57 below] Usually, they are the result of the child's egocentric perception of the world and her limited logic skills. At the pre-school age, children are just beginning to understand that other people see things from a different physical perspective and that other people have different thoughts, feelings and points of view. [See Note 58 below] This limits the types of questions that they should be asked. First, young children cannot accurately attribute motives to others. Children do not perceive aggressive or insincere motives, which explains why a child might not flee from an aggressor. [See Note 59 below] Young children generally believe that adults are always sincere. [See Note 60 below] For example, a child could not accurately answer a question such as: "Do you think he meant to put his finger in your bum?" or "Did he

enjoy putting his finger in your bum?" Second, a child cannot speculate about what someone else may have seen or heard. A pre-school child could not accurately answer a question such as: "Do you think your friend heard the screaming too?" The child will only know what he or she heard personally. Third, young children are not aware how their body language and behaviour affect others. Observing a young child's demeanor when answering questions is important, since their body language will not hide their true feelings. [See Note 61 below] However, children can incorrectly believe that they are telling the truth, when, for example, their memory has been altered by suggestive questioning. Nothing about a child's demeanor will accurately indicate that his answer is incorrect if he believes that the answer is correct. [See Note 62 below]

Note 57: Saywitz, *supra* note 8 at 122.

Note 58: Feldman, *supra* note 15 at 227.

Note 59: Saywitz, *supra* note 8 at 122.

Note 60: Handbook, *supra* note 6 at 14.

Note 61: Feldman, *supra* note 15 at 227.

Note 62: M. Winter, "Children as Witnesses" (1998) 26 *Human Ecology Forum* 9 at 10.

¶ 39 Young children are unable to reason logically or abstractly. This means that pre-schoolers often have difficulty accurately attributing causation. [See Note 63 below] Young children may offer strange explanations or draw implausible inferences. For example, if a church bell rings every day while Sesame Street is on television, a young child may assume that Sesame Street causes the bell to ring. Despite the inaccurate inference, the child's rendition of the facts that form the basis for these explanations and inferences will generally be quite accurate. [See Note 64 below] The bell did ring while Sesame Street was on. When eliciting evidence from a child, care should be taken to avoid asking "why" questions. The child may provide bizarre answers to those questions, which will unfairly affect the child's credibility.

Note 63: Handbook, *supra* note 6 at 30, 39.

Note 64: Saywitz, *supra* note 8 at 122-123.

¶ 40 Young children can only focus on one idea at a time. As a result, questions should be kept very simple and each question should contain only one idea. "When and

where was the first time you saw the man?" would be a question that is too complex for a pre-schooler. Another common type of double question is: "Are you saying it happened because it did or because your mommy told you that it did?" These questions actually contain two questions, but a pre-schooler can only focus on one part at a time. [See Note 65 below] The child will answer one part of the question, but will likely not say which part of the question they are answering. The only response may be "yes" or "no".

Note 65: Handbook, *supra* note 6 at 34-35.

¶ 41 Additionally, there are questions that appear to ask only one question, but which in fact ask many, such as "Do you remember" questions. "Do you remember" questions are very complicated and difficult to process. Consider the following: "Do you remember going for a drive with your father last Saturday?" This question appears to ask for only one piece of information. However, to answer it, the child must remember what happened last Saturday, what they did with their father, and the drive itself. If the event happened on Sunday, then the child must recognize that fact. The child must also figure out that the questioner must be corrected. Finally, the child must answer a modified version of the question. If the child can remember what happened on Saturday, but not the drive, then the child must figure out that they must say this.

¶ 42 Two other types of questions require concentration on several ideas at once. Any question that uses more than one verb tense will confuse a child. A simple question like "Did Mary ask you who I am?" uses both present and past tenses. A child may not recognize, or may not be able to interpret, the two tenses and may interpret the question as asking whether "Mary" is currently asking the question. [See Note 66 below] Another type of question that can confuse children is the "tag question". Tag questions make a statement and tag a question onto the end. "It is true, isn't it?" is a tag question. This type of question requires several mental operations to process. [See Note 67 below] Young children have difficulty doing all these operations simultaneously, which can cause them to misinterpret the question.

Note 66: *Ibid.* at 39.

Note 67: Tag questions require the witness to complete at least seven mental tasks before answering. For a full discussion, see *ibid.* at 38.

¶ 43 If a child is asked a question that requires any use of reasoning or conscious thought to answer, it is advisable to ascertain his reasoning skills. Having a child elaborate or explain his thoughts leading up to an answer can bring errors in logic to the

surface. [See Note 68 below] This ensures that a questioner understands that the child's answer is the result of poor reasoning skills, rather than an attempt to deceive.

Note 68: Saywitz, *supra* note 8 at 123.

C. Middle Childhood (ages 7 to 10)

¶ 44 The period of middle childhood lasts from about age seven to the onset of puberty at about age eleven. School aged children have a more sophisticated use of language and better reasoning skills than pre-schoolers. Sometimes, their use of language and their understanding appear similar to those of adults. School aged children can be very good witnesses. However, although they may sound like adults, their "adult-like" conversations may be the result of emulation, rather than a mature grasp of language and ideas.

¶ 45 Children in middle childhood face many of the same linguistic and cognitive challenges as pre-schoolers. Linguistically, they continue to have difficulty with negatives and the passive voice or other more advanced verb tenses. Questions that use more than one verb tense also confuse them. They may have difficulty with less common words, jargon or legal terms. They often misinterpret abstract or vague terms. School aged children also face many of the cognitive limitations found in pre-school children. They can carry out logical reasoning but only at concrete levels. Their memory is highly functional but continues to be susceptible to suggestion. They continue to have difficulty understanding time and space in unfamiliar or complex situations. They also have difficulty establishing causal relationships. [See Note 69 below] Nevertheless, in many aspects, children in middle childhood have made great advances over children in the pre-school stage.

Note 69: Flavell et al., *supra* note 16.

(i) Linguistic Development in Middle Childhood

¶ 46 The language children use during this period can sound very much like that of adults. The grammar of a well educated child of this age is generally correct. [See Note 70 below] However, children in middle childhood still have difficulty with the conditional and passive voices until the end of this stage, [See Note 71 below] which may lead to misunderstanding of questions. [See Note 72 below]

Note 70: Cole & Cole, *supra* note 25 at 309.

Note 71: *Ibid.*

Note 72: Handbook, *supra* note 6 at 30-31.

¶ 47 During this period, a child's vocabulary continues to grow. The average child will learn another five thousand words during this stage. [See Note 73 below] While this is a slower rate of vocabulary growth than for pre-schoolers, it reflects the fact that school aged children do not have the vocabulary of adults. Accordingly, adults must be careful to ensure that children understand the words the adults use. If the word is not common, the questioner should have the child use it in a sentence to ensure that the questioner and witness give it the same meaning. Jargon and legal terms should be avoided because it is unlikely that a school aged child will have much exposure to those types of words. [See Note 74 below] School aged children may not know the name of a colour if it is not red, orange, yellow, green, blue, purple, black, brown or white. [See Note 75 below] All the colours they see may be expressed in those terms. For example, a school aged child might say "tan" is "light brown." [See Note 76 below]

Note 73: Cole & Cole, *supra* note 25 at 309.

Note 74: Handbook, *supra* note 6 at 27-28.

Note 75: Saywitz & Camparo, *supra* note 12 at 829 (Figure 3).

Note 76: *Ibid.* Also, it should not be assumed that young children know all the primary colours. Even older children may not know less common colours such as mauve or turquoise.

¶ 48 Like pre-schoolers, school aged children frequently misinterpret questions involving negatives. Until about nine years of age, children may still apply negatives to the wrong part of the sentence. For example, a child asked "Could you see he was not home?" may interpret the question as "You could not see that he was home?" In addition, children at this stage may not understand that the negative form of a word is different from its usual form. To them, the word "unresponsive" may mean the same as "responsive". School aged children also have great difficulty with multiple negatives. [See Note 77 below]

Note 77: Handbook, *supra* note 6 at 32.

¶ 49 Complex sentences pose problems for school aged children. During this stage, children develop the ability to think about more than one idea at a time. However, school aged children still lack the linguistic skills to put all the parts of the sentence together correctly. Also, their short term memory may not be developed enough to allow them to remember the beginning of a long question by the time the questioner has reached the end. [See Note 78 below] It is still important to keep questions simple and to the point. Long questions should be replaced by several short ones. [See Note 79 below] School aged children will understand questions better if questioners phrase them in the subject-verb-object order. Until they approach adolescence, children probably cannot interpret pronouns that precede the referring noun. [See Note 80 below] Also, school aged children still frequently misunderstand complex sentences that contain "Do you remember?" or tag questions. [See Note 81 below] Lawyers and investigators should avoid those types of questions.

Note 78: Ibid. at 35.

Note 79: Saywitz & Camparo, supra note 12 at 828 (Figure 2).

Note 80: Handbook, supra note 6 at 37-38.

Note 81: Ibid. at 37-38.

¶ 50 School aged children have made several linguistic advances over pre-schoolers. They no longer interpret words very literally, as pre-schoolers do. They understand generalizations and they can give more than one meaning to a word. A school aged child understands that a person's "house" can be an apartment and that you can "touch" something with a part of your body other than your hand. [See Note 82 below]

Note 82: Ibid. at 11.

(ii) Cognitive Development in Middle Childhood

¶ 51 Children make substantial gains in cognitive development during the school age phase. They become aware of differing perspectives, which allows them to consider more ideas. School aged children develop logical thinking, which allows them to reason and solve problems. Logic also allows them to predict events and foresee some consequences. [See Note 83 below] They employ logical operations before they can identify or understand them. [See Note 84 below] However, school aged children cannot apply logical processes to abstract ideas. [See Note 85 below] This means that a child can

reason about the consequences of running across the street, but he cannot theorize about the importance of traffic laws. When asking school aged children questions that require them to use logical thinking to predict events or consequences, giving examples is important. Children are more likely to give an accurate answer to the question "What if you told a lie?" than "What happens when people tell lies?".

Note 83: Feldman, *supra* note 15 at 487.

Note 84: Cole & Cole, *supra* note 25 at 304-305.

Note 85: Feldman, *supra* note 15 at 485.

¶ 52 The improved reasoning skills of school aged children help them answer questions in several ways. They can recognize similarities and differences between groups of objects or events. [See Note 86 below] Children at this stage can say whether something was "like" something else. They can say that one person was "taller" or "shorter" than another. They can also begin to compare time periods with other time periods with which they are familiar, such as the length of recess or a television program. [See Note 87 below] There are several common periods of time that school aged children now understand. They know the seasons and understand the difference between them. School aged children also learn the days of the week, and later in this stage, the months of the year. [See Note 88 below] This knowledge allows school aged children to give information to questioners that pre-schoolers cannot. School aged children can use reasoning skills to help isolate dates. A school aged child can reason "I was wearing shorts, so it must have happened during summer", or "The news was on, so it must have been around six o'clock". [See Note 89 below] This information can be useful.

Note 86: Handbook, *supra* note 6 at 11.

Note 87: Park & Renner, *supra* note 2. See also Handbook, *supra* note 5 at 43 and Saywitz, *supra* note 8 at 122.

Note 88: Saywitz, *supra* note 8 at 121-122.

Note 89: *Ibid.*

¶ 53 However, school aged children cannot accurately estimate distances or sizes. For example, it was not appropriate to ask a ten-year-old child: "How wide were the windows at Pizza Joe's?" And when the child could provide no answer, it was not meaningful to ask as a follow-up question: "Compare it to the screen [that is blocking the view of the

accused] in front of you. How wide would the window be in comparison to the screen?". [See Note 90 below] The fact that a ten-year-old child cannot answer this type of question should not be a basis for discounting the child's testimony. The child's inability to answer such a question accurately will rarely have forensic significance, and will not support the spurious argument that this inability to answer reflects the accuracy of the child's memory or the child's honesty.

Note 90: Park & Renner, *supra* note 2 at 11.

¶ 54 School aged children also have trouble comparing periods of time. [See Note 91 below] They may have difficulty constructing narratives and may relate events out of chronological order. Without assistance, narrative skills do not develop until adolescence. For example, although it was done in an Ontario court, it is inappropriate to ask a seven-year-old child: "Did you live on x street three years ago or four years ago?" [See Note 92 below] Even an adolescent would have considerable difficulty with this sort of question.

Note 91: *Ibid.* at 12.

Note 92: Survey, *supra* note 3 (a judge reporting on a developmentally inappropriate question asked by defence counsel).

¶ 55 School aged children have familiarity with numbers, but often use them in a very rough way. If an eight-year-old child who has been abused many times is asked how often this occurred, on one occasion the answer may be "fifty times" and on another "two hundred times". While counsel, on cross examination, may try to exploit this discrepancy, it would be wrong to consider it significant. The answers simply indicate that the event occurred many times.

D. Adolescence (age 11 to 18 years)

¶ 56 Children enter adolescence at about eleven years of age, but they may not complete it until as late as twenty. However, witnesses over the age of fourteen are not generally considered children for the purposes of section 16 of the Canada Evidence Act [See Note 93 below] and the corresponding sections of most of the provincial evidence statutes. When a child is under the age of fourteen, a court in Canada is obliged to have an inquiry into the capacity of the child to testify, and over that age there is an onus on the party challenging the witness to raise the issue of testimonial incapacity. Even for twelve- and thirteen-year-old children, the section 16 inquiry is generally quite perfunctory, as they are usually regarded as likely to be legally competent witness.

Note 93: Supra note 5.

¶ 57 However, up to age fourteen, adolescents may still have many of the cognitive capacities and linguistic capacities of school aged children. Children over fourteen continue to have many characteristics of adolescents. Even after age fourteen, their level of development is not equal to that of adults. It continues to be important to keep the stage of development in mind when questioning an older adolescent witness. Although witnesses over the age of fourteen are presumed to be competent, keeping their development in mind when asking questions will increase the accuracy of their testimony.

(i) Linguistic Development in Adolescence

¶ 58 Adolescents are very close to achieving the mastery of language that adults enjoy. Continued development during this stage is dependent on education. At school, adolescents learn narrative skills and complex grammar. Experience with reading may allow them to interpret long, complex sentences. Without continued education, adolescents will pass into adulthood still at a school aged level of linguistic development. [See Note 94 below]

Note 94: Handbook, supra note 6 at 4.

¶ 59 There are some areas where adolescents are continuing to develop. Their vocabulary continues to grow and they develop the ability to figure out the meaning of a word from its context or by making reference to familiar words. [See Note 95 below] However, because of their lack of experience with legal phrases and jargon, those terms may still be misunderstood. Questioners should avoid legal terminology. [See Note 96 below] Adolescents still struggle with complex forms of negation that involve multiple negatives or phrases where a negative must be applied to a different clause in the sentence. [See Note 97 below] They will probably not fully understand the passive voice until the end of this stage. Questions should be stated so that every verb has a clearly expressed subject. [See Note 98 below]

Note 95: Cole & Cole, supra note 25 at 676.

Note 96: Handbook, supra note 6 at 28-29.

Note 97: Ibid. at 32.

Note 98: Ibid. at 31-32.

(ii) Cognitive Development of Adolescents

¶ 60 During adolescence, children learn to think abstractly and understand generalizations. This increases their ability to solve problems. It also allows them to think about hypothetical situations and to contemplate how others think about them, as well as how they think about others. [See Note 99 below] This in turn allows them to speculate about the motives of other people. The ability to consider abstract concepts allows adolescents to think about ethics and answer questions about whether an action was right or wrong. [See Note 100 below] Adolescents also become aware of their own thinking processes, which allows them to exercise more judgment in terms of how they act and answer questions.

Note 99: Cole & Cole, *supra* note 25 at 668.

Note 100: Ibid.

¶ 61 In later adolescence, children can accurately estimate times, distances and physical dimensions using measured units. [See Note 101 below] Adolescents also have a better sense of time than younger children. This allows them to estimate the date on which an event occurred when they cannot remember it exactly. However, they are much less likely than adults to take note of dates because they pay less attention to how time progresses around them. [See Note 102 below] That an adolescent did not note the date and time an event occurred should not affect her credibility as a witness.

Note 101: Park & Renner, *supra* note 2 at 8 (Table 1).

Note 102: Handbook, *supra* note 6 at 4.

¶ 62 It is also important to consider the adolescent's emotional and social development. Confusing or embarrassing questions can cause a reaction that may have negative effects; such questions can lead to a refusal to answer, an evasive or inaccurate answer or to an emotional outburst.

E. Summary of Child Development and Capacity to Answer Questions

¶ 63 Children have different speaking and thinking abilities than adults. Their stage of development will affect their ability to understand and answer questions. To maximize the accuracy of the evidence of children, they should be asked questions that are appropriate to their linguistic and cognitive skills. The chart on page 279 summarizes the information about the types of questions that cause problems for children of different ages.

¶ 64 It must also be remembered that a child who is upset may "regress" and be unable to understand or accurately answer a question which he might have been able to answer in a less threatening situation. Questioners should be sensitive to the fact that they might have to use simpler questions than this chart suggests if the child is upset. In court, many children will actually appear to be functioning at a lower level than suggested in the preceding discussion of child development.

¶ 65 It must also be emphasized that each child is unique. Information about linguistic and cognitive development is not only affected by a child's age and capacities, but also by education, home environment, culture and developmental delays.

¶ 66 It can be difficult to determine a child's level of development in every area. A child may be at a higher level of development in one area and a lower level in others. It is not possible to set specific age ranges where certain questions are inappropriate. Determining exactly what types of questions are appropriate requires consideration of the capabilities of each child witness.

II. Suggestions for Questioning Child Witnesses

¶ 67 Obtaining accurate information by questioning children is a challenging task, but with education, sensitivity and practice, justice system professionals can learn to question a child witness effectively. Whether in or out of the courtroom, the questioner needs to be aware of several different concerns while asking questions. To ensure that a child gives accurate answers, questioners must not only consider the child's level of development and the phrasing of the questions, but also their own body language and the issues that the questioner wishes to cover.

A. The Introductory Phase of Child Questioning

¶ 68 Investigators and psychologists have developed a technique that can prepare children to provide more accurate and complete answers. [See Note 103 below] This technique is frequently used in investigative interviews and could be employed in a courtroom as well. The technique of questioning a child witness about neutral events to prepare them to testify has been called a "pre-interview". [See Note 104 below] This is not an accurate term because the technique is properly used at the start of an interview or when the child first enters the witness box. The technique refers to an introductory phase

of the questioning, in which the questioner starts by asking the child about forensically unimportant events.

Note 103: R.P. Fisher & M.R. McCauley, "Improving Eyewitness Testimony With the Cognitive Interview" in M.S. Zaragoza et al. eds., *Memory and Testimony in the Child Witness* (Thousand Oakes: Sage Publications, 1995) 141 at 145.

Note 104: M.E. Lamb, K.K. Sternberg & P.W. Esplin, "Conducting Investigative Interviews of Alleged Sexual Abuse Victims" (1998) 22 *Child Abuse and Neglect* 813 at 818-819.

¶ 69 The goal of this introductory phase of questioning is two-fold. First, it allows the questioner and the court to evaluate the level of development of the child. Using this technique will help in the assessment of whether a child is able to function as a witness. If the child can function as a witness, it allows an assessment of what types of questions are inappropriate for the child's level of development. Second, asking questions about a non-threatening event allows the child to become more comfortable with the questioning process and more relaxed in the surroundings, which should enable the child to give more accurate answers. At this time, the questioner can also instruct the child about the importance of giving longer and more descriptive answers and also give the child some practice in doing so.

¶ 70 The technique used in the introductory phase of questioning, or the "pre-interview", is relatively simple. The questioner selects one or more events about which to question the child. These should be events that the child will enjoy talking about, but which have no relevance to the current proceedings. The child's last birthday party or holiday are some popular choices because they will likely have made an impression on the child. This allows the questioner to test the child's ability to remember an event and to report what is remembered. The event is also chosen because it is one that a child will feel comfortable and happy to talk about, allowing the questioner to build rapport with the child. [See Note 105 below]

Note 105: *Ibid.* at 819.

¶ 71 This rapport is important for several reasons. First, children, especially young children, may be shy. They may not like to talk with strangers. If a stranger asks them questions, they will either not answer or give very short answers. Discussing a "happy event" with the child allows the child to become familiar with the questioner. A child will be more willing to befriend someone who talks about pleasant topics than someone who talks about unpleasant ones. It is hoped that the child will "open up" to the questioner. If

the questioner becomes a "friend", then the interview room or courtroom may be a less intimidating place for the child. Even if the child has previously met the questioner, for example a Crown Attorney who has met the child sometime before the hearing date, the introductory phase will be important to allow rapport to be re-established and to allow the child to become comfortable in the surroundings.

¶ 72 The introductory phase also gives the questioner an opportunity to "teach" the child how to answer questions. Children tend to give short answers, to some extent because they do not know how to string pieces of information together into a long narrative. Since the subject of this introductory phase is forensically irrelevant, it does not matter if the questioner uses focused questions or directs the child about which pieces of information the questioner wants to hear. The questioner can attempt to teach the child witness that answers should include a "who", a "what", a "where", a "when" and possibly a "how". [See Note 106 below] During the introductory phase of questioning, children can practice and develop these techniques. Later they may use them to construct longer, more detailed answers when they are questioned about the events at the heart of the investigation or proceeding.

Note 106: Saywitz, supra note 8 at 128-129.

¶ 73 During this stage children can also be taught that "I don't know" and "I don't understand" are not only acceptable, but very appropriate answers to questions. For example, at this stage children may be asked questions to which they do not know the answers and also can be "corrected" if they "guess" an answer. Children should also be encouraged at this stage to ask for clarification or an explanation of questions that they do not understand.

¶ 74 It will be useful for the questioner to have spoken to a parent or guardian to learn about the events that are the subject of this initial questioning in order to assess how accurately the child is able to remember and report about events. During the questioning about forensically irrelevant, but known, events, the questioner can test how the child's level of development affects her ability to answer different types of questions. [See Note 107 below] The question, "how many presents did you get?" may test the child's understanding of numbers. "How long was your party?" followed by "how do you know?" could test the child's ability to quantify time. "What colour was the wrapping paper on your presents?" can test a child's knowledge of colours. "Did anything happen that you did not expect?" could test a child's ability to deal with negatives. A carefully constructed introductory phase to testimony can provide the questioner, and the court, with information about a child's level of linguistic and cognitive development in several areas. That information can then be used to create appropriate questions for the child.

¶ 75 The court and counsel can also use the information gathered during the introductory phase to evaluate the questions that the child is asked when testifying about the legally significant event. Based on the court's observations of the child's ability to respond to different types of questions, if a judge feels that a child could not answer a question meaningfully, the judge can ask that the question be rephrased. For example, counsel might argue that the court should give no weight to the child's answer about the height of an abuser because the child demonstrated an inability to estimate accurately the height of someone in the court room during the introductory phase of questioning.

¶ 76 With younger children, some "introductory phase" inquiry is already made to assess the capacity of the child to testify, under section 16 of the Canada Evidence Act. This inquiry, however, focuses on the issues of whether a child understands the nature of an oath, and failing that, whether the child is "able to communicate the evidence" in court and can testify on "promising to tell the truth". It is not uncommon to ask a young child who does understand the nature of an oath "simple questions" about an event like a birthday party or school attendance in order to determine the child's ability to communicate. However, the focus of this inquiry is to determine whether a child meets the minimum threshold of testimonial competence, and once this is established the inquiry ends.

¶ 77 The type of introductory phase to questioning of child witnesses proposed here is broader in purpose and scope than the present section 16 inquiry. In appropriate cases, a child might be ruled incompetent to testify, but if the child is ruled competent, as is commonly the case, the inquiry could be used to shape and assess the questions during the testimony about the matters at issue.

¶ 78 Legislative reform that not only allows for, but indeed requires, this type of introductory phase to the questioning of a child witness is desirable. However, there is no reason that counsel who is calling a child witness or a judge who is conducting a section 16 inquiry under the present Canada Evidence Act cannot have an introductory phase to questioning, such as that described above, when the child first takes the witness stand.

B. Suggestions for Questioning Children In and Out of Court

¶ 79 Ideally, the stage of development and capacities of a child witness should be determined during an introductory phase to questioning. Under the present legal regime, this may not be possible, since a judge might view this type of questioning as "irrelevant" or a "waste of the court's time". In that case, a questioner should assume that a child has only limited abilities and begin with simple questions. Before asking more "advanced" questions, the questioner should make sure that they are appropriate for the child witness.

¶ 80 The suggestions set out here are appropriate for younger children, and a good starting point for any child. Older children who display greater competence may be asked more complex questions.

- Keep sentences in the subject-verb-object order. Do not embed phrases within that order.
- Do not use the passive voice. Young children rarely understand it.
- Keep questions short. Be sure that each question has only one idea.
- Avoid using "do you remember . . ." questions.
- Do not use tag questions. Examples of tags in questions are: "didn't you?" or "isn't it true that . . ."
- Avoid using negatives. Asking a child, "didn't you go to the store?" may result in an incorrect response. It is preferable to ask a child, "did you go to the store?"
- Avoid using the negative forms of words. A child might not understand the sentence that uses the word "incorrect", but the same child would be more likely to understand the sentence that uses the word "correct".
- Avoid pronouns. Repeating the noun when questioning children is always better. For example ask: "when John arrived at school, was John late?", instead of, "when he arrived at school, was John late?"
- Describe an object or place in relation to objective criteria. Do not ask, "did you go over there?". What is meant by "there" depends on who is asking the question. Ask, "did you go to the park.?"
- When using any word that has a critical meaning, such as the names of genitalia, make sure that both the child and the questioner share the same meaning for the word. To check the child's definition for a word, ask the child to use it in a sentence. Use the child's terminology in asking questions.
- If at all possible, use simple everyday terms instead of more complex ones or jargon. It is not just legal terms, like "hearsay", that cause problems for children, but also words like "altercation", "reside" and "previous statement". For example, instead of "proceed", use "go to"; instead of "the accused", use the name of the person.
- Use concrete terms over general or hierarchical terms. For example, ask a child if he saw a "knife" rather than a "weapon". Children deal poorly with any type of abstraction.
- Do not ask school aged or younger children to answer questions that involve abstract ideas like "justice" or "love". [See Note 108 below] Until adolescence, children cannot think in the abstract.

Note 108: Young children should not be asked questions that require a discussion of abstract concepts like "truth". Though judges generally think that some discussion of "truth" is required for an inquiry under s. 16 of the Canada Evidence Act, supra note 5, it is much preferable to ask a young child to identify in concrete examples a "truth" or a "lie" than to ask general definitional questions about these concepts. In the Survey (1999), supra note 3, respondents reported on children who were asked to explain the meaning of

"perjury" and the "nature of God" during inquiries into their testimonial competence. These types of questions are not appropriate for a child.

- Avoid asking children to speculate. If speculation is necessary, use concrete hypotheticals such as, "what would happen if you rode your bike too fast around a corner?".
- Remember that young children cannot determine another person's motives, no matter how obvious they may seem.
- Do not use sarcasm. Children cannot understand it.
- Children's understanding of time, space and size is dependent on their level of development. Only older children should be asked to estimate these quantities in terms of concrete units. School aged children can probably compare quantities to other quantities they know. Pre-schoolers can only say that something is "big" or "small," "long" or "short". An inaccurate answer can result from expecting a more accurate appraisal of time, space or size than a child is able to make.
- Let the child know that he should tell the questioner when he does not understand a word or question. However, always remember that children are often unaware they have misunderstood. A child's failure to say that he did not understand a question should not be taken as an indication that he has understood it.
- Either in an interview or in court, children should never be told that they cannot have a break or go to the bathroom until all the questions are over. Children who want, or need, a break will give the answers they think the questioner wants to hear, regardless of the truth, just to "get it over with".
- Avoid asking exactly the same question more than once. Asking a child exactly the same question more than once may make the child think their first answer was incorrect, which can lead to inconsistent answers.
- Questioners should refrain from praising particular answers. This gives the child a cue about which answers are "helpful". Children generally want to please adults and so they may provide "helpful" answers regardless of whether they are true.
- Help the child to relax. Relaxed children can remember and relate events better than children who are experiencing stress.
- Avoid topics that may unnecessarily upset children. Telling young children that they may not see their parents for a while is likely to upset them. School aged children may be afraid of death. Conversations about being disabled or disfigured will upset adolescents.
- Speak slowly and clearly.

C. Questions for Child Witnesses in Court

¶ 81 In court, counsel and the judge should try to ensure that the questions asked of a child witness are developmentally appropriate for that witness. For the most part, following the above general guidelines will help counsel formulate questions that child

witnesses can understand and answer. However, there are a few points that are especially important for counsel who will be calling a child as a witness.

- Prepare the child to testify. [See Note 109 below] Counsel who will be calling a child as a witness should always meet with the child at least once before the day that the child will testify. With young children, several meetings may be required. [See Note 110 below] At these meetings, counsel should: develop a rapport with the child; assess the child's level of development and determine what types of questions will be appropriate; determine whether it will be appropriate to make an application to the court to have the child testify by closed circuit television or from behind a screen [See Note 111 below]; and ensure that appropriate arrangements have been made to support the child through the trial process. [See Note 112 below]
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Note 109: Some aspects of court preparation can most usefully be done by non-lawyers who work at the courts, when they are available. Critical aspects of court preparation, however, should be done by the lawyer who will be calling the child as a witness.

Note 110: At present, government policies in most provinces encourage or require meetings between young children and Crown prosecutors who are calling them as witnesses. However, for a variety of institutional reasons, too often these policies are not followed. For example, in Ontario the Crown Policy Manual (1994) has a policy that strongly advises the "red flagging" of cases with young victims or witnesses, to ensure that these cases receive special attention. A study revealed that the Crown prosecutor met with a child witness in only 70 per cent of the "red-flagged" cases where a child testified. See Sas, *supra* note 2 at 43.

Note 111: R.S.C. 1985, c. C-46, s.486 (2)(1) [hereinafter Criminal Code].

Note 112: *Ibid.*, s. 486(1)(2); this section allows an application to be made to have a support person present and close to a child who is under 14 years of age.

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- Counsel should encourage the child to give answers to open-ended questions that are as long as possible and practice this with counsel. The child should know that she should try to talk about "what", "where", "when" and possibly "who". Children who can speak spontaneously about alleged events are much more credible as witnesses.
 - Make sure the child is comfortable with what will go on in court beforehand by ensuring, for example, that a young child is encouraged to bring a "comfort toy" or blanket. This will allow the child to be more relaxed when testifying.
 - Make sure child witnesses understand words they will hear in court. Remember that to a child the word "swear" often means "saying bad things". This is complicated by the fact that many parents have told their children "not to swear". Also, prepare the child for court by explaining the names of people and objects in the courtroom so the child will know who or what they are.

- Child witnesses are often asked questions with religious significance during the capacity test under section 16 of the Canada Evidence Act. Knowing a child's religious beliefs will allow counsel or the judge to ask questions during the capacity test that will accurately elicit the child's understanding of these religious concepts. A discussion with a child witness about religious education and beliefs will also make the capacity test go more smoothly.
- Remember that the word "promise" is a special word. To ensure that a child understands it properly, the word "you", referring to the child witness, should be used close to the word "promise". Using the word "will" with the word "promise" may create a greater sense of obligation for children than using "promise" alone. The best way to ask a child to tell the truth is to ask: "do you promise that you will tell the truth?".
- At the courthouse, help the child to relax. Relaxed children remember events more accurately than children who are experiencing stress. A relaxed child will give longer, more detailed answers than a child who is upset.
- Avoid using legal terms when speaking to or questioning a child. This can be difficult in court, where many people present understand them. However, the child almost certainly will not understand legal terms. Using them may confuse and frustrate the child witness.
- Keep questions short and simple. This too can be difficult when counsel are "thinking on their feet" in court, but short questions can help children understand
- Avoid questions that will arouse a child witness unnecessarily. At different stages of development, children have specific "emotional buttons" that, if pushed, can result in a strong emotional response. Such questions may upset the child and can also make it difficult to elicit accurate testimony. In court, counsel will probably only get one chance to question a witness. Getting the witness upset may squander that one chance to get the witness' testimony.

III. The Role of the Courts

¶ 82 The initial responsibility for asking developmentally appropriate questions of child witnesses rests with counsel, who ask most of the questions in court. However, judges also have a critical role in monitoring and assessing questions. In some cases, experts in child development may play an important role in helping the court determine how a child's stage of development affects the child's ability to be a witness and answer various questions. Trial judges also have a very important role, and should be monitoring the types of questions that children are asked to ensure that they are developmentally appropriate. If a question is not developmentally appropriate, judges should either require it to be rephrased or withdrawn or if it has been asked, ensure that any answer that appears to discredit the child is discounted by the trier of fact.

A. Expert Testimony on Child Development

¶ 83 In some cases an expert on child development or children's memory may be called as a witness to testify about a range of issues related to the appropriate questioning of children or their capacity as witnesses. This type of evidence can be very helpful to judges, lawyers or jurors who may know little about how a child's development affects her capacity to answer questions.

¶ 84 Experts on child development can be very helpful in assessing the evidence of children. However, judges have understandably set boundaries on the type of expert evidence that they will permit. In particular, courts are generally not prepared to admit testimony that a mental health professional "believes that a child is (or is not) telling the truth", since this type of generalized credibility assessment is the responsibility of the trier of fact. Further, in some cases a court will refuse to admit the testimony of an expert on memory issues on the basis that the expert proposes to testify about a matter that is within the "normal experience of the trier of fact". [See Note 113 below]

Note 113: R. v. McIntosh (1997), [35 O.R. \(3d\) 97](#) at 97 (C.A.).

¶ 85 The 1998 decision of the Ontario Court of Appeal in R. v. M.(B.) [See Note 114 below] considered the issue of when expert testimony regarding child development and children's memory could be admitted, and applied the four general criteria for the admission of expert evidence set out by the Supreme Court of Canada in R. v. Mohan. [See Note 115 below] First, the expert must be properly qualified. To be qualified as an expert in child development, the Ontario Court of Appeal held that the witness should have expertise in this area which may be acquired through education, research or clinical experience. In addition, a recognized body of scientific knowledge must accept and support the witness' theories. Those theories must be supported by research using the scientific method, and not merely personal opinions or clinical judgement. [See Note 116 below] Second, the evidence must be relevant. It must help the court in determining an issue before it, but not at an unreasonable cost. [See Note 117 below] Third, the expert's opinion must be necessary for the trier-of-fact to assess the child's testimony properly. The expert must have useful knowledge that ordinary people do not have. That special knowledge must affect the way that the trier-of-fact assesses the child's evidence. [See Note 118 below] Many people do not realize the extent to which a child's level of development affects a child's answers. The expert's information could be special knowledge that would help a trier-of-fact accurately assess a child's testimony. Fourth, the possible prejudicial effect of the expert evidence against a party should not outweigh its probative value. [See Note 119 below] Counsel seeking to call an expert on child development should ensure that the expert's testimony will meet these criteria.

Note 114: (1998), [42 O.R. \(3d\) 1](#) (C.A.) [hereinafter M.(B.)].

Note 115: [\[1994\] 2 S.C.R. 9](#).

Note 116: Ibid. at 25.

Note 117: Ibid. at 21.

Note 118: Ibid. at 23.

Note 119: Ibid. at 33.

¶ 86 A party may want to have an expert in child development testify that the child is, or is not, competent to testify in court. Such a witness may testify about the nature of childhood memory, and whether the child can accurately perceive, remember and report an alleged event. This testimony may be useful during the court's inquiry under section 16 of the Canada Evidence Act to determine whether the child has the legal capacity to testify as a witness in court, or to determine that the child is not legally competent to testify and hence that there is a "necessity" to admit the child's out-of-court hearsay statements. [See Note 120 below] An expert in child development and memory may also be able to provide an opinion that supports the finding that a child's out-of-court hearsay statement is sufficiently "reliable", justifying its admission in court under the rule in *R. v. Khan*, [See Note 121 below] or is unreliable, and hence should not be admitted. [See Note 122 below] Another important function experts can play is in assessing the effect that previous out-of-court questioning now has on the in-court testimony of a child. There have been cases in which it is apparent that well-intentioned but under-trained police interviewers have subjected children to repeated, highly suggestive questioning that may have affected their memories. [See Note 123 below] In other cases, a child's therapist or a parent may have influenced a child's memory. Expert witnesses can play an important role in assisting a trier of fact to understand the effect that prior out-of-court suggestive questioning may have had on the memory of the child and on the accuracy of any testimony that the child offers in court. [See Note 124 below]

Note 120: The usefulness of an expert to discuss a child's competence as a witness is discussed in J.E.B. Myers, et al., "Expert Testimony in Child Sexual Abuse Litigation" (1989) 68:1 Nebraska L. Rev. 1 at 92-107; and F (W.J.), supra note 10.

Note 121: Supra note 14.

Note 122: *R. v. L.S.* [\[1999\] O.J. No. 877](#) at para. 9, online: QL (OJ).

Note 123: See Michaels, and Sterling, supra note 19.

Note 124: See e.g. *R. v. R.(D.)*, [\[1996\] 2 S.C.R. 291](#).

¶ 87 While experts in child development can play a useful role in helping with a court's assessment of a child witness, there are legal and practical limitations on this type of evidence. One problem with expert witnesses is that, due to several contentious issues in this area of psychology, experts' techniques for evaluating child witnesses often go uncontested. [See Note 125 below] There is controversy about whether psychologists and other mental health professionals can help assess the validity of a child's allegations of abuse or reliably determine whether a child's behaviour is indicative of the child having been abused. [See Note 126 below] Many behaviours, including how a child answers questions, are open to several explanations and the closer that an expert's evidence comes to an assertion that the child is "credible", the more problematic this type of evidence will be.

Note 125: D.M. Paciocco, "The Evidence of Children: Testing the Rules Against What We Know" (1996) 21:2 Queen's L.J. 345 at 383.

Note 126: Ibid.

¶ 88 Another problem with using expert witnesses is that the trial can turn into a "battle of the experts". Both sides call several experts to testify to contest the testimony of several experts called by the other side. The trier of fact is left with a deluge of contrasting expert opinion, which can interfere with the trier of fact's ability to make an accurate assessment of the evidence and reach a verdict. Instead of evaluating the testimony of the witness, the judge or jury evaluates the credentials, research and opinions of the experts. That assessment may replace the careful examination of the testimony of the child witness that is at the centre of the dispute. [See Note 127 below]

Note 127: Ibid. at 385.

¶ 89 This search for a second opinion raises another problem with expert witnesses: expense. The Martensville daycare cases [See Note 128 below] brought in experts from across North America. Such a far-reaching search for expert witnesses was necessary because there are relatively few respected experts in children's testimony. It is often necessary to look far afield to find an expert with the particular experience and qualifications to comment on a child's testimony. In most cases one or both of the parties lack the resources to allow counsel to call these types of experts to testify. [See Note 129 below]

Note 128: See Harris, *supra* note 19. One of the decisions that reveals the problems with suggestive investigative questioning of children and the role of experts is reported in Sterling, *supra* note 19.

Note 129: Paciocco, *supra* note 125 at 387.

¶ 90 Experts in child development can have an important role in evaluating the competence of a child witness, and in explaining to a trier of fact, especially a jury, how children's memory functions. Arguably an expert could be called to explain to the court that no child of the age (or stage of development) of the child who is testifying could answer some of the questions that have been asked at trial. It is apparent that even many justice system professionals are not aware of the capabilities of child witnesses, so this type of knowledge would appear to be "beyond the ordinary experience of a jury" and would be useful to them. There may also be a role for child psychologists to advise counsel about the appropriateness of questions asked of a child, allowing objections to be made. [See Note 130 below] However, the legal limitations on the role of expert witnesses and the costs of having psychologists involved in the court process will limit the extent of their involvement.

Note 130: Judge C.B. Schudson, "Special Techniques to Assist Child Witnesses in Court: The Judicial Tradition of Flexibility and Innovation" in J. Bulkley & C. Sandt, eds., *A Judicial Primer on Child Sexual Abuse* (Washington D.C.: A.B.A. Center on Children and the Law, 1994) 56.

¶ 91 Judges and lawyers will continue to have a central role in dealing with inappropriate questions, and in ensuring that the questioning of children is closely controlled and monitored. This requires that judges and lawyers have an understanding of the fundamental principles of child development.

B. Judicial Control and Assessment of Inappropriate Questions

(i) Controlling Developmentally Inappropriate Questions

¶ 92 Asking children developmentally appropriate questions is not just a courtesy to the child. Inappropriate questions can lead to inaccurate answers. The Supreme Court of Canada has clearly indicated that children should not be asked developmentally inappropriate questions, and if they are, any deficiencies in their answers should not be used to discredit them. It does not matter whether those questions were asked during examination-in-chief or cross-examination. [See Note 131 below]

Note 131: Fisher & McCauley, *supra* note 103 at 148.

¶ 93 The Supreme Court of Canada has recognized that the level of development of child witnesses affects the way they answer questions. In assessing the evidence of children, the court needs to consider more than just the answers they give. In *R. v. B.G.*, [See Note 132 below] Madam Justice Wilson recognized that a child's level of development should be an important consideration in assessing the child's testimony:

Note 132: [\[1990\] 2 S.C.R. 30.](#)

... a flaw, such as a contradiction, in a child's testimony should not be given the same effect as a similar flaw in the testimony of an adult . . . While children may not be able to recount precise details and communicate the when and where of an event with exactitude, this does not mean that they have misconceived what happened to them and who did it. In recent years we have adopted a much more benign attitude to children's evidence, lessening the strict standards of oath taking and corroboration, and I believe that this is a desirable development. The credibility of every witness who testifies before the courts must, of course, be carefully assessed but the standard of the 'reasonable adult' is not necessarily appropriate in assessing the credibility of children. [See Note 133 below]

Note 133: *Ibid.* at 54-55.

¶ 94 It is important to consider how development affects the way children answer questions. In *R. v. W.(R.)*, [See Note 134 below] Madam Justice McLachlin recognized that there has been a change in judicial attitudes and agreed that the abilities of each child witness need to be considered when deciding a case. As Madam Justice Wilson emphasized in *B.(G.)*:

Note 134: [\[1992\] 2 S.C.R. 122.](#)

The evidence of children should not be subject to the same standard of proof as the evidence of adult witnesses. Protecting the liberty of the accused and guarding against the injustice of the conviction of an innocent person require a solid foundation for a verdict of guilt, whether the complainant is an adult or a child. What the changes do mean is that we approach the evidence of children not from the perspective of rigid

stereotypes, but on what Wilson, J. called a "common sense" basis, taking into account the strengths and weaknesses which characterize the evidence offered in the particular case. . . [e]very person giving testimony in court, of whatever age, is an individual, whose credibility and evidence must be assessed by reference to criteria appropriate to her mental development, understanding and ability to communicate. [See Note 135 below]

Note 135: Supra note 132 at 267.

¶ 95 In her recent decision in *F.(W.J.)*, Madam Justice McLachlin commented on the "absurdity of subjecting children to examination on whether they understand the religious consequences of the oath." [See Note 136 below] She clearly recognized that this type of question about abstract concepts is not developmentally appropriate for a child.

Note 136: Supra note 10 at para. 42.

¶ 96 Treating children in a way that is appropriate to their level of development involves asking questions appropriate to their level of development. When a child is asked a developmentally inappropriate question, the child's answer may not be accurate. Not only can these questions confuse the witness and result in misleading answers, they can also unfairly discredit the witness. A child's testimony should not be discounted due to inconsistent answers to a few questions that the child did not understand. Children should have the opportunity to tell what they know about an alleged event by answering questions that they can understand. Only if a child gives poor answers to appropriate questions should their testimony be discredited.

¶ 97 Counsel should object to inappropriate questions. Whether or not counsel objects, judges should require that questions be asked in a manner that can be understood and answered meaningfully by a child witness. In *R. v. L.(D.O.)*, [See Note 137 below] Madam Justice L'Heureux-Dubé, writing for the entire Supreme Court of Canada on this point, gave judges the authority to intervene whenever a child is asked inappropriate questions. She wrote:

Note 137: [\[1993\] 4 S.C.R. 419](#).

It is my view that, in the case at hand as well as in other cases involving fragile witnesses such as children, the trial judge has a responsibility to

ensure that the child understands the question being asked and that the evidence given by the child is clear and unambiguous. To accomplish this end, the trial judge may be required to clarify and rephrase questions asked by counsel and to ask subsequent questions to the child to clarify the child's responses. In order to ensure the appropriate conduct of the trial, the judge should provide a suitable atmosphere to ease the tension so that the child is relaxed and calm. The trial judge, in this case, did not prevent the mounting of a proper defence, nor did he demonstrate favouritism toward the witness in such a way as to preclude a fair trial. I find that the trial judge in this instance did nothing more than "intervene for justice to be done". [See Note 138 below]

Note 138: Ibid. at 471 [emphasis added]. See also the concurring opinion of L'Heureux-Dubé, J. in F.(W.J.), supra note 10.

¶ 98 Not only is a judge permitted to require counsel to ask questions in a manner consistent with a child's level of development, but the judge has a duty to do so. If the judge does not realize that a question is inappropriate, opposing counsel should object to the question before it is answered. If a "pre-interview" or introductory phase of questioning was conducted at the outset of the child's testimony, the court or counsel may have a clear basis for asking that an inappropriate question be rephrased or withdrawn. According to Madam Justice L'Heureux-Dubé, the same approach applies to questions that unnecessarily upset a child witness by "adding to the tension" that the child experiences. Such an intervention ensures that the child witnesses are able to tell their story accurately in court.

¶ 99 Asking developmentally appropriate questions will allow children to give "strong" testimony that will be the "solid foundation for a verdict" described by Madam Justice McLachlin. Children understand developmentally appropriate questions, so they can provide accurate answers to them. The court does not have to wonder whether the child understood the question or what the child's answer would have been had understood the question. The court has a clear version of the child's story to consider when reaching a judgment. Unfortunately, questioners do not always ask developmentally appropriate questions.

¶ 100 It is also possible that the judge or counsel will not react to an inappropriate question before the child answers. In *R. v. C.C.F.*, [See Note 139 below] the court faced a situation in which some of the evidence on cross-examination of a six-year-old girl was inconsistent with her videotaped statements in a pre-trial interview regarding some "peripheral details". Mr. Justice Cory, writing for the Supreme Court, wrote:

Note 139: [\[1997\] 3 S.C.R. 1183](#).

A skilful cross-examination is almost certain to confuse a child, even if she is telling the truth. That confusion can lead to inconsistencies in her testimony. Although the trier of fact must be wary of any evidence which has been contradicted, this is a matter which goes to the weight which should be attached to the videotape and not its admissibility. [See Note 140 below]

Note 140: Ibid. at 1205.

¶ 101 In that decision, the court gave little weight to questions that may have "confused" the child and it was able to convict the accused. The Supreme Court's decision in C.C.F. suggests that when counsel ask child witnesses confusing or inappropriate questions, judges may give the answers to those questions little or no weight. In a jury trial, the judge may instruct the jury that they can do the same. Little advantage should be gained by eliciting inaccurate or contradictory statements from a child through inappropriate questioning.

¶ 102 A child's inaccurate or inconsistent answers should be given little weight if the problems with the child's testimony are due to poor questioning rather than the child's memory. In order to discredit a child witness, counsel should show that errors in the child's story exist despite proper questioning. There is a clear legal basis for judges to intervene when they believe that a child is being asked inappropriate questions. This is necessary to prevent the admission of inaccurate evidence that could mislead the court. The judges could base this intervention on the information gathered during an introductory phase of questioning like that described above. If the judge does not think that the child could understand a question, the judge should require counsel to rephrase it. If the judge believes that a child could not meaningfully answer a question, the question should be disallowed. If a child does give an answer to a developmentally inappropriate question, the judge should assign little or no weight to those statements. A child's answers to such a question may be inaccurate, confusing or inconsistent and may not be a true reflection of what the child knows or remembers.

ii) Controlling Questions that are "Just Wrong" for Children

¶ 103 In the course of examining witnesses, lawyers sometimes ask questions that appear offensive. For example, counsel may accuse a witness of being a liar, or may suggest that the alleged victim of a sexual assault consented to the abuse, or that the victim of an assault provoked the attack. Given the enormous consequences of the court process and the often intimate or personal nature of the incidents explored, there is a place in the justice system for questions that may be embarrassing or even offensive. However, there is a need for special sensitivity on the parts of lawyers and judges when a child is being asked questions that seem especially humiliating or insulting. The need to

control potentially offensive questioning of children most commonly arises in the context of cross-examination. It should be appreciated that lawyers often do not plan their questions to be offensive. Some poor questions simply "slip out" because the lawyer has not given the subject or phrasing of the question enough thought.

¶ 104 In a British Columbia case, a child was asked in court: "did you enjoy the anal intercourse?". [See Note 141 below] Many people believe that this type of questioning is emotionally abusive for children and "just plain wrong". Unnecessarily insulting or aggravating questions can produce an emotional reaction in the child that hinders the child's ability to answer accurately. The emotional effects of certain questions may make them inappropriate.

Note 141: Children as Witnesses, supra note 2 at 3. An Ontario judge also reports a case in which defence counsel asked an eight-year-old child whether she "liked" a sexual assault: Survey, supra note 3.

¶ 105 Testifying in court is usually a negative experience for child witnesses. It can cause them considerable anxiety, even terror, and disrupt their lives. [See Note 142 below] Many child witnesses experience a decline in school performance during testifying. [See Note 143 below] Child witnesses find cross-examination to be an extremely negative experience. In a London Family Court Clinic study, child witnesses reported specific aspects of their court experience that they found particularly unpleasant. They said that they were confused by lawyers using complex sentences and vocabulary. They resented accusations that they were lying or had enjoyed being abused. The children felt that defence counsel were attacking them, but no one would help them. [See Note 144 below]

Note 142: L. D. Sas, et al., Three Years after the Verdict: A Longitudinal Study of the Social and Psychological Adjustment of Child Witnesses Referred to the Child Witness Project (London, Ont.: Child Witness Project, London Family Court Clinic, 1993) 113 at 168. [hereinafter Three Years After the Verdict].

Note 143: Ibid. at 146.

Note 144: Ibid. at 111, 117-118.

¶ 106 Many insulting questions asked of children in the courtroom are also inappropriate for their cognitive and linguistic level of development. One five-year-old boy in a Nova Scotia trial was asked how many times he had been abused. He said twenty-five times. Previously, the boy had told the police that he had been abused five times. The lawyer then proceeded to impeach the child's testimony. [See Note 145 below]

Pre-school children, such as this five-year-old boy, do not understand the concept of numbers. They may not know that each number represents a specific quantity. From a young child's perspective, the boy's answers, "five" and "twenty-five", suggested several occurrences, not a specific number. The question about exactly how many times he had been abused was developmentally inappropriate. As a result, the answer seemed inaccurate.

Note 145: K.E. Renner and L. Park, "Documenting the Outrageous for Children", online: <<http://www.carleton.ca/erenner/nsap.html>> (date accessed: 7 September 1998).

¶ 107 In a British Columbia case, a defence counsel attempted to impeach a child's testimony by asking: "I'd like to suggest to you that you are lying. Isn't it true that you have lied before? I would like to suggest that you are lying now." [See Note 146 below] The questions about whether the child thought that he was lying were also developmentally inappropriate. They contained complex sentence structures that a five-year-old would probably not understand. They used tag questions, switched verb tenses, asked about an abstract idea and posed several questions at once. The child probably could not answer these questions. The child's stumbling in answering an "are you lying" question could negatively affect the child's credibility. In addition, children become upset when counsel accuses them of lying. Impeaching children on their answers to questions that they could not understand is unfair and leads to inaccurate responses. Counsel may try to use apparent inconsistencies or inaccuracies to discredit or dismiss all of the child's testimony. A child's recollection of events should be tested in cross-examination, not his ability to understand inappropriate questions.

Note 146: Children As Witnesses, *supra* note 2 at 3.

¶ 108 It is also important to recognize that when counsel ask confusing or insulting questions, a child witness can become upset, and emotional arousal can cause a child to give inaccurate testimony. Children have agreed with a lawyer's suggestion that they were lying, not because they were, but because they wanted to get off the stand. [See Note 147 below] It is important to keep in mind what effect development has on the factors that upset a child. Development affects how the child reacts to stress, which can affect the child's answers.

Note 147: Ibid. at 4.

¶ 109 Pre-schoolers are vulnerable to suggestions that they are responsible for an unpleasant event. Their egocentric thinking makes it impossible for them to understand the motivation of others. They probably cannot see how anyone else could be responsible for the event. [See Note 148 below] Pre-schoolers will become very upset if they believe the punishment for the act they "caused" will be separation from their parents. In fact, any involuntary separation from a parent upsets a young child. When pre-schoolers become upset, they cry and become uncooperative [See Note 149 below] and an upset pre-schooler may refuse to answer any more questions. Even if a pre-schooler does continue to answer questions, the anxiety she is experiencing may lead her to make mistakes in her testimony. High levels of anxiety in pre-school aged witnesses are associated with decreased accuracy in their testimony. [See Note 150 below] In addition, a pre-schooler who is upset may regress to the developmental level of an infant. [See Note 151 below] Pre-school children frequently fail to report an abuser's actions when they are testifying in the presence of that person. [See Note 152 below] School aged children become upset somewhat less easily than pre-schoolers. [See Note 153 below] Some of them are also able to understand the role of defence counsel in asking offensive or embarrassing questions, which may allow them to avoid taking counsel's comments personally. [See Note 154 below] However, they are still likely to blame themselves for anything they perceive as a personal failure. They also frighten easily. Like pre-schoolers, school aged children are terrified of being involuntarily or permanently separated from their family and friends. Any suggestion of this possibility will upset them. At this stage, children also start to fear death. The presence of an abuser may frighten school aged children enough to cause them to refuse to testify. [See Note 155 below]

Note 148: M.R. Eichelberger et al., eds., *Pediatric Emergencies*, 2d ed. (Upper Saddle River: Brady/Prentice Hall, 1998) at 9.

Note 149: Ibid.

Note 150: A. Kapardis, *Psychology and Law: A Critical Introduction* (Melbourne: Cambridge University Press, 1997) at 104.

Note 151: Eichelberger, et al., *supra* note 148 at 9-10.

Note 152: Ibid. at 103.

Note 153: Ibid. at 10.

Note 154: *Three Years After the Verdict*, *supra* note 142 at 118.

Note 155: Eichelberger, et al., *supra* note 148 at 103.

¶ 110 In its recent decision in *F. (W.J.)*, [See Note 156 below] the Supreme Court of Canada considered how to deal with a six-year-old girl who was unable to answer questions during examination-in-chief. Madam Justice McLachlin, writing for a majority of the Court, acknowledged the difficulty that children can have in revealing "highly personal" events in the presence of "imposing and intimidating strangers". [See Note 157 below] In the circumstances of this case, the Court ruled that there was a "necessity" to admit hearsay evidence about the child's out-of-court statements, even without expert evidence about the child's inability to testify. It was also accepted that trial judges have "great flexibility" in dealing with child witnesses. This might require providing an upset child with a recess. [See Note 158 below] This might also extend to controlling abusive or inappropriate questioning.

Note 156: *Supra* note 10.

Note 157: *Ibid.* at para. 43.

Note 158: *Ibid.* at para. 44.

¶ 111 School aged children, who are typically very modest, can also become upset if they are asked questions about their bodies. Children in this stage may try to avoid answering embarrassing questions about their bodies.

¶ 112 When school aged children become anxious, they offer less information spontaneously. [See Note 159 below] Their answers become shorter. Under stress, school aged children require more cues to remember details. These child witnesses do not necessarily make a conscious decision to behave in this way. Upset school aged children may act like pre-schoolers in that they may cry and try to be uncooperative. [See Note 160 below]

Note 159: Kapardis, *supra* note 150 at 104. One Ontario judge (Survey, *supra* note 3) reports a case in which defence counsel was cross-examining a "very distraught" eight-year-old and asked: "Why are you looking at your mother? Does she give you the answers? Don't look at her." Unless the judge has a concern that someone in the court is signalling the child (not the case here), this type of intimidation of a child is clearly upsetting and not appropriate.

Note 160: *Ibid.* at 10.

¶ 113 Adolescents can be very emotional and may be easily upset. They are very sensitive about their bodies. They do not want to imagine, remember or discuss any damage that has been done to their body. They may also be very modest and may avoid answering embarrassing questions. Adolescents can become angry and uncooperative when provoked. Since emotional turbulence is common during this stage, their anger may present in a way that seems like an "overreaction". [See Note 161 below] This can be damaging to their credibility if the trier of fact does not appreciate that there is likely not an ulterior motive behind an angry outburst.

Note 161: Ibid. at 10-11.

¶ 114 It is rare for children to suffer long emotional effects from the experience of testifying in court. Many children actually find it cathartic to tell others, especially the judge, about what happened to them. [See Note 162 below] Although it is distressing that children can become very upset during the process of testifying, it must be remembered that they usually get over that emotional upheaval. [See Note 163 below] The real concern with unnecessarily insulting or embarrassing questions is that they may also be developmentally inappropriate questions which a child can neither understand nor meaningfully answer. Additionally, such questions may unnecessarily upset the child and disrupt her testimony. For these reasons, judges have a responsibility to control offensive questioning of child witnesses. [See Note 164 below]

Note 162: Three Years After the Verdict, supra note 142 at 115.

Note 163: Ibid. at 168, 172.

Note 164: It was apparent from the Survey of Ontario judges, supra note 3 that many of them already see themselves as having the responsibility to intervene when a child is being asked inappropriate, embarrassing or intimidating questions, but clearly many judges do not share this view of their role.

Conclusion

¶ 115 When children testify, it is usually in regard to a matter that affects them personally. The cases frequently involve allegations of abuse and the child was often the only person present. Children often have vitally important evidence about very serious crimes. It is important that children be given the opportunity to provide evidence in a way that allows them to tell their stories accurately. Developmentally inappropriate and suggestive questions prevent a child from doing this. Unless the child is questioned properly, the child and others can suffer injustice.

¶ 116 All of those involved in the process of questioning children need to be educated as to how to ask children appropriate questions. Judges and lawyers need education about the fundamental principles of child development and how a child's stage of development affects the capacity to understand and respond to questions. They should have the opportunity to practice questioning children.

¶ 117 An introductory phase of questioning should be conducted immediately before the child speaks about the alleged events. The purpose of this type of questioning is to put the child at ease, teach the child how to answer questions and allow the questioner and the judge to assess what types of questions are appropriate for that child. This type of questioning should be required by both the Canada Evidence Act and its provincial counterparts. The court should be required to conduct this type of questioning whenever there is a concern that a witness' level of development may affect his understanding of the questions he is asked or the answers that he gives.

¶ 118 Judges should intervene to require that counsel ask questions in a manner appropriate for the child's level of development. If a child does answer an inappropriate question, the inappropriateness of that question should be a factor in determining how much weight should be given to the answer. When children are questioned properly, it will become clear that most of them can be very good witnesses.

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RE AUTHORS:-- John Philippe Schuman, articling student, Thomson Rogers, Toronto. This is a revised version of a portion of a thesis written by John Schuman as part of his LL.M. at the Faculty of Law, Queen's University. The authors wish to acknowledge the support of a grant from the Social Sciences and Humanities Research Council of Canada and the research assistance of Mandy Ayles, Queen's Law LL.B. candidate 2000.

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