

## The Competency of Children to Testify: Psychological Research Informing Canadian Law Reform\*

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### Abstract

The competency inquiry has traditionally been a critical initial challenge for child witnesses, most of who are called to testify about their own victimization or as witnesses of family violence. In most common law countries children can only testify if they can correctly answer questions about such abstract concepts as the “oath,” the “promise” and “truth.” These inquiries can be confusing to children, and may prevent children who are capable of giving important evidence from testifying. Recent psychological research establishes that the ability of children to answer questions about the meaning of such concepts as “truth” and “promise” is not related to whether they will actually tell the truth, but the act of “promising to tell the truth” increases the likelihood that children will tell the truth. Informed by this research, in 2006 Canada significantly reformed its laws governing the process for determining the competence of child witnesses. The last section of the paper briefly surveys laws that govern the competency of child witnesses in a number of other jurisdictions and offers proposals for reform.

### Keywords

competency of child witnesses; child witness testimony; children lying; promise to tell the truth; oath

### Introduction

In Canada and many other countries, before a child is permitted to testify in a criminal court,<sup>1</sup> the judge must be satisfied that the child is “competent” to be a witness. The competency inquiry, or *voir dire*, is a critical initial challenge for child witnesses, most of whom are testifying about their own victimization or as

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<sup>1)</sup> This paper deals only with child witnesses in criminal proceedings. There are significant issues about how courts in family cases should receive evidence about the wishes or views of a child who is the subject of a dispute between parents. In most jurisdictions it is very rare for children to be

witnesses of family violence. Traditionally, competency inquiries have focused on children's ability to answer questions about such abstract concepts as the "oath," the "promise" and "truth." These inquiries can be confusing and intimidating, especially to younger children, and may result in children who would otherwise have been capable of giving important evidence being prevented from testifying.

Recently Canada has very significantly reformed its process for assessing the competence of prospective child witnesses, introducing changes that were informed by psychological research. This article begins by exploring the historical development of the laws governing the assessment of children's competency to testify in criminal cases, both under the common law regime and under legislation, particularly in Canada, and analyzes some of the problems with the traditional competency assessment process. The paper then reviews recent psychological research about the competency process, including studies which have been carried out by the authors, which established that the traditional inquiry process was flawed. The paper considers how this research influenced statutory reforms in Canada. The last section of the paper briefly surveys the laws that govern the competency of child witnesses in a number of other jurisdictions and offers proposals for reform.

## History of the Competency Inquiry at Common Law

The common law was deeply suspicious of child witnesses, especially if they were to testify about their own victimization or abuse. By 1779, judges in England had established that "no testimony whatever can be legally received except upon oath,"<sup>2</sup> and a child could only take an oath if the child could answer questions that demonstrated an understanding of the "nature and consequences of an oath."<sup>3</sup> This common law rule was based on the belief that children who could not explain the meaning of the oath, and did not swear an oath, were less likely to tell the truth as witnesses, and hence should not be permitted to testify.

In 1895, the United States Supreme Court cited English common law precedents in *Wheeler v. United States*, and established the American common law position<sup>4</sup> that the competency of a child witness "depends on the capacity and intelligence of the child, his appreciation of the difference between the truth and

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called as witnesses in these proceedings, but rather social workers or psychologists interview the children and communicate their wishes to the court or the judge will interview the child in chambers, without having the child sworn as a witness: see Bala and Duvall-Antonacopoulos, 2006.

<sup>2</sup> *R. v. Brasier* (1779), 168 E.R. 202 (C.C.R.). This case involved charges against an adult male charged with the rape of a girl under the age of seven.

<sup>3</sup> *R. v. Brasier* (1779), 168 E.R. 202 (C.C.R.). For a fuller discussion of the common law history of the competency inquiry, see Spencer & Flinn, 1993, chapter 4.

<sup>4</sup> Whitcombe, 1992: 56.

falsehood, as well as of his duty to tell the former.”<sup>5</sup> In making such a determination, judges assessed whether children understood the “spiritual consequences” of lying under oath.

Children were required to demonstrate not only knowledge of the concept of an oath, but also a belief in a Supreme Being who would punish false oaths.<sup>6</sup> The assumption was that, although children might understand the nature of an oath, they could not appreciate its consequences without a belief in, and understanding of, God.<sup>7</sup> In the 1861 English decision in *R. v. Holmes*, the judge was satisfied that a child had the capacity to give sworn evidence when, after being asked “what becomes of a person who tells lies [under oath],” the child responded “if he tells lies he will go to the wicked fire”<sup>8</sup> of hell.

The common law perception that children were, in general, not sufficiently trustworthy to serve as witnesses, was a reflection of widespread contemporary beliefs. The psychiatric, medical and psychological opinions of the late nineteenth and early twentieth centuries reinforced some of these beliefs. Based, on biased case observations (made by exclusively male professionals), rather than on methodologically sound research, it was believed that children, especially girls, were inherently unreliable witnesses and prone to fantasy or fabrication, and that crimes such as the sexual abuse of children were a rare occurrence.<sup>9</sup>

In 1885 England made its first reform of child witness laws by permitting children who could not demonstrate an understanding of the oath to testify unsworn in cases of sexual abuse; this testimony, however, could not lead to a conviction without corroboration.<sup>10</sup>

## Statutory Reforms in Canada

Canada soon followed the example of England in modifying the common law treatment of child witnesses. In 1893, around the time that the earliest child protection agencies were being established to help children who were victims of abuse or abandonment, Canada enacted its first statutory provisions concerning child witnesses, permitting children to give unsworn evidence so long as the court found that the child “possessed sufficient intelligence” to justify the reception of the evidence, and understood “the duty to speak the truth.”<sup>11</sup> Judges were,

<sup>5</sup> *Wheeler v. United States*, 159 U.S. 523, 525 (1895).

<sup>6</sup> *R. v. Antrobus* (1946), 63 B.C.R. 372 at 374 (C.A.)

<sup>7</sup> *R. v. Antrobus* (1946), 63 B.C.R. 372 at 378 (C.A.)

<sup>8</sup> (1861), 175 E.R. 1286 at 1286 (Winter Assizes).

<sup>9</sup> See e.g. Smart, 1999.

<sup>10</sup> *Criminal Law Amendment Act*, 1885, 48 49 Vict., c. 69, s. 4.

<sup>11</sup> *Canada Evidence Act*, S.C. 1893, c. 31, s. 25; in the 1908 consolidation of the Act and thereafter, this became s. 16.

however, required to ask all children about their understanding of the oath. If a child could not give satisfactory answers, the child would be permitted to testify unsworn, but only if the child could correctly answer questions about the “duty to speak the truth.” As in England, a child’s unsworn testimony was viewed with suspicion and required corroboration. This general wariness to give weight to a child’s testimony proved enduring. As late as 1967, the Supreme Court of Canada cautioned that even if a child was sworn as a witness, judges were obliged to warn jurors of the “inherent frailties” of a child’s evidence.<sup>12</sup>

By the middle of the twentieth century, religious expectations for answers to questions about the meaning of the oath were relaxed. To be able to testify under oath, children did not need to state that they believed in divine sanctions for failing to tell the truth, provided they demonstrated an understanding that they were calling on God to witness their evidence, and that the oath was a promise to God to speak the truth.<sup>13</sup> By the latter part of the twentieth century, in leading cases, judges moved away from inquiring into a child’s religious beliefs.

In 1988, as part of a number of reforms intended to facilitate the giving of evidence by victims of child sexual abuse, the *Canada Evidence Act* s. 16 was amended to provide that children who did not understand the nature of an oath could testify if they had the “ability to communicate” upon “promising to tell the truth.”<sup>14</sup> The statutory requirement for corroboration of such “unsworn evidence” was also abolished in 1988. Further, appellate case law in the 1980s established that, as a matter of law, children did not have to demonstrate an understanding of the spiritual consequences of an oath to be permitted to testify, provided that they understood the “social significance” of the oath.<sup>15</sup>

## Problems with the Competency Inquiry

Both from a legal and a social policy perspective, there were a number of fundamental concerns with the child witness provisions of the 1988 *Canada Evidence Act*. The 1999 document of the Canadian Department of Justice, *Canada Child Victims and the Criminal Justice System: A Consultation Paper*, suggested that:

<sup>12</sup> *R. v. Horsburgh*, [1967] S.C.R. 746.

<sup>13</sup> The decisions in *R. v. Bannerman* (1966), 55 W.W.R. 257 (Man. C.A.), aff’d without reasons (1966), 57 W.W.R. 736. (S.C.C.) and *R. v. Budin* (1981) 32 O.R. (2d) 1 (C.A.) were extremely influential in lowering the religious expectations on child witnesses.

<sup>14</sup> *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 16. For a fuller discussion of the 1988 reforms, see Bala, 1990 and McGillivray, 1990.

<sup>15</sup> *R. v. Fletcher* (1982), 1 C.C.C. (3d) 370 (Ont. C.A.) at 380, leave to appeal to S.C.C. refused (1983), 48 N.R. 319 (S.C.C.). In *R. v. F (W)*, [1999] 3 S.C.R. 569, 27 C.R. (5th) 169 (S.C.C.) at 591 [S.C.R.] McLachlin J. commented on the “absurdity of subjecting children to examination on whether they understood the religious consequences of the oath.”

The competency test, and its interpretation by the courts, appears to add unnecessary complexity. The unintended effects of [the 1988] reform may have made the experience of child witnesses more rather than less traumatic and made it more difficult for their evidence to be heard. Preliminary proceedings for child witnesses are becoming more common and complex. A stigma continues to attach to evidence that is unsworn or given on a promise to tell the truth.<sup>16</sup>

One problem with the 1988 legislation was its emphasis on assessing the child's responses to questions about the "nature of an oath." Despite the leading precedents which held that a child need not have a spiritual understanding of the importance of the oath,<sup>17</sup> children were still commonly questioned about their religious beliefs in the competency inquiry. In a survey of Canadian judicial practice carried out by the authors of this paper in the late 1990s, eighty-six percent of responding judges reported that children were routinely questioned regarding their religious beliefs and observations during the competency examination.<sup>18</sup> Crown prosecutors reported that children were asked, during both preparation for court and during the competency inquiry, such questions as: "Do you go to Sunday School?" "Is the Bible a special book?" and "Do you understand the importance of God and why it is important not to lie to God?" Children were being asked questions that would confound religious scholars.<sup>19</sup> By delving into a child's religious understandings and beliefs, the inquiry lost its true focus, which was not to determine whether a child is religiously trained, but whether the child is committed to telling the truth as a witness. This problem was considered by the Criminal Law Revision Committee in England:

The inquiry whether the child understands the nature of the oath, if carried out conscientiously, seems to us unrealistic; and the investigation sometimes made by the court as to whether the child believes in divine retribution for lying is really out of place when the question is whether he understands how important it is for the proceedings that he should tell the truth to the best of his ability about the events in question, in particular that he should not say anything against the accused which he does not really believe to be true and that he should say if he did not see something or does not remember it.<sup>20</sup>

<sup>16</sup> Department of Justice, 1999, 17.

<sup>17</sup> *R. v. Fletcher* (1982), 1 C.C.C. (3d) 370 (Ont. C.A.) at 380, leave to appeal to S.C.C. refused (1983) 48 N.R. 319 (S.C.C.).

<sup>18</sup> Bala et al., 2000, 417.

<sup>19</sup> There is a broader argument that in an increasingly secular society, the requirement for testimony under oath should be abolished for all witnesses: see for example, Marlow, 2000, where a judge of the Ontario Superior Court advocated abolition of the oath and replacement by a promise, with an admonition of the possibility of a prosecution for perjury if the witness lies.

<sup>20</sup> As cited in Howard, 1990, 147. A similar position was taken in Canada in Department of Justice, 1984. Several provinces and territories in Canada have enacted legislation to eliminate or simplify the competency requirement for children to testify in civil proceedings, though it is rare for children to testify in these proceedings, and there is no reported case law interpreting these provisions. See, for example, *Ontario Evidence Act*, R.S.O. 1990, c. E-23, s. 18.1 (as amended S.O. 1995, c.6, s.6). These amendments were a response to the Ontario Law Reform Commission, 1991.

The work of the English Committee would lead to significant reforms in that country's child witness competency laws, which will be described towards the end of this paper.

Furthermore, while the 1988 Canadian legislation did not explicitly require that there should be an inquiry into a child's understanding of such concepts as "truth," "lie" or "promise," the courts interpreted the law as still requiring children to answer questions about the meaning of these abstract concepts.<sup>21</sup> The judicial practice of questioning children about their understanding of the "promise to tell the truth" was presumably premised on the view that, if they could not demonstrate this understanding, they were less likely to tell the truth. Inevitably, young children, who think in concrete terms, had difficulty in answering questions about these complicated concepts. Moreover, inquiries tended to be longer and more confusing for young children, who would likely have the shortest attention spans and be most prone to confusion.

In one British Columbia case, for example, a five-and-a-half-year-old girl was led through a lengthy inquiry by the trial judge who, satisfied that the child knew the meaning of the "promise to tell the truth," received her evidence and convicted the accused of sexual assault. The British Columbia Court of Appeal, in a 2001 decision, reviewed the transcript, and concluded that, while the child had given satisfactory answers to questions about the meaning of "truth" and "lie," she had not adequately explained the meaning of "promise," even though at one point the girl responded to a question from the judge in the following way:

Q: If you tell me things about what happened to you, would you tell me the truth or would you tell me lies?

A: I would have to tell you the truth.<sup>22</sup>

The Court of Appeal ordered a new trial, but the girl's parents understandably felt that the girl had experienced enough distress from her participation in the justice system, and the prosecution decided not to pursue a new trial.

An additional problem with Canada's former competency inquiry was the distinction between sworn and unsworn testimony, and the effect that this had on the complexity of the inquiry. Following the statutory elimination of the corroboration requirement for unsworn evidence in 1988, a number of appellate decisions in Canada held that in a non-jury trial, a judge did not err in concluding that the weight to be attached to the evidence of a child witness should not be affected by the "form of the witness's commitment to tell the truth" – i.e., whether the child gives sworn or unsworn testimony.<sup>23</sup> However, it continued to

<sup>21</sup> See e.g. *R. v. Marquard*, [1993] 4 S.C.R. 223; and *R. v. Rockey*, [1996] 3 S.C.R. 829.

<sup>22</sup> *R. v. M.A.M.*(2001), 40 C.R. (5th) 66 (B.C.C.A.); For a critical commentary on this decision, see Bala et al., 2001.

<sup>23</sup> *R. v. McGovern*, (1993), 88 Man. R. (2d) 18 (C.A.) at 307.

be an accepted practice of some judges in their charge to the jury to alert the jury to the fact that a child did not testify under oath as a possible reason for discounting the child's testimony.<sup>24</sup>

The core problem with the former Canadian competency inquiry was that the questions asked were essentially irrelevant to the issue of whether a child was actually committed to telling the truth. The psychological research discussed in the next section of this paper establishes that a child's commitment to telling the truth is unrelated to whether the child has the cognitive ability to answer questions about truth-telling or lying.

## Psychological Research

There is a growing body of psychological research into lying and lie detection.<sup>25</sup> While very young children do not lie, children begin to start telling lies around age 3. Almost as soon as they begin to lie, children start to learn that it is morally wrong to do so. There is no evidence that younger children are, in general, more likely to tell lies than older children or adults, though they may lie about different things than adults.

A series of psychological studies, carried out by the authors of this paper and some collaborators, found no evidence to support the premise that children's ability to correctly answer cognitive questions about such abstract issues as the meaning of "truth," "lie" and "promise" is related to whether or not children will actually lie.<sup>26</sup> However, this research does support the practice of having a child "promise to tell the truth" before answering questions, even if the child cannot correctly answer questions about the meaning of the concept of a "promise," as this significantly increases the likelihood that a child will tell the truth. Further, there is some evidence that if children tell a lie after promising to tell the truth, it may be easier to detect their lack of honesty. (Interestingly, there is no comparable research for the effect of an oath, solemn affirmation or promise on adults.)

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<sup>24</sup> See *R. v. Demerchant* (1991), 66 C.C.C. (3d) 49 (N.B. C.A.). In Ferguson and Bouck, 2002, 4-65-2, it was suggested that a judge should charge the jury in the following way:

Despite the fact that [the child witness] did not testify under oath... to tell the truth, you may still accept or reject (his/her) evidence in the same way you accept or reject the evidence of any other witness.

Ferguson and Bouck went on to propose a further "discretionary instruction that may be given in appropriate circumstances" that would summarize the specific concerns about a particular child's testimony, and they concluded that "there is a dangerous risk of relying on (his/her) unsworn evidence standing alone without some other supporting or confirming evidence."

<sup>25</sup> See e.g. Memon *et al.*, 2003.

<sup>26</sup> Talwar *et al.*, 2002; and Talwar *et al.*, 2004.

The results of this research were consistent both with research on child witnesses conducted in the United States, and with child development theory, which establishes that children have a great deal of difficulty in correctly answering abstract questions, especially about the meaning of a complex concept like the “promise to tell the truth.” Children (and adults) often understand and correctly use words without being able to define them or answer abstract questions about their meaning. It is, however, also established that, from a young age, children have a good understanding of the social importance of truth-telling and promising, well before they can answer abstract questions about the concepts. For both adults and children, the process of promising or swearing an oath serves to impress on the witness and others in the court the solemnity of the occasion. While having a child promise to tell the truth provides no guarantee of the honesty of the witness, it does no harm, and may well do some good in terms of facilitating the search for the truth.

### *Research Done in Canada: The Child Witness Project*

The Child Witness Project is an interdisciplinary research team, based primarily at Queen's University in Canada, which, starting in 1999, began to investigate issues related to the competence inquiry for child witnesses. The Principal Investigators for that team, who are the authors of this paper, and some of their graduate students, conducted a number of laboratory experiments, involving hundreds of children, to ascertain whether the legal test then in use in Canada for assessing the competency of child witnesses had any validity for identifying children who are more likely to tell the truth.

In the first study,<sup>27</sup> there were 123 children aged 3 to 7 who had committed a transgression by peeking at a toy while alone in a room, contrary to instructions they had received telling them explicitly “not to peek”. Of those children who peeked at the toy, 74% lied when asked about their transgression. The children were more likely to lie if they were older.<sup>28</sup> Before being asked about their

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<sup>27</sup> Talwar et al., 2002. See also earlier report in Bala et al., 2000.

<sup>28</sup> There was a total of 123 subjects, aged 3-7 years in this study. They were all constantly videotaped and monitored by hidden cameras, though they were not aware of this. The children were playing a game with the experimenter. The children were asked to identify various familiar toys that they could not see based on the sounds that they made. (e.g. the toy Buzz Lightyear could be identified by his familiar refrain: “To infinity and beyond.”) At one point the children were left alone in the room by the experimenter; before she left the experimenter asked the children not to peek at a “hidden” toy (a Barney doll) that was playing loud music but could not be identified by the sound. The children were told that they would get a prize if they could guess what the toy was when the experimenter returned, so there was therefore a strong temptation to “peek.” Out of the 123, 101 (82%) peeked. When the experimenter returned, she asked the children if they peeked at the toy. Out of the 101 who peeked, 75 subjects (74%) lied by denying that they had peeked. In the lying group there was no statistically significant difference in whether the child actually lied based on whether that child could identify a lie or say that lying is bad.

transgression, the children were asked questions about their understanding of the concepts of truth and lying. Even though 87% of the children could identify a lie in a story and 73% said that lying is “bad,” there was no statistically significant relationship between whether the child actually lied and whether they could correctly answer questions identifying a lie and say it was bad. In fact, 72% of the children who lied said that it is “bad” to lie. This suggests that truth-telling behaviour in children is not related to knowing the “correct” answers to questions about truth and lies, nor is truth-telling behaviour related to knowing that lying is “bad.” This finding calls into question the premise that a traditional competency inquiry could help a court ascertain whether or not a child is likely to lie while giving evidence.

In a second study, there were 86 children aged 3 to 7 years who had peeked at a toy, contrary to their instructions. Before being asked about their transgression (peeking), the children were questioned about the morality of truth and lying, and then asked to promise to tell the truth about their transgression.<sup>29</sup> The rate of lying dropped from 74% in the first study to 57% under this condition – a statistically significant drop. Interestingly, the discussion and promising to tell the truth had the greatest effect of increasing truth-telling behaviour with younger children (4-5 years of age), who had the greatest difficulty in “correctly” answering questions about truth and lying.

In the third study in this series, the research team found that when children who had committed a transgression were simply asked to promise to tell the truth prior to questioning, without any discussion of truth or lie telling, just over half of the children (59%) lied about their behaviour. This is in sharp contrast to the children who were only engaged in a discussion about truth- and lie-telling but not asked to promise to tell the truth, as 75% of them lied about their behaviour.<sup>30</sup> Thus, while the act of promising to tell the truth does not eliminate the possibility that a child will lie, it did significantly reduce the frequency of lying.

In another study, the team examined whether or not 64 children aged 3 to 11 years would lie to protect a parent whom they saw doing something wrong, breaking a toy.<sup>31</sup> Half of the children were engaged in a discussion similar to a traditional competence examination and asked to promise to tell the truth before being questioned about whether or not their parent broke a toy. The researchers found that the children who were led through the competence examination and asked to promise to tell the truth were significantly more likely to tell the truth and expose their parent’s transgression than children who were questioned without the inquiry and promise.

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<sup>29</sup> In this study there were 103 children aged 3-7 years, of whom 86 (83%), contrary to instructions, peeked at the toy while the experimenter was out of the room.

<sup>30</sup> In this study there were 177 children aged 3-7 years, of whom 127 (77%), contrary to instructions peeked at the toy while the experimenter left the room.

<sup>31</sup> Talwar et al., 2004.

The Child Witness Project has also investigated adults' ability to detect whether a child is lying or telling the truth. For this study, university students, customs officers and police officers were shown video clips of children being questioned about whether or not they committed a minor transgression (peeking at a toy contrary to their instructions). The adults were significantly more accurate in identifying whether a child was lying if the child had promised to tell the truth or had engaged in a moral discussion about truth telling, compared to children who were simply asked the questions.<sup>32</sup>

A recently completed set of studies by Evans and colleagues, involving 108 children aged 8 years to 16, years found that having these older children promise to tell the truth both significantly increased the likelihood that they would tell the truth about their transgressions and that their parents would be more likely to detect lie telling in their children.<sup>33</sup> The recent work of Evans with older children clearly supports the earlier findings with younger children; although this work was completed after the Canadian reforms were undertaken, it is clearly relevant for policy reform discussions in other jurisdictions.

These research findings suggest that if children are required to consider the importance of telling the truth before being questioned, this may make them more uncomfortable when they lie, and that this discomfort is reflected in their demeanour when being questioned, making their lies easier to detect. This supports the premise that having a child promise to tell the truth may help a judge or jury more accurately assess the child's credibility, though this conclusion must be viewed as tentative and more research needs to be done on this issue.<sup>34</sup> The fact that a number of studies all found that having a child promise to tell the truth makes it more likely that a child will tell the truth indicates that this a more robust conclusion.

### *Lyon et al. United States*

Psychological research relating to the child witness competency inquiry, undertaken in the United States by Lyon and a number of colleagues, also raised questions about the utility of the traditional type of child witness competency inquiry.

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<sup>32)</sup> Leach *et al.*, 2004.

<sup>33)</sup> Evans, 2009

<sup>34)</sup> In another study of 193 adult subjects, there was no statistically significant relationship between the ability of adult observers to correctly detect whether or not children had lied and whether they observed the children being asked questions about truth telling and promising to tell the truth. However, this study did not involve children talking about their transgressions. Rather it involved children telling true and fabricated stories about their own lives, such as whether they had attended a wedding; for the fabricated events the children were told to pretend that the events had occurred. Accordingly, this study is not directly comparable to the other studies that dealt with statements children made about their own conduct. Talwar *et al.*, 2006.

In a study of 192 maltreated children aged four to seven years Lyon and Saywitz<sup>35</sup> found that children who had been neglected or abused often showed seriously delayed vocabulary skills due to the ill-treatment that they suffered, making it more difficult to qualify as competent witnesses the very group of children who are most likely to be called to testify. While most maltreated children by age five have a basic understanding of the meaning and immorality of lying, their capacity to demonstrate this understanding depends on the manner in which the children are questioned.

In the Lyon and Saywitz study, children were asked to (i) define, (ii) explain the difference between and (iii) identify examples of truth and lies.<sup>36</sup> The children had the most difficulty with the most abstract task, providing a definition, and performed much better on the identification task, where they could demonstrate their understanding by recognizing examples of truth and lies. Sixty to seventy percent of children aged four to seven clearly understood the difference between truth and lies in the identification task, yet could not satisfactorily define those terms or explain the difference between them.

One interesting trend in this study was that, while the youngest participants (aged four) were no better than chance at identifying lies, they were very good at identifying true statements. Lyon and Saywitz suggest that the way in which the questions were posed made children reluctant to demonstrate an understanding of lying. In this study (as is often the case in traditional competency inquiries in court), the questions were phrased in a way that required children to identify the questioner as one who has told a lie. Children may be reluctant to identify an authority figure as a liar or morally bad person. However, Lyon and Saywitz suggest that phrasing recognition questions so that children identify another child in a story as telling a lie instead may minimize this motivational barrier.

In a study of 198 maltreated children reported in 2008, Lyon *et al.* found that having children aged 4 to 7 years promise to tell the truth significantly increased the likelihood that they would do so, even if they had been coached to make false statements.<sup>37</sup> Neither age nor the ability to correctly answer questions about the negative consequences of lying were consistently related to truth telling.

Thus, overall the psychological research has found that children's abilities to answer questions about truth and lies is not a reliable indicator of the honesty of their actual testimony. However, asking children to promise to tell the truth does significantly increase the likelihood that children will tell the truth.

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<sup>35</sup> Lyon and Saywitz, 1999, 16.

<sup>36</sup> Lyon and Saywitz, 1999, 17.

<sup>37</sup> Lyon *et al.*, 2008.

## Canadian Reforms

In 2004, the Committee on Justice and Human Rights of Canada's House of Commons considered new legislation dealing with a range of issues related to child victimization and child witnesses in the criminal justice system, including such issues as permitting children to testify via closed circuit television. While the Committee received a significant number of written briefs and heard from witnesses from a range of professional groups on a range of issues, only one brief dealt extensively with the competency inquiry issue, a brief prepared by the Child Witness Project, a group that included the authors of this paper.<sup>38</sup> The Committee heard testimony from a member of the Project (Bala) about the psychological research that had been carried out in Canada and elsewhere on child competency issues,<sup>39</sup> and as a result made amendments to ensure that the new legislation was largely consistent with the research findings.

Under the law, which came into force in January 2006, the *Canada Evidence Act* s. 16.1 established a completely new approach for qualifying children under the age of fourteen, and securing their commitment to telling the truth to the best of their ability. The 2006 revisions established the law as follows:<sup>40</sup>

### *Person under fourteen years of age*

16.1 (1) A person under fourteen years of age is presumed to have the capacity to testify.

### *No oath or solemn affirmation*

(2) A proposed witness under fourteen years of age shall not take an oath or make a solemn affirmation despite a provision of any Act that requires an oath or solemn affirmation.

### *Evidence shall be received*

(3) The evidence of a proposed witness under fourteen years of age shall be received if they are able to understand and respond to questions.

### *Burden as to capacity of witness*

(4) A party who challenges the capacity of a proposed witness under fourteen years of age has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to understand and respond to questions.

### *Court inquiry*

(5) If the court is satisfied that there is an issue as to the capacity of a proposed witness under fourteen years of age to understand and respond to questions, it shall, before permitting them to give evidence, conduct an inquiry to determine whether they are able to understand and respond to questions.

### *Promise to tell the truth*

(6) The court shall, before permitting a proposed witness under fourteen years of age to give evidence, require them to promise to tell the truth.

<sup>38</sup>) Bala et al., 2005.

<sup>39</sup>) Hansard, 2005.

<sup>40</sup>) *Canada Evidence Act* R.S.C. 1985, Chap. C-5, enacted as S.C. 2005, c. 32, s. 27.

*Understanding of promise*

(7) No proposed witness under fourteen years of age shall be asked any questions regarding their understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence shall be received by the court.

*Effect*

(8) For greater certainty, if the evidence of a witness under fourteen years of age is received by the court, it shall have the same effect as if it were taken under oath.

The new provision begins with a statement in s. 16.1(1) of the presumption that all children are competent to testify, while s. 16.1(4) places a burden on the “party who challenges the capacity” of a child to “satisfy the court that there is an issue as to the capacity” of the child to “understand and respond to questions.”

The requirements of the new s. 16.1(5) are different from the inquiry carried out under the 1988 statute. The sole issue under the new test is whether the child has basic cognitive, social and language abilities to be able to answer questions posed in court. Whether a child witness is able to understand and respond to questions is a matter for the judge to determine, and expert testimony is not normally required.<sup>41</sup> Although the new s.16.1 does not provide detailed directions about how a judge is to deal with a child who is called as a witness, as required by the Supreme Court of Canada in applying the “ability to communicate” portion of the test from the 1988 *Evidence Act* in *R. v. Marquard*,<sup>42</sup> there should be a relatively brief inquiry into whether the child has the capacity to remember past events and answer questions about those events.

The language used in the new statute suggests that the issue of competence is only to arise if the party challenging the competence of a child witness, usually the accused, can satisfy the court that there is a real issue about the child’s ability to meaningfully answer questions. Such a challenge seems most likely to be raised if there were problems revealed in videotapes of investigative interviews with the child, which under Canadian law must be disclosed to the accused prior to the trial. If the court is satisfied that there is a genuine issue of the child’s ability to communicate, when a child takes the stand, after initial introductions, the judge or counsel who has called the witness should ask the child preliminary questions about such matters as name, age, school, and residence, and then ask questions about one or two past events not related to the matters at issue, such as a previous holiday.<sup>43</sup> The initial questioning is intended to allow the court to ascertain whether the child is “able to understand and respond to questions.” This questioning about non-contentious matters should also help the court to understand the child’s speech and vocabulary, and will help the child feel less uncomfortable and hence able to be a more effective witness. The judge has a duty to ensure that

<sup>41</sup> *R. v. Parrott*, [2001] 1 S.C.R. 178, 39 C.R. (5th) 255 (S.C.)

<sup>42</sup> *R. v. Marquard*, [1993] 4 S.C.R. 223, at paras. 236-237.

<sup>43</sup> For a discussion of the type of “pre-interview” questioning that should be carried out to allow for the best “interview,” see Schuman *et al.*, 1999; and Lamb *et al.*, 1998, 818-819.

the questions that are posed to the child during this inquiry, and later in the proceedings, are appropriate to the child's stage of development, with age-appropriate vocabulary and sentence structure.<sup>44</sup>

Subsections 16.1(2) and (6) provide that a child under fourteen years of age shall not testify under oath or solemn affirmation, but rather shall give "a promise to tell the truth." These provisions remove the possibility that a judge or counsel might want to attempt to determine whether a child might be permitted to testify under oath by requiring the child to answer questions about the nature of an oath, or intrusive questions about religious understandings or observance. This should ensure that all child witnesses receive the same treatment, regardless of their faith or religious instruction.

Subsection 16.1(6) specifically requires a child to make a "promise to tell the truth" before testifying.<sup>45</sup> The process of a witness – whether a child or an adult – making a commitment to tell the truth has symbolic importance for all of those involved in the justice process. Further, as discussed above, this requirement is also supported by the psychological research that suggests that children who have promised to tell the truth are more likely to tell the truth, even if they are not able to provide a *definition* of "promise" or "truth."<sup>46</sup>

In a very significant change from practice under the 1988 law, s. 16.1(7) specifies that "[n]o proposed witness under fourteen years of age shall be asked any questions regarding their understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence shall be received by the court." This provision is clearly intended to preclude the judge or counsel from asking a child questions about the definition or meaning of such abstract

<sup>44</sup> See Schuman *et al.*, 1999. In *R. v. L. (D.O.)*, [1993] 4 S.C.R. 419 L'Heureux-Dubé J., gave trial judges the responsibility of intervening when children are asked developmentally inappropriate questions (at 471, emphasis added):

in . . . 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.

<sup>45</sup> Lyon conducted research which suggests that the preferable form of the commitment for a child should be: "I promise that I will tell the truth." While older children understand that "I promise" means a guarantee to do something, younger children tend to better identify "I will" than "I promise" as an indicator of certainty. Lyon writes that "[t]he results advise caution in using the word 'promise' in eliciting a child's guarantee that he or she will tell the truth. Children at all ages in our research understood that 'will' predicts performance, and some children at older ages understand that 'promise' increases the likelihood of performance. In order to communicate the importance of telling the truth to children at all ages, we suggest that children be asked if they can 'promise' that they 'will' tell the truth." Lyon, 2000, 1063.

<sup>46</sup> Talwar *et al.*, 2002 and Talwar *et al.*, 2004.

concepts as “promise,” “truth” and “lie” as a condition of being permitted to testify. Under the new provisions, it is clear that children are not expected to demonstrate that they understand the duty to speak the truth or define abstract concepts. These changes to the competency inquiry reflect the psychological research which establishes that the former, cognitively based inquiry can exclude children who were in fact competent to give honest, reliable answers to questions, and did nothing to promote the search for the truth.

While s. 16.1(7) makes clear that the answering of questions about the promise is not to be a condition of the child testifying, the judge may give the child simple instructions about the role of a witness in court.<sup>47</sup> This might include simple statements about the importance of telling the truth.<sup>48</sup> The child may also be encouraged and instructed during this initial period about the need to give responses that are as detailed as possible. Children should also be reminded that, if there are questions that they do not understand, they should indicate this to the court, and if there are questions that they cannot answer, they should not guess at answers, but rather should respond “I don’t know.”<sup>49</sup>

Section 16.1(8) provides that if a child testifies after giving a promise to tell the truth, this “shall have the same effect” as if the child testified under oath; that is, there is to be no discounting of the evidence of a child merely because the child has not given an oath. This new provision addresses the judicial view, common, as previously mentioned, under the 1988 Act, that there was a distinction between the sworn and unsworn testimony of a child. While a judge might caution a jury about inconsistencies or frailties in the testimony of any individual witness, including a child, there should not be a warning for classes of witnesses, such as children.

A result of the changes to the competency test for children is that children and adults are now treated in a similar manner. By requiring children to demonstrate that they understood the “nature of an oath or solemn affirmation,” the old law required more of children than of adults. Adults are not asked to define abstract concepts like “oath” before they are permitted to testify, even though a significant

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<sup>47</sup> It is submitted that this is an aspect of the inherent obligation and power of the presiding judge to control the court process. See *R. v. A.A.*, [2003] O.J. 4 (C.A.) on the inherent powers of a presiding judge, including a justice of the peace, to control the court process, and in the context of a youth court proceeding to ensure that a young person understands the significance of the charges that he faces, even if his counsel waives the reading of the charges.

<sup>48</sup> The *Youth Criminal Justice Act*, S.C. 2002, c. 1, s. 151 provides that a youth justice court judge shall “instruct” a child witness under twelve “as to the duty to speak the truth and the consequences of failing to do so,” and may give such instructions to a young person who testifies.

<sup>49</sup> Young children often do not understand all that an adult questioner asks, but have been socially trained to “guess” at what is being asked and “respond.” They will usually try to provide an answer to a question even if they did not understand it, or do not know how to answer it. It is appropriate for the judge to remind a child of the importance of saying that they did not understand a question, and not to guess at answers.

portion of adult witnesses are not able to give a good definition of this term. For both adults and children, the process of promising or swearing an oath serves to impress on the witness and others in the court the solemnity of the occasion.

### Reception by the Courts of Canadian Reforms

The new provisions have simplified and shortened the process for children giving evidence in criminal cases in Canada. It is clear that Canadian judges are satisfied that the changes to the laws governing the assessment of child witness competency do not interfere with the rights of an accused to a fair trial and facilitate the search for the truth.

A survey completed by 34 judges in four Canadian jurisdictions revealed that 96% of the respondents agreed that the reform of the competency provision is “useful.” In a significant portion of cases, judges reported that the child is accepted as competent without inquiry, often based on video interview material disclosed to the defence before the hearing. In the survey, judges reported that there was a competency inquiry in about four-fifths of cases with the youngest age group (3-5 years), falling to about one quarter with the older age group (10-13 years).

In the reported case law, there were no instances of judges writing decisions to explain why a child is incompetent to testify. In the survey, while some children in all age groups were found incompetent, even in the youngest age group (3-5 years) almost one-half of the judges reported that they had never found a child incompetent under the new provision. Judges reported that the average length of time spent on a competency inquiry is now 12 minutes.

It is now a common practice in Canada for the police to video-record investigative interviews with children. A child will only be called as a witness if the Crown prosecutor is satisfied, upon viewing the video-record that the child can meaningfully answer questions about the events in question. The video is disclosed to defence counsel before the trial, leading one judge in the survey to observe that there is often no need for an inquiry:

Disclosure of videotaped statements by a child witness before the trial usually satisfies opposing counsel as to competence.

In *R. v. J.F.*,<sup>50</sup> a 2006 Alberta case in which a seventeen-year-old was charged with the sexual assault of a seven-year-old girl, Ho Prov. Ct. J. recognized the significance of the new approach, noting “not being able to provide a satisfactory definition of the difference between a truth and a lie does not negate the ability of [the witness] to provide reliable evidence to the Court.”<sup>51</sup>

<sup>50</sup>) [2006] A.J. No. 972.

<sup>51</sup>) *R. v. J.F.*, [2006] A.J. No. 972. at paragraph 39.

In a number of decisions the courts have upheld the constitutionality of the new s.16.1 of the *Evidence Act*, concluding that it is consistent with the rights of an accused person to a fair trial to be conducted “in accordance with the principles of fundamental justice.”<sup>52</sup> Interestingly each of the reported constitutional decisions discussed the Canadian social science research about the soundness of the reform and its promotion of the search for the truth.

The most significant constitutional decision was the British Columbia Court of Appeal in *R. v. J.S.*<sup>53</sup> The Court of Appeal noted that s.16.1 prohibits a pre-testimonial inquiry into the proposed child witness’ understanding of a promise to tell the truth, unless the applicant demonstrates that there is an issue as to the child’s capacity to testify. The Court of Appeal concluded that s.16.1 reflects the procedural and evidentiary evolution of Canada’s criminal justice system, in order to facilitate the testimony of children as a necessary step in its “truth-seeking goal.” D.M. Smith J.A. wrote:<sup>54</sup>

I do not accept the appellant’s argument that if a moral obligation to tell the truth is not established, the testimony of the witness should be inadmissible. Parliament, in enacting s. 16.1, has decided that a promise to tell the truth is sufficient to engage the child witness’s moral obligation to tell the truth. Section 16.1 places child witnesses on a more equal footing to adult witnesses by presuming testimonial competence....

.....It discards the imposition of rigid pre-testimonial requirements which often prevented a child from testifying because of their inability to articulate an understanding of abstract concepts that many adults have difficulty explaining. It reflects the findings of Child Witness Project that the accuracy of a child’s evidence is of paramount importance, not the ability of a child to articulate abstract concepts.

While accepting that children cannot be asked questions about their understanding of concepts such as “truth” and “promise” to be accepted as witnesses, the Court of Appeal did not totally preclude this type of questioning<sup>55</sup>

A child witness’s moral commitment to tell the truth, their understanding of the nature of a promise to tell the truth, and their cognitive ability to answer questions about “truth” and “lies” may still be challenged on cross-examination during their testimony; their credibility and reliability may still be challenged in the same manner as an adult’s testimony may be challenged. These potential concerns, however, go to the weight of the evidence, not its admissibility.

<sup>52</sup> Other decisions upholding the constitutionality of this provision are *R. v. S.(M.)*, unreported Aug. 31, 2006 (Port Coquitlam, File. No. 7740), per Antifaev Prov. Ct J.; *R. v. Persaud*, [2007] O.J. 432 (Ont. Sup. Ct.), per Epstein J.; *R. v. F.(J.)*, [2006] A.J. No. 972 (Prov. Ct.) (police asked questions in a video-recorded interview). Ho Prov. Ct. J.: “not being able to provide a satisfactory definition of the difference between a truth and a lie does not negate the ability of C.S. [the complainant] to provide reliable evidence to the court.”

<sup>53</sup> [2008] B.C.J. 1915, 2008 BCCA 401 (B.C.C.A), aff’g *R. v. J.S.*, [2007] B.C.J. 1374 (B.C.S.C.), per Metzger J.

<sup>54</sup> [2008] B.C.J. 1915, 2008 BCCA 401 (B.C.C.A), at para. 52 & 53.

<sup>55</sup> [2008] B.C.J. 1915, 2008 BCCA 401 (B.C.C.A), at para. 53.

In commenting on this aspect of the decision, Prof. Lisa Dufraimont questioned whether such questions should be permitted even in cross-examination at the end of a child's testimony:<sup>56</sup>

If questions about abstract concepts like truth and promise are developmentally inappropriate and that is why they have been eliminated from the competency inquiry, one might wonder whether they have any real value when they are posed during cross-examination.

On May 5, 2009, the Supreme Court of Canada granted leave to appeal in *R v. J.S.*;<sup>57</sup> a decision is likely to be rendered before the end of 2010.

### **Reforms to the Child Competency Inquiry in Other Jurisdictions**

Jurisdictions outside of Canada currently take a range of approaches to the assessment of child witness competency. Many jurisdictions have modified the common law requirements allowing children to testify unsworn, and others have removed the corroboration requirement for unsworn evidence. Some legal regimes have, like Canada, abolished the inquiry into the child's understanding of such concepts as a "promise" altogether. However, Canada is currently the only jurisdiction where, despite eliminating the traditional competency inquiry, the child is nonetheless asked to promise to tell the truth. Exploring a few examples of reforms made in other countries will illustrate the range of contemporary approaches to child witness competency assessment.

#### *United States*

Typically, children who testify in American courts do so in criminal proceedings governed by state law. While the statutory provisions dealing with child witness competency vary considerably from state to state, most state courts require that children must have the "capacity of expression" and an "appreciation of the duty to tell the truth,"<sup>58</sup> requirements similar to those in the 1988 version of Canada's child witness competency law. It is a common practice to ask children to promise to tell the truth.

Most American courts avoid some of the most problematic issues related to children's understanding of an oath. They tend to focus on a more general

<sup>56</sup> L. Dufraimont, *S. (J.): Care in Cross-Examining Child Witnesses* (2007) 48 C.R. (6th) 357; this commentary was actually on the trial decision, but it is equally applicable to the appeal judgement.

<sup>57</sup> *R. v. J.Z.S.*, [2008] S.C.C.A. No. 542.

<sup>58</sup> *State v. Eiler*, 762 P. 2d 210 at 213 (Mon 1988), citing *State v. Phelps*, 696 P. 2d 447 at 453 (Mont. 1985).

understanding of the importance of telling the truth. American judges generally do not ask questions about religious beliefs or practices that arise out of an inquiry into the meaning of an oath, as most American statutes do not require an inquiry into children's understanding of the "nature or consequences of an oath" or promise. In many states, children may testify even if they cannot define an oath, or are unable to explain the nature and purpose of an oath.<sup>59</sup> However, American courts still require an initial assessment by the court of children's ability to remember the events at issue and to meaningfully answer questions,<sup>60</sup> as well as a determination that the child "appreciates the duty to speak the truth."

In some American states, legislation has been enacted to exempt children who are the victims of sexual abuse from the standard competency requirements, requiring them to meet a specified lower standard or no statutorily announced standard at all.<sup>61</sup> However, the courts have interpreted these provisions as leaving a residual judicial discretion to preclude children from testifying, even in the face of legislation that provides that a child victim of an alleged offence "shall be considered a competent witness and shall be allowed to testify without prior qualification."<sup>62</sup>

In *State v. Fulton*,<sup>63</sup> the Utah Supreme Court held that this type of law did not mean that the trial court may never prevent such a child from testifying. It was held that the court may exclude any testimony where the "probative value is substantially outweighed by the danger of unfair prejudice... or misleading the jury."<sup>64</sup> The court further held that in considering a defendant's application to have a child's testimony excluded, the court should consider "the child's ability to function in a courtroom setting, i.e., to understand the questions, to communicate... facts to the jury, to *distinguish truth from fantasy or falsehood*, etc."<sup>65</sup> This type of ruling continues to allow a form of competency inquiry for young children, albeit placing the onus on the defendant who seeks to prevent a child from testifying.

<sup>59</sup> See *Strickland v. State*, 297 S.E. 2d 491 (Ga. App. 1982); *Lashley v. State*, 208 S.E. 2d 200 (Ga. App. 1974). In some states, legislation now allows a child to testify by promising to tell the truth. Section 710 of the California Evidence Code (1999) provides: "Every witness before testifying shall take an oath or make an affirmation or declaration in the form provided by the law, except that a child under the age of 10, in the court's discretion, may be required only to promise to tell the truth."

<sup>60</sup> See *Lowe v. State*, 650 So. 2d 975 (Fla. 1994), where the court found a child incompetent to testify because he was "[i]ncapable of expressing himself concerning the matter in such a manner as to be understood" at 975.

<sup>61</sup> See, for example, Utah: Utah Code Ann. s. 76-5-410 (1999). Special provisions also exist at the federal level for child victims of abuse. Subsection 3509 of 18 U.S.C.A. (1999), provides that a child victim is presumed to be competent, and a competency examination may be conducted by the court only upon written motion and offer of proof of incompetency by a party.

<sup>62</sup> Utah Code Ann. s. 76-5-410 (1999).

<sup>63</sup> 742 P. 2d 1208 (Utah 1987).

<sup>64</sup> *State v. Fulton*, 742 P. 2d 1208 (Utah 1987) at 1218.

<sup>65</sup> Emphasis added. *State v. Fulton*, 742 P. 2d 1208 (Utah 1987) at 1218.

Researchers Lyon and Saywitz found that, from a survey of a representative sample of 600 prosecutors of child sex abusers, about half said the testimonial competence of child witnesses was an issue at trial in most or all of their cases.<sup>66</sup> While the United States has made some important reforms to improve its process for assessing child witnesses, children are still often required to go through some form of competence inquiry, which, as we have seen, research shows is not an accurate indicator of whether or not a child will testify truthfully.<sup>67</sup>

Although the American reforms that have abolished the inquiry into the child's understanding of the oath are an improvement over previous legal regimes, the requirement for children to be questioned to establish their understanding of the "duty to tell the truth" is problematic. This requirement may preclude some children who are capable of giving reliable testimony from giving evidence, and does not make it more likely that children who testify will in fact tell the truth.

### *England & Wales*

In 1988, England and Wales enacted a new set of laws regarding child witnesses in criminal trials.<sup>68</sup> The 1988 reforms eliminated the need for corroboration in order to secure a conviction on the unsworn testimony of a child. The reforms also changed the competency inquiry, eliminating the requirement that a child demonstrate understanding of the "oath," the "truth" or a "promise." Section 33A of the *Criminal Justice Act 1988* provided:

- (1) A child's evidence in criminal proceedings shall be given unsworn.
- (2) A deposition of a child's unsworn evidence may be taken for the purpose of criminal proceedings as if that evidence had been given on oath.
- (2A) A child's evidence shall be received unless it appears to the court that the child is incapable of giving intelligible testimony.
- (3) In this section a "child" means a person under fourteen years of age...<sup>69</sup>

<sup>66</sup> Lyon and Saywitz, 1999, 16. T.D.

<sup>67</sup> For examples of other jurisdictions which have a competency inquiry, see Australia's *Evidence Act 1995* (Cth.), which maintains a distinction between sworn and unsworn testimony for children, thus requiring that the child demonstrate an understanding of the importance of telling the truth. (section 13). While the states and territories each have their own laws dealing with child witness competency, several similarly preserve the competency inquiry. See New South Wales' *Evidence Act 1995* (N.S.W.) and Victoria's *Evidence Act 1958* (Vic.). Tasmania has also adopted these requirements under its state law.

<sup>68</sup> For a fuller discussion of the history and background to English reforms of the nineteenth and twentieth centuries, see Spencer & Flinn, 1993, chapter 4, and Spencer, 1998.

<sup>69</sup> (U.K.), 1988, c. 33, s. 33A. Section 33A (1), (2) and (3) were inserted into the *Criminal Justice Act 1988* by amendments in the *Criminal Justice Act 1991* (U.K.), 1991, c. 53, s. 52. Section 33A (2A) was inserted into the *Criminal Justice Act 1988* by the *Criminal Justice and Public Order Act 1994* (U.K.), 1994, c. 33, Sch. 9, para. 33.

In *D.P.P. v. M.*<sup>70</sup> the respondent was convicted of indecently assaulting a four-year-old girl based on the child's unsworn testimony. The respondent appealed, arguing that by reason of her age the child was too young to testify. The English Divisional Court held that it was not open to the judge to exclude the evidence of the child based on her age alone:<sup>71</sup>

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

In *D.P.P. v. G.*<sup>72</sup> the trial court allowed two young children aged six and eight to give evidence-in-chief and refused to hear testimony from a proposed defence expert that the children were incompetent to testify. The Divisional Court held that the trial court was right to refuse to hear the expert evidence, as the competency inquiry "is a simple test well within the capacity of a judge or magistrate."<sup>73</sup> The statutory requirement for "intelligible testimony" from the child was held by Lord Justice Phillips to be "evidence that is capable of being understood."<sup>74</sup>

In 1999 England and Wales further reformed the laws governing child witness competency inquiries in criminal proceedings. The *Youth Justice and Criminal Evidence Act 1999*<sup>75</sup> now provides that children under 14 will testify unsworn,<sup>76</sup> and that unsworn evidence should not be given any less weight than sworn testimony: "A deposition of unsworn evidence... may be taken for the purposes of criminal proceedings as if that evidence had been given on oath."<sup>77</sup> Section 53 states that the sole test for determining the competence of a child to testify is whether the child is "able to understand questions put to him as a witness, and give answers to them which can be understood."<sup>78</sup>

In its 2005 decision in *R v MacPherson*, the English Court of Appeal held that once the issue of competence is raised, there is an onus on the party calling the witness, usually the prosecution, to establish that the child is competent to answer

<sup>70</sup> (U.K.), 1988, c. 33, s. 33A. Section 33A (1), (2) and (3) were inserted into the *Criminal Justice Act 1988* by amendments in the *Criminal Justice Act 1991* (U.K.), 1991, c. 53, s. 52. Section 33A (2A) was inserted into the *Criminal Justice Act 1988* by the *Criminal Justice and Public Order Act 1994* (U.K.), 1994, c. 33, Sch. 9, para. 33.

<sup>71</sup> *D.P.P. v. M.*, [1998] Q.B. 913, [1997] 2 All E.R. 749 at 753, per Lord Justice Phillips.

<sup>72</sup> [1998] Q.B. 919, [1997] 2 All E.R. 755.

<sup>73</sup> *D.P.P. v. G.*, [1998] Q.B. 919, [1997] 2 All E.R. 755 at 759.

<sup>74</sup> *D.P.P. v. G.*, [1998] Q.B. 919, [1997] 2 All E.R. 755 at 758.

<sup>75</sup> *Youth Justice and Criminal Evidence Act 1999* (U.K.), 1999, c. 23.

<sup>76</sup> *Youth Justice and Criminal Evidence Act 1999* (U.K.), 1999, c. 23, s. 55(2)(a).

<sup>77</sup> *Youth Justice and Criminal Evidence Act 1999* (U.K.), 1999, c. 23, s. 56(3)

<sup>78</sup> *Youth Justice and Criminal Evidence Act 1999* (U.K.), 1999, c. 23, s. 53(3)

questions. However, the trial judge was permitted to satisfy himself that a girl, aged about five years at the time of trial, was competent to testify by viewing the video-record of an investigative interview and engaging the child in a “general conversation ... in the form of questions and answers of a most general nature.”<sup>79</sup> There is no requirement for the judge to ask the child questions about the difference between truth and falsehood.

England’s child witness competency laws conform in some significant ways to recent psychological research. Although the 1988 and 1999 reforms were enacted before the research discussed in this paper was undertaken, the law nonetheless provides that children do not have to be questioned regarding the nature of an oath, and the *Youth Justice and Criminal Evidence Act 1999* makes clear that their testimony should not be treated as less credible solely because it was given unsworn. However, the present law of England fails to require a child should be made to “promise to tell the truth,” without being asked questions about the meaning of this abstract concept.

Psychological research indicates that having children promise to tell the truth increases the likelihood that they will tell the truth, and some research suggests that adults may have a greater likelihood of accurately ascertaining whether a child is lying if the child has first made a promise to tell the truth. Accordingly, requiring children to promise to tell the truth should enhance the truth-seeking function of the legal promise, and certainly will not diminish it. The English reforms moved in the direction of better reflecting current understandings of children’s needs and abilities, but do not reflect current psychological research as well as the more recently enacted Canadian statute.<sup>80</sup>

## Conclusion

Until the 2006 reforms, the competency inquiry required by law to determine whether children would be permitted to testify in Canadian courts could be intrusive and upsetting to children, and was clearly a waste of court time that did nothing to promote the search for the truth. Some children who could give

<sup>79</sup>) [2005] EWCA Crim 3605, at para. 20.

<sup>80</sup>) Other jurisdictions have legislation very similar to England’s regarding child witness competency assessment. See, for example, Ireland’s *Criminal Evidence (Ireland) Act 1992*, 1992/12, s. 27 and Australian Capital Territory’s *Evidence Act 1971* (A.C.T.) s. 64. Scotland’s *Vulnerable Witnesses (Scotland) Act 2004*, A.S.P. 2004, s. 24(1)(a) and (b) similarly provide that “the court must not, at any time before the witness gives evidence, take any step intended to establish whether the witness understands [the nature of the duty of a witness to give truthful evidence, or the difference between truth and lies].” This change was implemented after psychological research such as that mentioned in this paper took place. However, while the competency inquiry has been abolished in Scotland for live testimony, it is still required in other interviews with a child during the judicial process. See *Vulnerable Witnesses (Scotland) Act 2004* Phase 3 & 4 Implementation Steering Group, 2007.

honest, reliable evidence were prevented from testifying, potentially resulting in miscarriages of justice. The 2006 reforms to the *Canada Evidence Act* allow Canadian courts, when assessing the capacity of a child to give evidence, to base their decision on methodologically sound social science research. Examining the ability of a child witness to understand and answer questions is a more realistic and meaningful criterion to use to determine whether a child is competent to testify than the artificial, abstract inquiry into a child's understanding of the "promise to tell the truth." The new s.16.1 of the *Canada Evidence Act* is based on psychological research rather than outdated biases against children, and promotes the search for the truth. Asking a child to promise to tell the truth, but not expecting the child to explain the significance of this undertaking, is the same treatment as is afforded adults who testify under oath.

Many jurisdictions, including most American states, still require children to correctly answer questions about the meaning of the "promise to tell the truth" if they are to be permitted to testify. This type of inquiry does not ensure that children who are permitted to testify are more likely to tell the truth than those who are excluded, but it results in children who may have important evidence, often about their own victimization, being prevented from testifying. Jurisdictions with this type of legal regime should be reviewing the psychological literature and studying changes that have been adopted elsewhere, most notably in Canada, and undertake reform of their legal regimes.

A number of jurisdictions, including England and Wales, have reformed their laws to abolish the abstract inquiry into the child's understanding of the oath or the difference between truth and falsehood. While the abolition of this inquiry is certainly an improvement to the treatment of child witnesses, there are important reasons for retaining the requirement for children to promise to tell the truth, even though children should not be asked questions about their understanding of the abstract concepts involved in this undertaking. Research indicates that truth-seeking may be undermined when the promise is eliminated, as children may be less likely to tell the truth if not required to promise to do so. In addition, it is possible that juror perception is biased against children when they are not required to make a promise, since adults must testify under oath; while this hypothesis has not yet been fully tested by research, there is certainly no harm in requiring a child to "promise to tell the truth."

The story of this paper has significance beyond the issue of competence of child witnesses. Although there is a need for more research about issues related to children's understanding of the "promise to tell the truth" and its effect both on children and on adult perceptions of children's credibility, there has been sufficient psychological research to persuade one legislative body, Canada's Parliament, to reform its laws. This is an important instance of conducting research to empirically test the premises in a legal regime, finding those premises invalid, and then using the results of that research to help establish a better legal regime. Some critics of

the reforms may question the significance of research carried out in psychology laboratories for the “real world” of the child abuse investigations and court rooms. However, the research was considered highly persuasive to legislators and judges, who recognize that it is only in a controlled laboratory setting that it is possible to be sure whether children are actually telling the truth. Further the consistency of the results with child development theory and the similarity of results in a number of different studies made the conclusions robust. There are many other laws relating to children in every country, including Canada, which should be subjected to such empirical scrutiny, and, if appropriate, reformed.

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