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## Taking the Stand: Access to Justice for Witnesses with Mental Disabilities in Sexual Assault Cases

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## Taking the Stand: Access to Justice for Witnesses with Mental Disabilities in Sexual Assault Cases

### Abstract

In this article the authors argue that the existing adversarial trial process often prevents the stories of sexual assault complainants with mental disabilities from being heard in court. Relying on social science evidence, the authors argue that subjecting a woman with a mental disability to a rigorous cross-examination with repeated and leading questions, in a manner that is confrontational and often accusatory, is probably the worst way to get her story heard accurately in court. It is likely to unfairly undermine her credibility and to result in unjustified acquittals or in prosecutors deciding not to pursue a case. The article examines the challenges posed by traditional methods of cross-examination for witnesses with cognitive, developmental, or intellectual disabilities that affect their ability to recall, process, and communicate information, suggesting that existing Criminal Code accommodations are inadequate to address these concerns. Cross-examination should be conducted in a way that respects both the right of the accused to a fair trial and the complainant's right to sex equality. Relying on developments in other jurisdictions, the authors recommend adopting a system of victim support persons or intermediaries, which would allow witnesses with mental disabilities to have assistance in understanding questions and in communicating their evidence to the court as fully as possible. Judges should also be given explicit legislative authority to intervene to disallow questions that are inappropriate based on the particular witness's abilities. Such accommodations facilitate rather than impede the truth-seeking function of a trial and are not inconsistent with the fair trial rights of the accused.

### Keywords

Sex crimes--Trial practice; Legal assistance to sexual abuse victims; Cross-examination; Mental health laws; Canada

# Taking the Stand: Access to Justice for Witnesses with Mental Disabilities in Sexual Assault Cases

JANINE BENEDET\* & ISABEL GRANT\*\*

In this article the authors argue that the existing adversarial trial process often prevents the stories of sexual assault complainants with mental disabilities from being heard in court. Relying on social science evidence, the authors argue that subjecting a woman with a mental disability to a rigorous cross-examination with repeated and leading questions, in a manner that is confrontational and often accusatory, is probably the worst way to get her story heard accurately in court. It is likely to unfairly undermine her credibility and to result in unjustified acquittals or in prosecutors deciding not to pursue a case. The article examines the challenges posed by traditional methods of cross-examination for witnesses with cognitive, developmental, or intellectual disabilities that affect their ability to recall, process, and communicate information, suggesting that existing *Criminal Code* accommodations are inadequate to address these concerns. Cross-examination should be conducted in a way that respects both the right of the accused to a fair trial and the complainant's right to sex equality. Relying on developments in other jurisdictions, the authors recommend adopting a system of victim support persons or intermediaries, which would allow witnesses with mental disabilities to have assistance in understanding questions and in communicating their evidence to the court as fully as possible. Judges should also be given explicit legislative authority to intervene to disallow questions that are inappropriate based on the particular witness's abilities. Such accommodations facilitate rather than impede the truth-seeking function of a trial and are not inconsistent with the fair trial rights of the accused.

Dans cet article, les auteurs font valoir que le processus contradictoire actuel des procès fait en sorte que la version des plaignantes d'agression sexuelle atteintes de déficience mentale n'est souvent pas entendue par le tribunal. En se fondant sur l'enseignement des sciences sociales, les auteurs allèguent que le fait d'astreindre une femme atteinte de déficience

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\*\* Professor, Faculty of Law, University of British Columbia. Both authors would like to thank The Foundation for Legal Research for its support of this article and law students Laura DeVries, Laura Johnston, Emily MacKinnon, and Shirley Smiley for their research assistance and help with the editing of this article.

mentale à un contre interrogatoire rigoureux comportant des questions insistantes et suggestives, de façon conflictuelle et souvent accusatoire, est sans doute le pire moyen pour faire entendre sa version exacte devant le tribunal. Cela entachera probablement sa crédibilité de manière inéquitable et entraînera des acquittements injustifiés, ou fera en sorte que les procureurs décideront de ne pas donner suite à ce cas. Cet article se penche sur les défis que posent les méthodes traditionnelles de contre interrogatoire des témoins atteints de déficiences cognitives, développementales ou intellectuelles qui affectent leur capacité de se rappeler, traiter et communiquer des renseignements, et suggère que les dispositions actuelles du *Code criminel* sont inadéquates pour aborder ces problèmes. Le contre interrogatoire devrait être mené d'une façon qui respecte le droit de l'accusé à un procès équitable et le droit de la plaignante à l'égalité des sexes. En se fondant sur de nouvelles méthodes utilisées ailleurs, les auteurs recommandent d'adopter un système faisant appel à des intermédiaires capables de venir en aide aux victimes, ce qui permettrait aux témoins souffrant de déficience mentale de mieux comprendre les questions et de communiquer de la manière la plus complète possible leur témoignage au tribunal. On devrait également légiférer spécifiquement pour accorder aux juges l'autorité de rejeter les questions inappropriées en raison des capacités intellectuelles du témoin. Plutôt que lui faire obstacle, de telles dispositions favoriseraient la recherche de la vérité, sans pour autant être incompatibles avec le droit de l'accusé à un procès équitable.

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*Mentally disabled victims do not fare well in our verbally based adversarial processes that demands [sic] mental agility, a good memory, quick responses, and a facility to readily employ a rich vocabulary to accurately describe or slyly obfuscate truth.<sup>1</sup>*

**WOMEN WHO ARE VICTIMS** of sexual assault must overcome a number of serious hurdles before a charge of sexual assault is approved. They must deal with the physical and emotional trauma of the assault; they must be interviewed by police, sometimes multiple times; and they are often subject to an intrusive physical

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1. *R v Gadway* (1993), 21 WCB (2d) 383, YJ No 69 at para 42 (Terr Cr) (QL).

examination. Police and prosecutors decide whether their story is unfounded<sup>2</sup> and whether there is a likelihood of conviction sufficient to warrant proceeding with the charge.<sup>3</sup>

For women with mental disabilities these challenges are magnified.<sup>4</sup> While recognizing that this is not a homogenous group of women, we can say that women with mental disabilities may require various kinds of assistance to have full access to police services and services offered to victims of sexual assault. They may have difficulties remembering and communicating what has happened to them.<sup>5</sup> The person who assaulted them is often a caregiver or other person in a position of trust.<sup>6</sup> In a more limited number of cases, they may not understand

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2. Sexual assault complaints continue to be declared unfounded at a higher rate than other charges, despite an absence of evidence that they are, in fact, more likely to be fabricated. See Holly Johnson, “Limits of a criminal justice response: Trends in police and court processing of sexual assault” in Elizabeth Sheehy, ed, *Sexual Assault Law Practice and Activism in a Post-Jane Doe Era* (Ottawa: University of Ottawa Press, 2012); UK, Home Office Research, *A gap or a chasm? Attrition in reported rape cases* (Research Study 293) by Liz Kelly, Jo Lovett & Linda Regan (London: Home Office, 2005); Australia, Victoria, Statewide Steering Committee to Reduce Sexual Assault, *Study of Reported Rapes in Victoria 2000-2003* (Summary Research Report) by Melanie Heenan & Suellen Murray (Melbourne: Office of Women’s Policy, July 2006).
  3. The policies and standards on this charge screening vary from province to province. In Ontario, prosecutors must proceed if there is a reasonable prospect of conviction. In British Columbia, the standard is higher: a reasonable likelihood of conviction and whether a prosecution is required in the public interest. Minister of Attorney General, Province of Ontario, “Charge Screening” in *Crown Policy Manual*, 21 March 2005, online: <<http://www.attorneygeneral.jus.gov.on.ca/english/crim/cpm/2005/ChargeScreening.pdf>>; Criminal Justice Branch, Ministry of Attorney General, Province of British Columbia, “Charge Assessment Guidelines” in *Crown Counsel Policy Manual*, 2 October 2009, online: <<http://www.ag.gov.bc.ca/prosecution-service/policy-man/pdf/CHA1-ChargeAssessmentGuidelines-2Oct2009.pdf>>.
  4. As in our past work in this area, we use the term “mental disability” to refer collectively to intellectual, developmental, and psychiatric disabilities that result in cognitive impairment affecting comprehension, communication, or learning. Such disabilities may be present from birth or acquired through illness or accident. We recognize that this is an extremely diverse group of women and that the term “mental disability” is not used by any of these groups as a descriptor. We use it as a collective reference because it is the term used in section 15(1) of the *Charter*, which guarantees equality without discrimination on the basis of sex and mental or physical disability among its listed grounds. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 15(1) [*Charter*].
  5. *R v Harper*, 2002 YKSC 18, YJ no 38 [*Harper*]; *R v Parrott*, 2001 SCC 3, [2001] 1 SCR 178 (QL).
  6. See Dick Sobsey, *Violence and Abuse in the Lives of People With Disabilities: The End of Silent Acceptance?* (Baltimore: Paul H Brookes, 1994) at 75-79.

that what has been done to them is a criminal offence, or they may not understand the nature and consequences of sexual activity.<sup>7</sup>

If a woman with a mental disability can navigate the system to the point at which charges are laid, her challenges continue. Women with mental disabilities are subjected to sexual assault at a considerably higher rate than other women.<sup>8</sup> One would expect, therefore, that the criminal-justice system would have developed means to ensure that this group of complainants could have their stories heard and acknowledged in court. In fact, these are among the hardest sexual assaults to prosecute, and the system itself erects barriers to women with mental disabilities accessing the criminal justice system. Complainants are expected to have fully functioning memories, to be able to answer detailed questions about minute

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7. See *R v McPherson* (1999), WL 556 (BCSC). For further discussion, see Michelle McCarthy, *Sexuality and Women with Learning Disabilities* (London: Jessica Kingsley, 1999) at 120-201.
  8. It is difficult to find current empirical studies on the incidence of sexual assault against women with mental disabilities as many rely on the 1990s work cited here. See e.g. Erin Barger et al, "Sexual Assault Prevention for Women With Intellectual Disabilities: A Critical Review of the Evidence" (2009) 47:4 *Intellectual & Developmental Disabilities* 249. The leading studies from the 1990s include Roeher Institute, *No More Victims: A Manual to Guide Counselors and Social Workers In Addressing the Sexual Abuse of People with a Mental Handicap* (North York: Roeher Institute, 1992) at 25; Roeher Institute, *Harm's Way: The Many Faces of Violence and Abuse Against Persons with Disabilities* (North York: Roeher Institute, 1995) at 9; Sobsey, *supra* note 6 at 69; McCarthy, *supra* note 7 at 29-30. However, more recent work shows that the incidence of sexual assault against women with mental disabilities is significantly higher than the incidence against women without this label. See Sandra L Martin et al, "Physical and Sexual Assault of Women with Disabilities" (2006) 12:9 *Violence Against Women* 823 at 829. In their North Carolina study, Martin et al found that the incidence of sexual assault against women with cognitive disabilities was approximately three times that of women without disabilities. Some studies do not distinguish between mental and physical disability. For example, in a Canadian study, persons with disabilities were generally found to be three times more likely to be subjected to sexual violence at the hands of their intimate partners. See Douglas A Brownridge "Partner Violence Against Women With Disabilities: Prevalence, Risk, and Explanations" (2006) 12:9 *Violence Against Women* 805. Brownridge also found that the difference in rates of violence between women with disabilities and those without has increased since the late 1990s (*ibid* at 812). The General Social Survey on victimization conducted by Statistics Canada excludes respondents living in institutions, thereby excluding some people with mental disabilities. It also combines mental and physical disabilities. The most recent report from the Canadian Centre for Justice Statistics also finds, based on this data, that persons with disabilities report sexual assault at a rate of more than twice that of respondents without disabilities. See Canada, Canadian Centre for Justice Statistics, *Criminal Victimization and Health: A Profile of Victimization Among Persons with Activity Limitations or Other Health Problems*, (Ottawa: Statistics Canada, 2009) at 8. While the definition of persons with "activity limitations" included those with mental disabilities, the exclusion of persons in institutions suggests that this number is artificially low.

details of the offence (often phrased in complex language), and, perhaps most importantly, to be able to stand up to a robust cross-examination, which may include leading questions, allegations of falsification, and repeated questioning likely to confuse any witness.

We have argued elsewhere that the criminal justice system in Canada was not designed with the needs and interests of this group of witnesses in mind.<sup>9</sup> We have contended that, given the high rate of sexual assault faced by women with mental disabilities, they should be considered paradigmatic rather than exceptional victims. In this article we build on these premises by considering existing discriminatory barriers that prevent the evidence of these women from being fully heard in court. In particular, we consider the challenges posed by traditional methods of cross-examination for witnesses with cognitive, developmental, or intellectual disabilities that affect their ability to recall, process, and communicate information. We describe the kinds of accommodations currently available for these witnesses and examine whether they ought to be expanded or modified to better respond to these concerns.<sup>10</sup> We also examine some of the subtler and more pervasive barriers to complainants with mental disabilities, focusing on the process of examining a witness and, particularly, subjecting her to cross-examination. One of our goals is to reconsider whether cross-examination, thought to be at the heart of the adversarial system, can be conducted in a way that respects both the right of the accused to a fair trial and the complainant's right to sex equality.

In this article, we argue that current practices distort rather than facilitate the truth-seeking function of a trial for this group of witnesses. Subjecting a woman with a mental disability to a rigorous cross-examination with repeated and leading questions, in a manner that is confrontational and often accusatory, is probably the worst way to get her story heard in court. It is likely to unfairly undermine her credibility and to result in unjustified acquittals, or to result in prosecutors deciding not to pursue a case knowing that the complainant could not withstand these practices. Even direct examination can fail to fairly bring out

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9. Janine Benedet & Isabel Grant, "Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity, and Mistaken Belief" (2007) 52:2 McGill LJ 243 [Benedet & Grant, "Consent, Capacity, and Mistaken Belief"].
  10. There is also the very real possibility that a witness with mental disabilities will not be permitted to testify at all, because he or she is considered to be incapable of testifying, whether under oath or on a promise to tell the truth. We consider this question briefly below in Part I, and in more detail in a forthcoming article, "More Than An Empty Gesture: Enabling Women with Mental Disabilities to Testify On a Promise to Tell the Truth" (2013) CJWL [Benedet & Grant, "More Than an Empty Gesture"].

the complainant's story if the questioning is not conducted with the necessary attention to the complainant's particular abilities.

The *Criminal Code* (the *Code*)<sup>11</sup> provides some accommodations that are designed to make the process less traumatic for a complainant with a mental disability rather than to facilitate the actual questioning process itself. Few accommodations go to the heart of what makes these cases so difficult to prosecute, namely our legal system's assumptions about the truth-seeking function of a trial and how it is best accomplished. We examine these existing accommodations and conclude that, while they are important, they do not speak to the problems we have identified. We suggest that victim-support persons, sometimes called intermediaries, be used as a matter of course, and that they be allowed to assist the witness in understanding the questions posed and in communicating her answers. This would be an important step towards meaningful support for this group of witnesses. We also suggest that judges be given explicit legislative authority to intervene to disallow questions that are inappropriate based on the particular witness's abilities. However, we will also argue that the attitudes about the credibility and the sexuality of women with mental disabilities must also be changed in order to truly allow this group of witnesses to have their stories heard fully in court.

#### *A Note on Gender*

While our work focuses on women, who make up the large majority of sexual-assault victims, many of our concerns about the criminal trial apply in similar fashion to men with mental disabilities who complain of sexual assault and who are called as witnesses by the Crown.<sup>12</sup> We have not excluded these cases and, where we speak generally of "witnesses" with mental disabilities, our analysis applies to both male and female victims. We focus on women with mental disabilities because there are particular gendered assumptions about sexual assault that intersect with the general systemic deficiencies in cases involving complainants with mental disabilities.<sup>13</sup>

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11. *Criminal Code*, RSC 1985, c C-46 [*Code*].

12. Indeed, one can infer that accused persons who have mental disabilities and who decide to take the stand in their own defence may experience some of the same challenges. This subject is beyond the scope of this article but deserves further attention. This article suggests that enhancing support for all witnesses with mental disabilities may benefit the criminal trial process as a whole.

13. A recent report by Statistics Canada indicates that 97 per cent of accused persons in sexual assault crimes are male, while rates of sexual victimization range from 4 to 5.6 times greater for females than for males. Canada, Canadian Centre for Justice Statistics,



The myths and stereotypes that have been applied to women's complaints of sexual assault are well-documented in case law and scholarship.<sup>14</sup> These attitudes have led some to blame women for their own victimization,<sup>15</sup> to distinguish victims according to their perceived chastity (measured along racial lines, among other factors),<sup>16</sup> and to construct scripts for how a 'real' rape victim would behave that may bear little relation to actual victim behaviour.<sup>17</sup> 'Real' rape has been understood to involve a stranger who uses overwhelming force to subdue his struggling victim. Sexual assaults between acquaintances or intimates that involve the consumption of alcohol or drugs or that involve delayed disclosure risk being considered unfounded or less serious.<sup>18</sup> Underlying these myths is the

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*Sexual Assault in Canada 2004 and 2007* (Ottawa: Statistics Canada, 2008) at 11-12. See also Statistics Canada, "The nature of sexual offences," online: <<http://www.statcan.gc.ca/pub/85f0033m/2008019/findings-resultats/nature-eng.htm>>. Thus in this paper, when discussing sexual assault specifically, we utilize language that reflects the gendered reality of sexual assault, referring to the accused as "he" and the complainant as "she."

14. *R v Seaboyer*, [1991] 2 SCR 577, 83 DLR (4th) 193 [*Seaboyer*]; Elizabeth A Sheehy, "Causation, Common Sense, and the Common Law: Replacing Unexamined Assumptions with What We Know About Male Violence Against Women or from *Jane Doe* to *Bonnie Mooney*" (2006) 17:1 CJWL 87; Elizabeth Sheehy, "From Women's Duty to Resist to Men's Duty to Ask: How Far Have We Come?" (2000) 20:3 Can Woman Stud 98.
15. Justice L'Heureux-Dubé makes this point generally about sexual assault against girls and young women in *R v L(DO)*, [1993] 4 SCR 419 at para 29, 88 Man R (2d) 241 [*L(DO)*].
16. William H George & Lorraine J Martinez, "Victim Blaming in Rape: Effects of Victim and Perpetrator Race, Type of Rape, and Participant Racism" (2002) 26:2 Psychol Of Women Q 110; Roxanne A Donovan, "To Blame or Not To Blame: Influences of Target Race and Observer Sex on Rape Blame Attribution" (2007) 22:6 J Interpers Violence 722; Regina A Schuller & Marc A Klippenstine, "The Impact of Complainant Sexual History Evidence on Jurors' Decisions: Considerations From a Psychological Perspective" (2004) 10:3 Psychol, Pub Pol'y & L 321.
17. See e.g. *R v JAA*, 2011 SCC 17, [2011] 1 SCR 628; *R v Butts*, 2012 ONCA 24 at para 24, 91 CR (6th) 424 (finding relevant evidence that complainant had consensual sex with someone two hours after the alleged sexual assault). See also Lise Gotell, "Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women" (2008) 41:4 Akron LR 865.
18. For example, in February 2011, a Manitoba judge on the Court of Queen's Bench handed down an unusually lenient sentence for a conviction of sexual assault, noting that the female victim was wearing a tube top with no bra and lots of makeup and saying she sent signals that "sex was in the air." *R v Rhodes*, 2011 MBCA 98, 98 WCB (2d) 329. See media coverage in, for instance, Mike McIntyre, "No woman asks to be raped: Victim slams judge's decision," *National Post* (25 February 2011), online: <<http://news.nationalpost.com/2011/02/25/no-woman-asks-to-be-raped-victim-slams-judges-decision/>>. For evidence of this tendency in the context of marital sexual assault, see Ruthy Lazar "Negotiating Sex: The Legal Construction of Consent in Cases of Wife Rape in Ontario, Canada" (2010) 22:2 CJWL 329. For evidence of similar reasoning in applications for exemption from sex

persistent belief that women falsify complaints of sexual assault out of spite, fantasy, or shame.<sup>19</sup>

While many of these myths have been recognized as such by courts and commentators,<sup>20</sup> this does not mean that their influence over collective consciousness has been erased in the span of a few decades.<sup>21</sup> In particular, merely being told that these are stereotypes may do little to dislodge these myths if they are not replaced by credible contrary information about victim behaviour and the prevalence of sexual assaults in various settings.

Women with mental disabilities are affected by these myths and stereotypes in ways that are sex-specific. We have written elsewhere that the history of public policy responses to what was usually called “mental retardation” has been one in which women with mental disabilities have simultaneously been treated as asexual, in that they have been denied sexual health information and discouraged from sexual activity, and as hypersexual, in that they are understood as motivated by animal instincts and eager for indiscriminate sexual contact.<sup>22</sup> The myth of hypersexuality is particularly potent in the sexual assault context, as it can be used to portray the victim as the true sexual aggressor.<sup>23</sup> More subtly, there can be a belief that women with mental disabilities are ‘lucky’ when a man displays sexual interest in them and that they ought to be grateful for that attention.<sup>24</sup> This conclusion

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offender registration, see Janine Benedet, “A Victim-Centred Evaluation of the Federal Sex Offender Registry” (2012) 37:2 Queen’s LJ 437.

19. See, for instance, Dickson J’s (as he then was) comments in *R v Pappajohn*, [1980] 2 SCR 120 at 149, 111 DLR (3d) 1. Also see Philip NS Rumney, “False Allegations of Rape” (2006) 65:1 Cambridge LJ 125 (noting influence of false allegation claims on evidentiary rules and unreliability of measurements of false allegations).
20. See Heureux-Dubé J’s comments in *Seaboyer*, *supra* note 14 at 649-56, 659-61.
21. Eliana Suarez & Tahany M Gadalla, “Stop Blaming the Victim: A Meta-Analysis on Rape Myths” (2010) 25:11 J Interpers Violence 2010 (considering demographic factors associated with rape myth acceptance); Melanie Randall, “Sexual Assault Law, Credibility, and ‘Ideal Victims’: Consent, Resistance, and Victim Blaming” (2010) 22:2 CJWL 397.
22. Benedet & Grant, “Consent, Capacity, and Mistaken Belief,” *supra* note 9.
23. For example, in *R v Alsadi* the trial judge acquitted the accused on the basis that a civilly committed woman with a mental disability had initiated the sexual activity with the accused, a uniformed security guard in the hospital. The British Columbia Court of Appeal ordered a new trial on the basis of errors made by the trial judge with respect to whether the accused abused a position of trust or authority. 2012 BCCA 183, [2012] BCJ No 826 (QL) [*Alsadi*].
24. Personal conversation with Delphine Raymond, Collectif Feministe Contre Le Viol, 31 October 2011. See also Sherene Razack, “From Consent to Responsibility, from Pity to Respect: Subtexts in Cases of Sexual Violence Involving Girls and Women with Developmental Disabilities” (1994) 19:4 Law & Soc Inquiry 891; Carol A Howland & Diana H Rintala, “Dating Behaviors of Women with Physical Disabilities” (2001) 19:1 Sexuality and Disability 41.

may be even stronger where the woman has other characteristics that make her less ‘attractive’ in conventional terms, such as obesity or physical disabilities.<sup>25</sup>

Other gendered assumptions apply with respect to male victims, who are also typically targeted by male abusers.<sup>26</sup> In particular, we recognize that sexual assaults against male victims are also acts of gendered violence that raise different stereotypes affecting the assessment of the witness on the stand. Most sexual assaults against men are committed by other men in a social context of homophobia where it is not automatically assumed that the complainant must have consented to the same-sex sexual activity. While this may sometimes work to the benefit of the male complainant’s credibility, the assumption that a non-consenting victim will show vigorous physical resistance may be stronger for male victims than for women.<sup>27</sup>

People of both sexes with mental disabilities also face other stereotypes affecting credibility. It is often assumed that they cannot distinguish fact from fiction,<sup>28</sup> that they are more likely to make up stories around sexual assault,<sup>29</sup> or that they are more likely to lie because they do not appreciate the solemnity and consequences of judicial proceedings.<sup>30</sup> These assumptions take on a gendered dimension because of historical attitudes that treated women as less credible than men, and sexually active women as further diminished in credibility.<sup>31</sup>

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25. Sarah M Buel, “Fifty Obstacles to Leaving, *a.k.a.*, Why Abuse Victims Stay” (1999) 28:10 Colorado Lawyer 19 at 21-22.
  26. Michael Scarce, *Male on Male Rape: The Hidden Toll Of Stigma and Shame* (New York: Insight Books, 1997); Philip NS Rumney & Natalia Hanley, “The mythology of male rape: Social attitudes and law enforcement,” in Clare McGlynn & Vanessa E Munro, eds, *Rethinking Rape Law: National, International and Comparative Perspectives* (New York: Routledge, 2010) 294; Catherine A MacKinnon, *Oncale v Sundowner Offshore Services, Inc.*, 96–568, Amici Curiae Brief in Support of Petitioner (1997) 8:1 UCLA Women’s LJ 9.
  27. See *e.g.* *R v RJS* (1994), 123 Nfld & PEIR 317, 25 WCB (2d) 275 (PEISC).
  28. See, for example, the reference to confusing truth with “wishful thinking” by the dissent of Justice Binnie in *R v DAI*, 2012 SCC 5 at para 145, 280 CCC (3d) 127 [DAI], rev’g 2010 ONCA 133, 73 CR (6th) 50.
  29. *R v Dinardo*, 2008 SCC 24, [2008] 1 SCR 788, rev’g 2007 QCCA 287, 75 WCB (2d) 657 [Dinardo].
  30. *R v Farley* (1995), 23 OR (3d) 445 (CA), 40 CR (4th) 190 [Farley]; *R v Lanthier*, 36 WCB (2d) 189, [1997] OJ No 4238 (Ct J).
  31. Kathy Mack, “Continuing Barriers to Women’s Credibility: A Feminist Perspective on the Proof Process” (1993) 4:2 Crim LF 327; Rosemary C Hunter, “Gender in Evidence: Masculine Norms vs. Feminist Reforms” (1996) 19 Harv Women’s LJ 127; Ann Althouse, “The Lying Woman, the Devious Prostitute, and Other Stories from the Evidence Casebook” (1994) 88:3 Nw UL Rev 914; Christine Boyle, “Reasonable doubt in credibility contests: sexual assault and sexual equality” (2009) 13:4 Int’l J Evidence and Proof 269 at 284-91.

Thus women with mental disabilities who complain of sexual assault face an especially difficult challenge.

## I. CROSS-EXAMINATION AS A SYSTEMIC BARRIER

What is it that makes sexual assault cases involving witnesses with mental disabilities particularly hard to prosecute successfully? We contend, in particular, that the experience of cross-examination as presently permitted deters valid complaints from being made, causes prosecutors not to proceed with cases that are otherwise sound, and results in unjustified acquittals. None of the accommodations presently available to complainants is meant to be responsive to these problems.

A common law criminal trial seeks to uncover the truth about a series of events within the complex structures that the legal system has developed to ensure a fair trial. In the context of sexual assault prosecutions where the complainant has a mental disability, we argue that the importance of truth seeking can be obscured by our unquestioning adherence to rules that may in fact hinder rather than facilitate the pursuit of truth. We are not suggesting that aggressive cross-examination of sexual assault complainants is only a problem for complainants with mental disabilities, but rather that the problem is particularly acute for women who have cognitive limitations that are easy for defence counsel to exploit.

There is no doubt that cross-examination is seen as a fundamental part of our common law adversarial system. Historically speaking, the right to cross-examine, along with many other facets of common law criminal justice systems, developed in pursuit of a fair trial process that would make meaningful the presumption of innocence and the requirement of proof beyond a reasonable doubt. Karen Muller and Mark Tait<sup>32</sup> summarize the traditionally accepted purposes of cross-examination as follows:

The purposes of cross-examination are twofold: Firstly, to elicit information that is favourable to the party conducting the cross-examination. Secondly, to cast doubt upon the accuracy of the evidence given in chief by the witness. This would mean that in the course of cross-examination only questions concerning facts relevant to the issue or to the witness's credibility may be asked.<sup>33</sup>

There is a fundamental belief that cross-examination, and the techniques employed in it, are tools for discovering the truth and assessing credibility. According to Wigmore,

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32. David Carson, "Regulating the Cross-Examination of Children" (delivered at the BS&L Network Conference, 2 April 1995) at 4, cited in Karen Muller & Mark Tait, "The Child Witness and the Accused's Right to Cross-Examination" (1997) J South African L 519 at 520.
33. Muller & Tait, *ibid* at 519.

it is “The greatest legal engine ever invented for the discovery of the truth” and leaves not a moment’s doubt in the mind of any lawyer as to its effectiveness ...<sup>34</sup>

Yet the idea that cross-examination as currently understood is fundamental to a fair trial is often accepted as true without adequate scrutiny. In particular, endorsements of the power of cross-examination rarely distinguish between contradictions that reveal the truth and those that obscure it. A witness may make a mistake or get confused on cross-examination, but this does not necessarily mean she is lying.<sup>35</sup> As David Carson explains, this witness may simply “be very poor at being a witness rather than ... a truth-teller.”<sup>36</sup> The court is not actually assisted in its truth-finding role when lawyers rely upon questioning techniques that demonstrate only that a particular witness is fallible under cross-examination.

Muller and Tait further argue that cross-examination can impede the truth-seeking function:

Cross-examination is often regarded as a feature of an adversarial system which enables it to claim superiority over the inquisitorial system. However, adherents of the latter system have often accused the adversarial system of giving an “exaggerated efficiency” to the right of questioning. They argue that cross-examination bends and distorts the evidence by means of suggestive questions and that justice cannot prevail in an atmosphere where witnesses are influenced and badgered.<sup>37</sup>

There is a parallel here with the problem of false confessions by accused persons that are at the heart of many of our wrongful convictions. It was once widely assumed that no suspect would falsely implicate him or herself in a serious crime. Yet we now know that police tactics like pretending to have found damning evidence of guilt, or repeatedly questioning the suspect for many hours without respite, may produce exactly such a confession—one that impedes rather than assists in getting at the ‘truth.’ This may be particularly true where the goal of the interrogation is to get a confession rather than to gather useful evidence. In a similar fashion, it is quite possible that witnesses will falsely contradict themselves out of confusion, fatigue, or fear under cross-examination, and this possibility is heightened where the witness has a cognitive or intellectual disability.

In this article, we do not consider cases in which there is a challenge by the defence to the competence of the complainant to give evidence in court.<sup>38</sup>

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34. *Ibid* at 520.

35. *Ibid*.

36. *Ibid*.

37. François Gorphe, *La Critique du Témoignage* (Paris: Dalloz, 1927) at 90, cited in *ibid* at 521.

38. We consider this problem in detail in a forthcoming article. “More Than An Empty Gesture,” *supra* note 10.

We note, however, that this remains a possibility in sexual assault cases involving complainants with mental disabilities. Until recently, the questioning on the *voir dire* could itself be problematic for complainants, who were faced with abstract questions about the meaning of “truth” and “promises” or inquiries into their religious education.<sup>39</sup> The Supreme Court of Canada has recently addressed this issue in *R v DAI*,<sup>40</sup> where a majority held that a competency inquiry should determine only whether the witness can communicate the evidence and whether she can make a promise to tell the truth. It is thus no longer acceptable to ask the witness questions about her ability to understand the promise or about her understanding of the meaning of truth and lies. However, the precise contours of what questions will be acceptable will need further clarification after *DAI*.<sup>41</sup>

In the following Part of this article we demonstrate that our traditional methods of cross-examination may be contrary to the truth-seeking function of the criminal trial, particularly for witnesses with mental disabilities. We begin by summarizing the social science evidence on the subject, which suggests that cross-examination serves to obfuscate rather than elucidate the truth for many witnesses with mental disabilities. We then move on to illustrate some of these problems by examining sexual assault prosecutions involving complainants with mental disabilities.

## II. SOCIAL SCIENCE EVIDENCE ON CROSS-EXAMINATION OF WITNESSES WITH MENTAL DISABILITIES

The available social science literature supports the view that witnesses with mental disabilities are able to give accurate, useful, and truthful evidence that furthers the truth-seeking process, but that their ability to do so is greatly hindered by current practices of cross-examination. Of course, this is a very heterogeneous group of complainants, and it would be wrong to assume that every complainant, regardless of her disability, has precisely the same difficulties or needs precisely the same accommodation.<sup>42</sup> It is also important to note that the various social

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39. This was done at the competency hearing held in *DAI*. *Supra* note 28 at para 84.

40. *Ibid.*

41. For example, we argue that it is not acceptable after *DAI* to ask a witness: “If I said my sweater is red (when it is in fact blue) would I be lying?” Rather, we will suggest in a forthcoming article that the proper question is: “Is my sweater red?” The latter question sufficiently tests the complainant’s ability to communicate facts and her ability to disagree with the questioner about the colour of the sweater. See Benedet & Grant, “More Than an Empty Gesture,” *supra* note 10.

42. Louise Ellison, “The mosaic art?: cross-examination and the vulnerable witness” (2001) 21:3

science studies involve different populations and use different language to describe the group studied; thus it is difficult to generalize from any one study to persons with mental disabilities across the board.<sup>43</sup> However, some findings are consistent enough that it is possible to draw some generalizations from the literature that allow us to challenge some of our existing practices.

We know that some witnesses with mental disabilities may have “broad deficits in memory encoding, storage and retrieval.”<sup>44</sup> Some witnesses will only have trouble with long-term memory, while others will have difficulty even with short-term memory.<sup>45</sup> We also know that most witnesses with intellectual disabilities do best with questions that are open ended rather than closed.<sup>46</sup> For example, a witness with an intellectual disability might respond better to a question like “tell us what happened on the day of the picnic” than to a question like “what colour was the accused’s shirt on the day of the picnic?” In fact, when given open-ended questions, witnesses with intellectual disabilities have a high accuracy rate, although they may not give as much information as witnesses without disabilities.<sup>47</sup> Mark R. Kebbell et al described the reasons witnesses with intellectual disabilities typically do better with open-ended questions:

The influence of question type can be understood in terms of the different cognitive and social demands of different question formats. For more open questions, the task is to tell the interviewer what the witness can remember relying on their own memory. For more specific, closed questions, the task changes to one of providing the interviewer with what he or she wants the witness to remember that the witness may not be able to recall. As witnesses with intellectual disabilities spontaneously recall fewer details concerning events, it is unsurprising that they provide less accurate answers to specific questions and tend to confabulate.<sup>48</sup>

Leading questions can be particularly problematic. Studies have shown that this occurs because persons with certain intellectual disabilities are more suggestible and may try to please the questioner more than other witnesses. There may also be a tendency for a witness with a mental disability to answer “yes” to a question

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LS 353 at 354-55.

43. Depending on when and where the study was conducted, some of that language is no longer considered appropriate to describe people with disabilities. For the purposes of accuracy, in describing the studies, we use the language of the authors in the studies.

44. Mark R Kebbell, Christopher Hatton & Shane D Johnson, “Witnesses with intellectual disabilities in court: What questions are asked and what influence do they have?” (2004) 9:1 *Legal & Criminological Psychology* 23 at 23 [Kebbell, Hatton & Johnson].

45. *Harper*, *supra* note 5.

46. Kebbell, Hatton & Johnson, *supra* note 44.

47. *Ibid* at 24.

48. *Ibid* [citations omitted].

when the question is not understood. This may be due to the witness's cognitive ability, a desire to please the interviewer,<sup>49</sup> or because persons with intellectual disabilities may be quite skilled at giving the impression that they understand a question by agreeing with the questioner.<sup>50</sup> Some data suggest that when a question is repeated, a person with an intellectual disability will be more likely to change her answer on the basis that the questioner must have asked again because he or she did not like the first answer.<sup>51</sup> Persons with disabilities may also have learned that acquiescing makes sense if they believe that authority figures are more likely than they are to know the right answer.<sup>52</sup>

The manipulation of language may lie at the heart of cross-examination. However, as Louise Ellison notes:

Language has been identified as the 'primary manipulative tool' at the disposal of lawyers in court. In the context of cross-examination, it is a tool often abused to gain advantage over immature and comparably unsophisticated language users.<sup>53</sup>

Thus witnesses whose disabilities interfere with their capacity to comprehend and manipulate language are at a stark disadvantage in the criminal justice process.

The use of complex language and questions may be particularly confusing on cross-examination, which often evolves "on the fly" as the answers are received. Kebbell et al summarize their findings on this topic:

... [C]hildren and adults from the general population were much less accurate when questions were asked using the kind of language favoured by lawyers (e.g. negatives, double-negatives, and multi-part questions) than when asked questions in everyday language. Negatives are questions that involve the word 'not' (e.g. 'Did the man not tell you to be quiet?'). Double-negatives involve the word 'not' twice (e.g. 'Did John not say that he would not go to the shops?'). Multi-part questions involve two or more parts that have different answers (e.g. 'At eleven o'clock were you in the bar? Was John at the garage?'). Experimental evidence shows that children and adults frequently give 'don't know' or incorrect responses to over-complex questions even though they know the answer to the question if it is phrased simply. In non-court situations, these factors appear to be particularly problematic for people with intellectual disabilities.<sup>54</sup>

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49. Carol K Sigelman et al, "When in Doubt Say Yes: Acquiescence in Interviews with Mentally Retarded Persons" (1981) 19:2 *Mental Retardation* 53.

50. Kebbell, Hatton & Johnson, *supra* note 44 at 32.

51. Ellison, *supra* note 42 at 362.

52. *Ibid* at 359.

53. *Ibid* at 354-55 [citations omitted].

54. Kebbell, Hatton & Johnson, *supra* note 44 at 25 [citations omitted]. Kebbell et al explain that "[c]onfabulation involves replacing gaps in memory with distorted or fabricated material. Suggestibility is providing the answer believed to be required by the questioner,



Nancy W. Perry et al also found that the closed questions typical of cross-examination may decrease the accuracy of eyewitness testimony in general, and that this tendency was especially pronounced in the case of eyewitnesses with intellectual disabilities. Further, individuals with intellectual disabilities may be especially vulnerable to the heavily suggestive leading questions (for instance, “He went to the bathroom after he got a coffee, yes?”) often used in cross-examination. The increased suggestibility of witnesses with intellectual disabilities can be unjustly used to argue that they are lying or have an unreliable memory when in fact it may mean that different types of questions are better suited to trigger a memory and that some types of details (such as dates and times) are less likely to be remembered.<sup>55</sup> When a witness hesitates or expresses confusion, this can be misinterpreted as a lack of honesty or credibility, even when the details that cannot be recalled are not important to the allegations at issue.

Cross-examination involves a high level of leading questions for all witnesses, not just those with mental disabilities.<sup>56</sup> However, Kebbell et al found that witnesses with mental disabilities were more likely to be asked questions repeatedly, which the authors hypothesize may be due to an attempt to exploit suggestibility or merely because the witness did not appear to understand.<sup>57</sup> A witness with a mental disability may also be less likely to provide additional information<sup>58</sup> or ask for clarification if they do not understand the question.

The authors discuss the implications of these findings for witnesses with intellectual disabilities:

Witnesses with intellectual disabilities were significantly more likely than general population witnesses to agree with the force of a leading question, less likely to disagree with the force of the question, and less likely to provide additional information, particularly in cross-examination. Lawyers are likely to deliberately exploit the characteristics of leading questions. As Evans (1995) points out in his trial manual, leading questions are a powerful tool – both because they allow the lawyer to formulate events as he or she sees them, and because they constrain the witness to reply in a certain way. The implication of these results is that cross examination as

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which may involve simple compliance with the questioner’s demands or incorporation of the suggestion into recollection. Acquiescence concerns the fact that people are more likely to say ‘yes’ than ‘no’ to questions which require a yes or no response.” “People with learning disabilities as witnesses in court: What questions should lawyers ask?” (2001) 29:3 *British Journal of Learning Disabilities* 98 at 99 [citations omitted].

55. Nancy W Perry et al, “When Lawyers Question Children: Is Justice Served?” (1995) 19:6 *Law & Human Behavior* 609, as cited in Kebbell, Hatton & Johnson *supra* note 44.

56. *Ibid* at 30.

57. *Ibid*.

58. *Ibid* at 32.

currently practised is particularly likely to lead to inaccurate testimony from witnesses with intellectual disabilities.<sup>59</sup>

It may be that witnesses with mental disabilities are more suggestible only when they do not understand a particular question or know the answer to it. At least one study has found that they may be as steadfast as other witnesses when they are sure about their answers.<sup>60</sup> The authors conclude that new approaches are needed to facilitate the process of questioning witnesses with disabilities, as is education for lawyers and judges on these issues.

Strategically-framed questions are not the only means by which defence lawyers assert control over a witness in cross-examination. Other commonly used tactics can also be intimidating to witnesses:

Vigorous objection, warnings, reminders, repetition of questions and the insistence of proper answers are all devices used to attain and maintain editorial control. These preventative techniques are not only 'abrupt, frustrating and degrading to the witness', but they also dramatically reduce scope for clarification, explanation and elucidation. There is, for example, no provision, as in everyday conversations, for a witness 'to express their concerns, their possible lack of comprehension about the questions, or to negotiate in any way the content or direction of the line of questioning.'<sup>61</sup>

Given these difficulties with cross-examination in general and certain types of questions in particular, one might expect that judges would intervene to assist witnesses with mental disabilities by requiring lawyers to simplify their questions for such witnesses or at least to avoid very complex syntax, double negatives, and the like. In fact, one English study found otherwise. The authors had hypothesized that judicial intervention would be higher for witnesses with learning disabilities than for other witnesses.<sup>62</sup> As the authors explain:

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59. *Ibid.*

60. Mark Keibell & Chris Hatton, "People With Mental Retardation as Witnesses in Court: A Review" (1999) 37:3 *Mental Retardation* 179.

61. Mark Brennan & Roslin E Brennan, *Strange Language – child victims under cross examination* (Wagga Wagga: Riverina Murray Institute of Higher Education, 1988), cited in Ellison, *supra* note 42 at 359-60.

62. Catriona ME O'Kelly et al, "Judicial intervention in court cases involving witnesses with and without learning disabilities" (2003) 8:2 *Legal & Criminological Psychology* 229. However, the authors concluded, there were "no significant differences in the number of interventions made by the judge with witnesses depending on whether the witness had learning disabilities or was from the general population ... ." This is perhaps surprising, given the generally poorer cognitive, memory, and linguistic skills of people with learning disabilities (*ibid* at 237).

Potentially, the judge can have a tremendous impact on lawyers' questioning styles and, consequently, witness accuracy. The function of controlling the trial is largely a matter of judicial discretion. In this respect, judges should act as impartial "umpires" and have the discretion to be flexible enough to tailor their power to individual cases. Judges are obliged to have regard both to the need to ensure a fair trial for the defendant and to the reasonable interests of other parties to the court process, including witnesses.<sup>63</sup>

Contrary to expectations, the authors found no difference in the rate of intervention by judges for witnesses with intellectual disabilities as compared to other witnesses. Judges did not intervene any more often to assist witnesses with intellectual disabilities in making sure they understood the question or how they could reply; the same was true of interventions to call for breaks or to require lawyers to simplify their questions.<sup>64</sup> The study also concluded that lawyers were not changing their type of questioning for witnesses with intellectual disabilities; rather they just continued their usual practices without any accommodation.<sup>65</sup>

We are not suggesting that cross-examination is always problematic nor that direct examination never is. An unprepared Crown counsel or one who has not made efforts to understand the abilities of a particular complainant may also create confusion by using the wrong types of questions or overly complex linguistic devices. Similarly, in theory, defence counsel could be sensitive to the needs and abilities of the complainant, although this appears to be more challenging in practice given that cross-examination is more likely than examination-in-chief to involve leading, negative, and closed questioning and that defence counsel will have less familiarity with the complainant.<sup>66</sup> The point is that all participants in the process—including Crown counsel, defence counsel, and judge—must be attuned to the needs and abilities of the witness.

This social science evidence should at least give us pause about relying on the traditional methods of cross-examination for complainants with mental disabilities. If we really are trying to get at the truth, we should be asking questions that facilitate that objective rather than interfere with it. The right to cross-examination surely does not extend to the right to take advantage of vulnerable witnesses' difficulties. The purpose of cross-examination should be to test and challenge the veracity of evidence, not to confuse and badger the witness into saying things that conflict with what he or she may have said in direct examination.

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63. *Ibid* at 230 [citations omitted].

64. *Ibid* at 237.

65. *Ibid* at 230. See also Kebbell, Hatton & Johnson, *supra* note 44 at 30.

66. *Ibid* at 25, 32.

### III. THE CASE LAW—SOME EXAMPLES

The case law provides examples of sexual assault cases in which cross-examination and even direct examination appear to confuse the complainant and lead to doubts about her testimony that may not have been warranted. In this Part, we provide four examples of cases in which the complainant appeared confused about the questions being asked and where her credibility was undermined or challenged as a result. These examples demonstrate that these questions can create difficulties through cross-examination, direct-examination, and even when appellate courts try to give meaning to apparent problems in a witness's testimony. Our fourth example, drawn from New Zealand, demonstrates how clear intervention by a trial judge can mitigate the confusion caused to a witness by inappropriate questioning.

In *R v DT*,<sup>67</sup> the 33-year-old complainant had numerous physical and mental disabilities that required her use of a wheelchair and left her with hearing, vision, and speech impairments. She testified through American Sign Language interpreters and answered questions through “hand gestures, head nods, facial expressions and audible sounds.”<sup>68</sup> Beginning when she was in her early twenties, there were a number of incidents of sexual activity with the accused, her “favorite uncle.”<sup>69</sup> Her evidence was that she had asked him to stop on several occasions and did not want the sexual activity to take place. The defence argued that the complainant consented. The trial judge expressed doubt that the complainant understood much of the sexual activity involved.<sup>70</sup> He nonetheless found that non-consent had not been proven beyond a reasonable doubt because “[s]ome of the complainant's answers regarding whether she consented to the sexual activity on the date of the alleged offence and any sexual activity that occurred prior to that date are ambiguous.”<sup>71</sup> In direct examination, the complainant's evidence could not have been labelled unclear; she indicated on several occasions that the accused hurt her, that the sexual activity made her “crazy,”<sup>72</sup> that she wanted it to stop,<sup>73</sup> and

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67. 2011 ONCJ 213, 85 CR (6th) 195 [*DT*].

68. *Ibid* at para 1.

69. *Ibid* at para 47.

70. Notwithstanding this finding the trial judge made no inquiry into capacity to consent. See Benedet & Grant, “A Situational Approach to Incapacity and Mental Disability in Sexual Assault Law” (2012) 43:1 Ottawa L Rev [forthcoming].

71. *DT*, *supra* note 67 at para 41.

72. *Ibid* at para 3.

73. *Ibid* at para 6.

that she “didn’t want it.”<sup>74</sup> Nonetheless, during cross-examination she appears to have become confused following leading questions where answers were suggested to her and several questions were asked in the negative. The trial judge summarized the evidence, given through the interpreters, as follows:

She was questioned about the incident involving the accused putting his penis in her vagina. It was put to her that she asked him to touch her with his penis. She answered “not sure, I’m not sure”. It was put to her that when he was touching her boobs she said she didn’t want it anymore, counsel putting the emphasis on the word “anymore”. She answered she “wanted it to stop, but it kept going, kept going and I said stop, I don’t want”. It was put to her that in the past she allowed the accused to touch her sexually. Her response was “no, no, no, no”. When she was asked again about the arm wrestling incident she answered “he touched my breasts and vagina”. It was suggested by defence counsel that she didn’t say no that time. Answer: “Right”. She was questioned about the incidents at the camp. Counsel suggested that the accused would touch her. Answer: “yes that’s right, in the boat”. It was put to her that she never told anyone that was happening. Answer, “I didn’t that’s right”. It was suggested that she never told anyone she didn’t want to go back. She replied “No”.

Defence counsel asked about the accused coming over to her house. He suggested that she would let him in when he came back. She agreed. Then counsel asked about August 8, 2009. Defence counsel suggested before he touched her breasts the accused asked her if he could. She answered “don’t remember, I’m confused”. Defence suggested the accused put his hand on her waist and then asked if he could touch her there. Answer: “Oh that’s right I’m sorry”. Defence went on to ask if he did touch her down there. She replied “yes”. Defence suggested the accused touched her because she said yes. Answer: “yes that’s right”.

She was asked about the bathroom incident. Defence asked her if the accused stimulated her in the bathroom. Answer: “yep”. It was suggested that there was lots of water. Answer: “Yeah right”. She was asked if that scared her. Answer: “yes, yes, right”. It was suggested she took her wet shorts and clothes and put them in hamper. She answered “yes”. Counsel suggested that they sat down and had pop together for 15 minutes after that. Answer: “yeah”. It was suggested that she asked the accused what happened with the water in the bathroom. Answer: “don’t know”. Counsel then suggested the accused told her he had to leave and gave her a hug and left. Answer: “yes”.<sup>75</sup>

It is the ambiguity in this testimony that led the trial judge to have a reasonable doubt about non-consent. In our view, these paragraphs make it clear both that

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74. *Ibid.*

75. *Ibid* at paras 6-8.

the complainant did not want sexual activity with the accused to take place and that she was having some difficulty with the questions asked on cross-examination. She acknowledged being confused, but it appears that no steps were taken to remedy that confusion and the questions kept coming.

The Crown asked the court to look at “the totality of the evidence given by the complainant.”<sup>76</sup> He argued that it was “clear from the entirety of the complainant’s evidence that she misunderstood the questions”<sup>77</sup> surrounding the incident involving the touching with the accused’s penis. Intervention by the trial judge in assisting her to understand what was being asked could well have clarified this ambiguity. Recognition that she was, by her own admission, becoming confused on cross-examination should have triggered some assistance for this witness.<sup>78</sup> Instead, she was left to “sink or swim” in the hands of defence counsel. The only acknowledgement of this problem is the Crown’s submission after the fact that any ambiguities ought to be given less weight because of her disabilities. This is an unacceptable response to an obvious problem with the criminal trial process. As we will discuss below, this would have been an ideal case for someone who could have assisted the complainant in understanding the questions being asked and ensuring her responses were understood.

*Dinardo*<sup>79</sup> is another example of a case in which the complainant was clearly confused by questioning. This case demonstrates how an appellate court decontextualized and, in our view, unnecessarily problematized testimony by a complainant with a mental disability. In *Dinardo* the complainant was a 22-year-old woman with a mild mental disability and Tourette’s syndrome. The accused was a cab driver who was driving the complainant to an activity centre. On her arrival there she immediately recounted to the staff that the cab driver had touched her breasts and put his finger inside her vagina.<sup>80</sup>

On the *voir dire* to determine whether the complainant was competent to testify, she said that she understood what it meant to tell the truth, that she knew what lying meant, and that it was wrong. However, on cross-examination she was asked whether she ever invented stories. She testified that she did sometimes

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76. *Ibid* at para 25.

77. *Ibid* at para 25.

78. The trial judge went on to find that the accused had abused a position of trust or authority and therefore that there was no valid consent, a finding we applaud. However we are deeply troubled that the trial judge initially was not able to make a finding of non-consent on the evidence before him. The decision is currently under appeal. *Ibid* at para 48.

79. *Dinardo*, *supra* note 29.

80. *Ibid* at para 3.

invent stories “to be funny”<sup>81</sup>—as an example she said that she sometimes said silly things such as that a friend “kicked ... [her] in the ass.”<sup>82</sup> The defence position was that she could be made to say almost anything. The following passage is taken from cross-examination by defence counsel followed by redirect examination by the Crown.

Q This story you told Ms. Thériault on arriving at the Maison des Jeunes, is it possible that it, that the story was made up?

A Yes.

Q Why did you make the story up?

A Well, I made it up to say he touched me.

Q You made it up to say he touched you?

A Yes.

Q Why? You didn't like him?

A No, I didn't like him.

Q Why?

A I was afraid of him.

Q You were afraid of him. Because he had tattoos?

A Yes.

10 In re-examination, the complainant testified as follows (A.R., at pp. 181-82):

[TRANSLATION]

Q [L]isten to me carefully. He said: “Is it possible that you made up the story you told Nicole Thériault?”

A Oh, I didn't make it up.

Q Okay. But you said yes. Do you know ... what do you mean by that? What is ... explain that, about that.

A I didn't make it up.

Q Okay. Your sentence, it was: “I made it up—after what he said to you—to say he touched me”.

A Yes.

Q What do you mean by that?

A He touched me.

Q Okay. But when you told her that, told Nicole Thériault that, was it made up? Had you made it up?

A No.

11 At the end of the complainant's testimony, the trial judge asked the following questions: (A.R., at p. 182):

[TRANSLATION]

BY THE COURT

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81. *Ibid* at para 7.

82. *Ibid*.

- Q I have one, X. Can you tell me what it means to “make something up”?  
 A I don’t know.  
 Q You don’t know, eh? So when you answered earlier that, that you made it up, you don’t know what that means?  
 A No.<sup>83</sup>

The trial judge believed the complainant’s allegations and convicted the accused. The Court ordered a new trial on the basis that the trial judge had given inadequate reasons for disbelieving the accused.

It was clear that the Court was troubled by the complainant’s “contradictory answers”<sup>84</sup> and made no attempt to put them in the context of her disability. Her statement that she sometimes made up stories was translated by the Court into her admitting that she “had a tendency to lie.”<sup>85</sup> She admitted that she made up stories to be funny, but this acknowledgement was blown out of proportion and distorted. In fact, her example of making a joking allegation about a friend shows a great degree of candour on the part of this witness and might cause one to have more confidence in her evidence than a bold claim that she had never lied.

In cross-examination, the complainant appeared to say that she made up the allegations but she quickly corrected herself on redirect and clarification by the trial judge. One could not read this testimony and be left with any reasonable doubt that she ever admitted to fabricating the allegations. The trial judge zeroed in on the reason for the apparent contradiction, which was that the witness was not clear on what “making up” meant.<sup>86</sup> She remained steadfast in her claim and the trial judge believed her.

Our third example demonstrates how judges sometimes make assumptions about a witness’s level of functioning and what that should mean about her testimony. Inconsistencies in testimony may be portrayed as evidence of consent rather than as difficulties with the examination of the witness. Further, this case illustrates how inappropriate questioning by the Crown can also create difficulties for a complainant with a mental disability.

In *R v Prince*,<sup>87</sup> the complainant lived in the same apartment building as the accused. The accused and the complainant had met casually in the hall and, on two occasions, he entered her apartment under an excuse and initiated sexual activity with her. On the first occasion, he sat with her on the couch, kissed her,

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83. *Ibid* at paras 9-11.

84. *Ibid* at para 9.

85. *Ibid* at para 17.

86. The trial was conducted in French, and the actual word at issue was *inventer*. *Ibid* at para 72.

87. 2008 MBQB 241, 232 Man R (2d) 281 [*Prince*].



and touched her breasts. On the second occasion, the subject of the charge, he began by kissing her on the couch and ultimately led her to the bedroom where sexual intercourse took place.<sup>88</sup> The trial judge accepted the defence's argument that the complainant had consented because she had not said no and did not tell the accused to stop, although there was evidence that he had told the police that she probably had said no at some point, but that he could not remember. He had also admitted to police that he may have been using her. The accused did know that the complainant had a mental disability and had not asked her if she wanted the sexual activity to take place.<sup>89</sup>

An expert witness testified that the complainant was likely to give the answers she thought the questioner wanted to hear. The complainant contradicted herself in cross-examination and re-direct and did not recognize the inconsistencies in her testimony.<sup>90</sup> The trial judge stressed how well she did as a witness and how her performance on the stand appeared to surpass her reported mental age of 6-8 years, but then concluded that "[t]he significant contradictions throughout her evidence on critical facts make her testimony unreliable."<sup>91</sup> The testimony of the accused was also inconsistent and contradictory, yet the trial judge relied on his contradictions as hallmarks of a "ring of truth."<sup>92</sup>

This analysis puts the complainant in an impossible position. It is as if she did not appear disabled enough to need assistance in her testimony yet the problems with that testimony, which may well have been affected by her disabilities, led to a reasonable doubt on the question of consent. Instead of making an inquiry into whether the contradictions could have been reconciled with some support during questioning, or whether they were a result of the complainant's high level of suggestibility, the trial judge instead said that the contradictions led her to a finding of consent:

During the Crown's re-examination J.I. contradicted most of what she had said in cross examination and essentially reverted to her first story. She left the impression that she wanted to be friendly and accommodating and would agree, in what appeared to be a very sincere way, with whatever was suggested to her. At no time in direct examination, cross examination, or redirect examination did she seem uncertain about what she said. Neither did it appear that she did not understand the questions posed. Throughout her answers were straightforward and appropriate, but

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88. *Ibid* at paras 7-10.

89. *Ibid* at paras 36, 38-39.

90. *Ibid* at paras 18, 28.

91. *Ibid* at paras 59-60.

92. *Ibid* at para 61.

it was evident that she had no appreciation of the stark contradictions in what she was saying or their impact on the issues before the court.<sup>93</sup>

The judge indicates that the witness appeared to understand all the questions yet admits that she did not recognize the blatant inconsistencies in her answers. Surely the fact that a witness with a mental disability does not even grasp that she has contradicted herself should have raised concerns during the trial and not simply be invoked to find her evidence unreliable at the stage of the verdict. While contradictions may be a product of being unable to keep one's false story straight, they may also be the product of confusion with the language chosen by the questioner, with the point of the question, or with the type of questions utilized.

Even in direct examination, the Crown asked questions that required the complainant to analyze why the sexual acts were taking place and to offer an opinion on what the accused was thinking— tasks that required a high level of abstract thinking and that contributed little to the truth-seeking function:

In direct examination . . . [s]he said as they were having sex she told Mr. Prince it hurt "a bit", but he still did it anyway. She said she felt "nervous" and "scared" and that she told him she did not want to have sex. When asked whether she thought he knew this she said, "I think so, yeah." When asked why all of this was happening and what she thought about it, she said she did not really know. When asked to identify where he touched her, she did and said she was not comfortable at the time, but then said she never told Mr. Prince this. However, when asked what she thought should happen as a result of these events, she later said, "I think he should get charged for what he did."

Again, and still in direct examination, J.I. said she thought Mr. Prince knew she did not want these things to happen. When asked why she thought this, she said, "I think he knew I did not think it would happen." When pressed about what she meant by this she said, "He would not know it," apparently referring to whether he knew she did not want to have sex, but she could not explain why. When it was put to her again by Crown counsel about whether Mr. Prince would know she was unwilling, she said emphatically, "He would not" and when again asked why, she said she did not really know.<sup>94</sup>

Reading this summary, the complainant appears to be most confused by questions asking her to speculate on the accused's appreciation of her lack of consent. This is hardly surprising, since she is being asked to consider how her own behaviour and demeanour might have appeared to the accused and, in turn, how that would have affected his state of mind. Any answer she could have given

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93. *Ibid* at para 18.

94. *Prince, supra* note 87 at paras 11-12.

to such a question would have been speculative and would have required a high level of lateral and abstract thinking to process and understand.

*R v Poutawa*,<sup>95</sup> a New Zealand case, is instructive insofar as it demonstrates not only that the cross-examination of the complainant was clearly confusing to her, but also that intervention by the trial judge was able to help clarify the questioning. The complainant was an adult woman with an intellectual disability. She was described by the judge as having “a reading age of an eight to nine year old, and the verbal recognition skills about five and a half to six year old. She had daily visits from caregivers who assisted her with medication, grocery shopping and financial arrangements.”<sup>96</sup> The accused was her neighbour who had visited the complainant and asked her to call a cab for him. On the way out he kissed her and later that day returned to her apartment after having been drinking. At some point he told her that he wanted to have sex with her and led her into the bedroom. The complainant indicated that she was scared of what he might do if she did not comply. He then had intercourse with her, followed by anal intercourse; the complainant then indicated that she did not want this and he stopped. At trial he was convicted on two counts of rape.

He appealed his conviction, arguing among other things that the assistance the trial judge gave the complainant showed partiality to the Crown. In particular, the trial judge interrupted cross-examination of the complainant four times to ask defence counsel to rephrase questions. At one point, the judge asked the complainant if she would like a break. The accused also contended that the trial judge addressed the complainant in a “soft and reassuring way ... [that] would have engendered sympathy for her and prejudice against Mr Poutawa.”<sup>97</sup>

The trial judge had relied on section 85 of the *Evidence Act 2006*,<sup>98</sup> which allows a judge to intervene where he or she considers a question “improper, unfair, misleading, needlessly repetitive, or expressed in language that is too complicated for the witness to understand,” with mental disability being one of the factors the judge should consider before doing so.<sup>99</sup> The Court of Appeal upheld the convictions, noting that defence counsel was using complex questions to make quite a sophisticated point and that it was appropriate for the trial judge to intervene to clarify them for the complainant. The following excerpt is taken from the cross-examination:

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95. *R v Poutawa*, [2009] NZCA 482 [*Poutawa*].

96. *Ibid* at para 2.

97. *Ibid* at para 8.

98. (NZ), 2006/69 (NZLII).

99. *Ibid* at s 85(1)-(2).

Q — I'm suggesting to you that he must have told you that or how else would u [*sic*] have known that's what he wanted.

A — He told me he wanted sex.

JUDGE

Q — Where were you standing when he told you he wanted sex?

A — In the bedroom.

CROSS EXAMINATION: MR BULLOCK — CONTINUED

Q — That can't be right [M] if you knew he wanted to have sex when you followed him to the bedroom, do you agree with that? Do you understand what I am asking you [M]?

A — Yes.

Q — You do, okay.

JUDGE

Q — [M] did you know before you went into the bedroom that he wanted to have sex?

A — No I didn't.

CROSS EXAMINATION: MR BULLOCK — CONTINUED

Q — Why did you say then that you followed him to the bedroom because he wanted to have sex. Why when you were asked why you followed him to the bedroom did you answer, "He wanted to have sex with me".

A — I don't know. I'm all confused. I'm not sure.

Q — It's because he'd said that before you went down there and that's why you knew when you followed him.

JUDGE

Q — Did he say it to you before you went down to the bedroom?

A — When I went in the bedroom.

CROSS EXAMINATION: MR BULLOCK — CONTINUED

Q — So [M] if [Mr Poutawa] said that he had told you he wanted to have sex with you out by the back door you would disagree with that?

A — Yes.<sup>100</sup>

In agreeing with the trial judge's interventions, the Court of Appeal noted:

To the extent there was any disruption to the flow of the cross-examination, that was necessary to ensure that questions were put fairly to the complainant. Mr Poutawa cannot claim then, to have been unfairly prejudiced by these interruptions.<sup>101</sup>

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100. *Poutawa*, *supra* note 95 at para 15.

101. *Ibid* at paras 17-18.

Canadian judges already have the authority to intervene in questioning that is confusing or inappropriate for a particular witness, even in the absence of the kind of legislation invoked here.<sup>102</sup> We argue below, however, that specific legislative direction would be helpful in this context and that laws from New Zealand and Australia should be considered as possible models for Canada.

#### IV. EXISTING TESTIMONIAL ACCOMMODATIONS FOR WITNESSES WITH MENTAL DISABILITIES

What supports currently exist in Canadian law to deal with complainants who face the kinds of difficulties in testifying we have identified? In the case of sexual assault prosecutions, specific accommodations for certain witnesses were formalized in the *Code* beginning in 1987.<sup>103</sup> These include the possibility of testifying behind a screen that blocks the complainant's view of the accused, the use of a support person, and the possibility of testifying from another location by video link. While these accommodations are quite modest, all of them have been challenged at various times as undermining the right of the accused to a fair trial.<sup>104</sup> These accommodations should not necessarily be seen as exhausting the scope of accommodations that a trial judge can order under her inherent authority to control the trial process, although we have been unable to find Canadian cases

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102. The Canadian appellate case law considering challenges to interventions by trial judges deals with issues other than intervention on behalf a witness who is confused or suggestible. The cases do affirm, however, that trial judges have the authority to ask questions of witnesses to clear up ambiguities and such interventions only attract appellate review when they appear to compromise the fairness of the trial. See *R v Brouillard*, [1985] 1 SCR 39, 17 CCC (3d) 193; *R v Valley* (1986), 26 CCC (3d) 207, 13 OAC 89 (CA); *R v Hamilton*, 2011 ONCA 399, 271 CCC (3d) 208.

103. *An Act to amend the Criminal Code and the Canada Evidence Act*, SC 1987, c 24, s 14. For further amendments, see *An Act to amend certain Acts with respect to persons with disabilities*, SC 1992, c 21, s 9.

104. The following challenges, all of which involved the accommodation of child witnesses and not witnesses with mental disabilities, were all ultimately unsuccessful. *R v Levogiannis*, [1993] 4 SCR 475, 25 CR (4th) 325 [*Levogiannis*] (involving a *Charter* challenge to the use of screen under previous legislation); *R v JZS*, 2008 BCCA 401, 61 CR (6th) 282 [*JZS*] (involving a *Charter* challenge to the use of screens under current legislation); *R v CNH*, 2006 BCPC 119, 140 CRR (2d) 213 (involving a *Charter* challenge to testifying through CCTV and in the presence of a support person); *R v R (ME)* (1989), 49 CCC (3d) 475, 71 CR (3d) 113 (NSCA) (involving a *Charter* challenge to testifying over CCTV); *L(DO)*, *supra* note 15 (involving a *Charter* challenge to section 715.1 of the *Criminal Code*, which allows video-taped evidence to be introduced).

in which trial judges provided additional accommodations for sexual assault complainants with mental disabilities.

Most of the existing accommodations in the *Code* were designed to deal with child victims of sexual assault; however, they also apply to witnesses with disabilities, a linkage that we have challenged elsewhere as problematic.<sup>105</sup> It is difficult to find case law dealing with these provisions in the context of people with disabilities. A recent study concluded:

The vulnerable adult witness provisions have been the subject of very little reported case law, and the survey indicates that there have been relatively few applications for the use of testimonial aids for adults. When applications are made for the use of testimonial aids for adults, they are generally successful, but they are less likely to be granted than applications for child witnesses.<sup>106</sup>

Some of the more extensive case law involving child witnesses is nonetheless helpful. This is not because adults with disabilities are analogous to children, nor because they necessarily have the same accommodation needs. Rather, these child-witness cases demonstrate that the courts have consistently held that these accommodations do not infringe on the fair trial rights of the accused.<sup>107</sup> While the complainants in these cases are very different, the implications for the fair trial rights of an accused are similar; for example, where a screen is used for a child complainant as where it is used for an adult complainant with a disability.

#### A. SUPPORT PERSONS

Section 486.1 of the *Code* allows for a support person to be provided to a witness who is under eighteen or who has a disability. That support person is someone of the witness's choice, although they cannot themselves be a witness in the proceedings.<sup>108</sup> Most cases suggest that the role of the support person is just to be there and not to interact with the witness or the lawyer in any way. Section 486.1(5) provides that the judge may order that the support person and the witness not communicate with each other while the witness testifies.<sup>109</sup> Subsection (6)

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105. Benedet & Grant, "Consent, Capacity, and Mistaken Belief," *supra* note 9. In fact, many of these accommodations would probably assist most sexual assault complainants regardless of their age or abilities.

106. Canadian Research Institute for Law and the Family, *Testimonial Support Provisions for Children and Vulnerable Adults (Bill C-2): Case Law Review and Perceptions of the Judiciary* by Nicholas Bala et al (Ottawa: Department of Justice, 2011) at x.

107. *Prince*, *supra* note 87.

108. Although there may be some discretion to allow a witness to be a support person where they have already testified.

109. See e.g. *R v Brown*, 2010 SKQB 420 at para 7, 368 Sask R 69 [*Brown*]; *R v MF*, 2010

prevents any adverse inference from being drawn from the fact that an order was or was not made under this section. For a witness under eighteen or a person with a mental or physical disability, the provision is worded in presumptive language such that if the Crown applies for a support person, the judge shall order it unless he or she is of the opinion that the order would “interfere with the proper administration of justice.”<sup>110</sup>

When dealing with witnesses with disabilities, the most common support persons requested are victim services support workers, although in some cases the witness may ask a friend or family member.<sup>111</sup> In our view, the presence of a support person is a good start in terms of making a complainant with a disability feel secure enough to tell her story. However, as we will discuss below, it does nothing to facilitate the communication of her evidence, particularly in the face of what can sometimes be confusing and difficult questions on the witness stand.

## B. TESTIMONY OUTSIDE THE COURTROOM OR BEHIND A SCREEN

Section 486.2(1) provides that a witness who is able to communicate evidence but has difficulty doing so because of her physical or mental disability may testify outside the courtroom or behind a screen or other device that would allow the witness not to see the accused. Again, the order must be granted on application by the Crown unless the judge determines that it would “interfere with the proper administration of justice.”<sup>112</sup> This section also provides that a witness shall not testify outside the courtroom unless arrangements are made for the accused, the judge, and the jury to watch the testimony by means of closed circuit television, and that the accused is permitted to communicate with counsel while watching the testimony.

Prior to 2006,<sup>113</sup> both of these provisions required a pre-testimonial inquiry to determine whether the testimonial aid was necessary to obtain a full and candid

ONSC 4018 at para 97, [2010] OJ no 3578; *R v Aikoriogie*, 2004 ONCJ 96 at para 8, 62 WCB (2d) 118; *R v JW*, 2007 BCPC 81 at para 2, [2007] BCWLD 4522. The case law demonstrates that this order is commonly made but not discussed.

110. In the version of section 486.1(2) in force prior to 2007, the order was discretionary; the subsection then stated that the judge will only order a support person if he or she is of the opinion that “the order is necessary to obtain a full and candid account from the witness of the acts complained of.” *Code, supra* note 11, s 486.1(2).

111. Bala et al, *supra* note 106 at 52.

112. Subsection 2 provides for use of these devices with other witnesses if it is necessary to obtain a full and candid account from the witness of the acts complained of. *Code, supra* note 11, ss 486.1(1)-(2).

113. *An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, SC 2005, c 32.

account of the acts at issue. Under the current legislation, it is not necessary to establish a need for these accommodations; the court is mandated to grant them unless they interfere with the proper administration of justice. However, the right to these aids for witnesses with mental disabilities is not absolute, as it is for children. The Crown must first establish that the witness will have difficulty communicating her evidence because of a disability.

The situation is further complicated by the permissive provision applicable to all witnesses under section 486.2(2). It allows for an application to testify behind a screen or to testify outside the courtroom for any witness if it is necessary to obtain a full and candid account from that witness, echoing the language of the provision as it existed for vulnerable witnesses prior to 2006. The criteria for determining whether to allow either measure are the same as those for allowing a support person. One of those criteria is whether the witness has a mental or physical disability, which might suggest that disability is not automatically grounds for accommodation under section 486.2(1).

While we applaud efforts to extend the possibility of this accommodation to other witnesses, this overlap is problematic because we believe the presumptive language of section 486.2(1) should prevail for all complainants with mental disabilities. The question of whether the complainant will have difficulty giving her evidence is often impossible to determine until she has actually testified.

Courts have disagreed as to whether judges retain the discretion to determine which of these means of testifying will be used. For example, in British Columbia, the courts have held that the judge must order the type of accommodation sought by the Crown under this section, and that the judge has no discretion to depart from the Crown's request unless it would interfere with the administration of justice.<sup>114</sup> In Manitoba, by contrast, the Court of Queen's Bench has suggested that it is within the discretion of the trial judge to control the trial process and that he or she has the authority to choose between the types of accommodation provided for in this section.<sup>115</sup> This latter approach appears contrary to the legislative intent in making the section automatic. Allowing the judge discretion to choose the method of accommodation will inevitably result in inquiries into which type of accommodation is necessary to get a full and candid account from the witness—precisely the type of assessment these amendments were designed to avoid.

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114. *R v SBT*, 2008 BCSC 711 at paras 36-40, 232 CCC (3d) 115.

115. *R v CTL*, 2009 MBQB 266 at paras 16-19, 246 Man R (2d) 170. In *Brown*, the Saskatchewan Queen's Bench preferred this approach over that taken by the BCSC. *Supra* note 109.



In order to understand the minimal intrusion on the trial process resulting from the use of a screen, it is important to stress how a screen operates. The screen merely blocks the complainant's view of the accused. The accused and other participants in the courtroom still have a full view of the witness. As Justice L'Heureux-Dubé described in *Levogiannis*,

The screen does not obstruct the view of the complainant by the accused, his counsel, the Crown or the judge. All are present in court. The evidence is given and the trial is conducted in the usual manner, including cross-examination. As a result, the issue before this Court, is, simply put, whether a witness's obstructed view of an accused, infringes the rights of such accused under s. 7 or 11(d) of the Charter.<sup>116</sup>

Thus, all that is 'lost' is the complainant's view of the accused. Only if we assume that the accused has a right to intimidate the complainant by his presence or facial expressions can this measure be seen as a violation of his rights. As one judge put it, there is no right on the part of the accused to glower at a complainant.<sup>117</sup>

In *Levogiannis*<sup>118</sup> the predecessor section, which vested the trial judge with the discretion to order a screen, was upheld against a constitutional challenge in the context of a sexual assault prosecution involving a child. The Court, per Justice L'Heureux-Dubé, held that the section did not infringe on the accused's fair trial rights because its purpose was to facilitate the truth-seeking function by enabling the complainant to be able to give her evidence more fully and candidly.

In *JZS*,<sup>119</sup> the accused challenged the constitutionality of the current provisions. The defence argued that the provisions' presumptive nature distinguished them from the legislation that was upheld in *Levogiannis*. The *Charter* challenge focused on the fact that the new provisions had shifted the process for determining the type of testimonial aids necessary from the court to the Crown. The accused was convicted of sexually assaulting his son and daughter, who were eight and eleven by the time of the trial. Both children testified behind a screen on a promise to tell the truth. It was argued that using the screen and testifying on a promise to

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116. *Levogiannis*, *supra* note 104 at para 17.

117. *R v Accused (T488)*, [1989] 1 NZLR 660 (CA). McMullin J, concurring, cited in *R v Levogiannis* (1990), 1 OR (3d) 351 at para 35, 62 CCC (3d) 59 (CA). McMullin J said, "Confrontation in the sense of being in the presence of one's accusers is one thing; but confrontation merely to afford the opportunity to glower at and thereby intimidate witnesses is another. The sight of an accused person from whose actions a child has lived in terror in the past is very likely to intimidate that child in the giving of evidence about that accused, particularly when the evidence involves him in incidents of the most intimate and degrading kind."

118. *Levogiannis*, *supra* note 104 at paras 43-44.

119. *JZS*, *supra* note 104 at para 14.

tell the truth rather than under oath violated the fair trial rights of the accused under sections 7 and 11(d) of the *Charter*.<sup>120</sup>

The British Columbia Court of Appeal rejected the argument that the presumptive nature of the legislation justified a departure from *Levogiannis*. The court noted that Justice L'Heureux-Dubé had framed the issue as “simply put, whether a witness’ obstructed view of an accused, infringes the rights of such accused under section 7 or 11(d) of the *Charter*.”<sup>121</sup> Relying on a decision of the Nova Scotia Court of Appeal, Justice Smith held:

The right to face one’s accusers is not in this day and age to be taken in the literal sense. In my opinion, it is simply the right of an accused person to be present in court, to hear the case against him and to make answer and defence to it.<sup>122</sup>

A physical screen can be awkward to use and may in itself be intimidating for some complainants, although one English study suggests that complainants generally appreciate the screen and would prefer to use one if given the opportunity.<sup>123</sup>

The *Code* also provides the possibility of testimony by live video link, which affords the complainant more freedom and could permit him or her to testify from familiar or comfortable surroundings.<sup>124</sup> This method too has its drawbacks. Even if the equipment functions perfectly, it may be beneficial for the judge and jury to have the immediacy that comes from being in the same room as the complainant. Also, the video-link room may itself seem isolated and unfriendly.<sup>125</sup>

### C. VIDEO RECORDINGS

The screen, the support person, and the video link are all measures designed to increase the psychological comfort of the witness in the hope that he or she will be better able to testify to the events at issue. None of these accommodations alter

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120. *Ibid.*

121. *Charter*, *supra* note 4, ss 7, 11(d).

122. *Ibid* at para 34, citing *R v R (ME)* (1989), 49 CCC (3d) 475 at 484, 90 NSR (2d) 439 (CA).

123. UK, Home Office Research, *Are special measures working? Evidence from surveys of vulnerable and intimidated witnesses* (Research Study 283) (London: Home Office, 2004), online: <<http://library.npia.police.uk/docs/hors/hors283.pdf>> at 71, 79. In particular, twenty-two of twenty-seven witnesses who used screens considered them to be helpful.

124. For example, in *Harper*, the complainant testified from the long term care facility in which she resided. She suffered from a severe form of multiple sclerosis, which severely affected her memory and rendered her unable to walk. After medical evidence indicated she would function better in familiar surroundings and with her care worker present, the trial judge ordered that she be permitted to testify from her home. *Supra* note 5 at para 6.

125. Allison Riding, “The Crown Court Witness Service: Little Help in the Witness Box” (1999) 38:4 *Howard Journal of Criminal Justice* 411 at 413.

the requirement that the complainant give live evidence in the trial. There is one accommodation in the *Code*, however, that can be used to limit the requirement for such testimony. Section 715.2 provides that if a witness with a disability is able to communicate evidence but has difficulty doing so because of this disability, a video recording made within a reasonable time after the alleged offence in which he or she describes the acts complained of is admissible if he or she adopts the contents of the video. The trial judge has the discretion not to allow the admission of the video if such admission would interfere with the proper administration of justice.<sup>126</sup> The limitation of this option is that the witness is still subject to cross-examination on the contents of the video.

Most judges are willing to utilize these provisions to admit video-recorded evidence. One problem, however, may be the weight given by judges (or juries) to such evidence, especially where the complainant can no longer clearly remember the events and may contradict some of the earlier statements made in her trial testimony. This problem may be particularly acute where the complainant has serious memory deficits and may not be able to confirm in court that the statements made are true (because he or she does not remember making the recording).<sup>127</sup> In *R v CCF*,<sup>128</sup> the Court held that the witness must remember “giving the statement and ... [must testify] that she was then attempting to be honest and truthful.”<sup>129</sup> It is not necessary that the witness have a present recollection of the events in question because this requirement can make cross-examination difficult if the witness does not recall the events fully. Section 715.2 has been upheld (in the context of child witnesses) by a unanimous Court as not violating the accused’s right to a fair trial.<sup>130</sup> The Court held that there is no right to have cross-examination occur contemporaneously with the giving of evidence.

Most of the accommodations discussed thus far are relatively noncontroversial<sup>131</sup> and provide some support for people with disabilities testifying in sexual assault cases. It is surprising, therefore, that we do not see more applications for their use in this context. The more important point, however, is that they appear to be fairly modest in their impact. Certainly they do not change anything about the

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126. The *Code* provides other measures to facilitate the participation of sexual assault complainants, such as publication bans and provisions not allowing the accused to personally cross-examine the complainant, but none of these are targeted at the specific needs of witnesses with disabilities and we do not discuss them here.

127. *Harper*, *supra* note 5 at para 55.

128. [1997] 3 SCR 1183, 154 DLR (4th) 13.

129. *Ibid* at para 36.

130. *L(DO)*, *supra* note 15.

131. Bala et al, *supra* note 106 at 61.

questioning that the witness must undergo, with the exception of shortening the examination-in-chief where a video-recorded statement is used.

These accommodations appear to focus on making a complainant more comfortable in the witness box either by, for example, blocking her view of the accused, having a familiar person with him or her, or by allowing her evidence to be admitted through a video link rather than live testimony. Such accommodations assume that if we can make a witness more comfortable with her surroundings, we will get better testimony from him or her. However, in our view, these provisions do little to actually address the problems we see in the process of getting that evidence from the complainant, either through direct examination or cross-examination, and hence do not deal adequately with the problems we are addressing in this article. It is important to make all complainants as comfortable as possible when testifying in a sexual assault trial. But, particularly with this group of witnesses, such measures fall short of ensuring that their testimony is acquired in a fair manner that contributes to, rather than hinders, the truth-seeking process.

#### D. INTERMEDIARIES FOR WITNESSES WITH MENTAL DISABILITIES

There is no one simple accommodation that will address the difficulties with cross-examination. Judges and lawyers need to be educated about the kinds of assistance witnesses may need, and assumptions about the inviolability of unfettered cross-examination need to be confronted. It is insufficient to try and factor in the effects of the complainant's disability only at the final stage of weighing the evidence as a way of offsetting problems with the examination and cross-examination of the witness. Instead, trial judges must do what they can to understand the challenges that the particular witness is facing and insist that questions be broken down into simple parts and that negative and closed leading questions be avoided where they are likely to produce reflexive compliance on the part of the witness.

The problem with relying entirely on trial judges, however, is that they may not have any detailed understanding of the challenges faced by a particular complainant. While they can be expected to try to control overly complex questions, they may not be aware that a particular question is confusing to the witness.

Clearly, more personalized support is needed. We argue that the use of intermediaries would be a significant positive development in Canada for sexual assault complainants with mental disabilities. These are trained individuals who can assist a witness both in understanding the questions asked and in communicating her answers. They can also help to prepare the judge and lawyers in advance of the trial to understand the abilities of the particular complainant so that difficulties can be anticipated and avoided. Intermediaries go beyond the role of

interpreters in that they can suggest what kinds of questions are confusing and how questions might be asked in a simpler or more understandable way. Intermediaries could be used effectively at all stages of the process, from police questioning to testifying at trial.

England has the most developed system of intermediaries that we have found. In England and Wales, the *Youth Justice and Evidence Act 1999*<sup>132</sup> authorizes the use of “special measures” to assist vulnerable witnesses.<sup>133</sup> Witnesses may be eligible for special measures because of their age, mental capacity, fear, or distress. Section 16<sup>134</sup> sets out which witnesses are eligible for special measures on grounds of age or incapacity. Witnesses with mental disabilities are eligible, although special measures are only available for such witnesses if the “quality” of their evidence (as defined in section 16(5)) would be diminished by reason of the disability.<sup>135</sup>

One special measure available to section 16 witnesses is the use of an intermediary, set out in section 29.<sup>136</sup> The intermediary may be quite active in the proceedings, “translating” both the questions put to the witness and the witness’ answers while also explaining the questions or responses where necessary.

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132. (UK), c 23 [*YJEA 1999*].

133. *Ibid* at s 23-30.

134. This section has been in force since 24 July 2002. *The Youth Justice and Criminal Evidence Act 1999 (Commencement No. 7) Order 2002*, SI 2002/1739.

135. *YJEA 1999*, *supra* note 132, s 16 (1)-(2), (5). The relevant parts of section 16 read as follows:

16. Witnesses eligible for assistance on grounds of age or incapacity.

- (1) For the purposes of this Chapter a witness in criminal proceedings (other than the accused) is eligible for assistance by virtue of this section—
  - (a) if under the age of 17 at the time of the hearing; or
  - (b) if the court considers that the quality of evidence given by the witness is likely to be diminished by reason of any circumstances falling within subsection (2).
- (2) The circumstances falling within this subsection are—
  - (a) that the witness—
    - (i) suffers from mental disorder within the meaning of the Mental Health Act 1983, or
    - (ii) otherwise has a significant impairment of intelligence and social functioning;
  - (b) that the witness has a physical disability or is suffering from a physical disorder.

....

- (5) In this Chapter references to the quality of a witness’s evidence are to its quality in terms of completeness, coherence and accuracy; and for this purpose “coherence” refers to a witness’s ability in giving evidence to give answers which address the questions put to the witness and can be understood both individually and collectively.

136. *YJEA 1999*, *supra* note 132, s 29.

The purpose of an intermediary is set out in section 29(2):

The function of an intermediary is to communicate—

- (a) to the witness, questions put to the witness, and
- (b) to any person asking such questions, the answers given by the witness in reply to them,

and to explain such questions or answers so far as necessary to enable them to be understood by the witness or person in question.<sup>137</sup>

In the 2007 review of intermediary pilot projects,<sup>138</sup> the authors described how intermediaries work in a court setting. While the authors do not provide any citations for the cases they describe, the report is instructive.

During cross-examination, intermediaries can flag non-comprehension of questions. Judges can instruct the witness to alert the intermediary when a question in cross-examination is not understood. Intermediaries can also intervene of their own accord. The following exchange is illustrative:

Defence barrister: When you went to speak to the police ladies, do you know why you went to speak to them?

Intermediary: Your Honour, L finds it difficult to understand ‘Why’ questions.

Judge: Defence counsel will re-phrase the question.

Defence barrister: You remember going to the police station?<sup>139</sup>

Intermediaries prepare reports to familiarize the court with the particular witness’ needs. As a result of an intermediary’s report, at least one judge was able to intervene when questions became too complex.

[A] defence barrister asked a witness whether the money he received weekly was more or less than a certain sum. The judge referred to the report to emphasise that the witness was likely to have difficulty with comparative questions.<sup>140</sup>

Another defence lawyer stated that he or she used the intermediary report when preparing an appropriate cross-examination.<sup>141</sup> However, not all advocates were willing to modify their style of questioning:

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137. *Ibid* at s 29(2).

138. Joyce Plotnikoff & Richard Woolfson, *The ‘Go-Between’: evaluation of intermediary pathfinder projects* (Lexicon Limited, 2007), online: <[http://www.lexiconlimited.co.uk/PDF%20files/Intermediaries\\_study\\_report.pdf](http://www.lexiconlimited.co.uk/PDF%20files/Intermediaries_study_report.pdf)>.

139. *Ibid* at 53.

140. *Ibid*.

141. *Ibid* at 44.

[A]dvocates' ability to modify their style of questioning varied widely. Some adapted their questions in light of information in intermediary reports. Three defence barristers were particularly careful to speak slowly, mostly use short questions, follow a chronological order and 'signpost' a change of subject. Some problematic approaches persisted despite interventions by the intermediary and sometimes by the judge or magistrates. Nearly all intermediary interventions concerning questions were seen as appropriate. However, views of appropriateness were closely linked to the ability of advocates to take account of intermediary guidance. Where advocates did not modify their questioning style the rate of intermediary interventions tended to increase, in a few instances exposing the intermediary to comments from advocates that they had intervened too often. Some prosecution advocates, however, thought that intermediaries had not intervened enough.<sup>142</sup>

The mere presence of an intermediary may help slow things down for a complainant with a mental disability, which can increase her ability to understand the questioning in cross-examination.<sup>143</sup>

In some cases, pre-trial hearings can be used to lay the ground rules for questioning and the timing of judges' interventions. For example:

The judge set the following ground rules: when the advocate asked a question, the intermediary would say when there was a problem; the advocate would then re-phrase; if the intermediary said there was still a problem, the intermediary would be entitled, with the judge's authority, to put the substance of the question in a simpler way; and the intermediary would intervene in answers only on request.<sup>144</sup>

Laying ground rules in this fashion can both reduce misunderstanding of the role of the intermediary during cross-examination and respond to the criticism that the intermediary may improperly cross the line into the role of advocate for the complainant. This is less likely to happen where the intermediary can voice concerns with the questions *before* the witness attempts to answer them, rather than after the fact on the basis that the answer given was unsatisfactory.

Intermediaries are also able to re-phrase questions.<sup>145</sup> Although this often worked well, there were some concerns with specific interventions. Some magistrates were concerned that "interventions by intermediaries could 'lead to a danger of advocates losing the flow and of misinterpretation.'"<sup>146</sup> While these are important concerns, it appears that the introduction of intermediaries has been a promising

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142. *Ibid* at 52.

143. *Ibid* at 53.

144. *Ibid* at 45.

145. *Ibid* at 53.

146. *Ibid* at 54.

development for criminal trials in England and Wales and that the intention is to continue with their use.

Intermediaries are not only useful in courtroom settings but also in police interviews of witnesses. They can assist in having the complainant's story understood at the earliest stages of the process and in preparing the prosecution and court for the needs of the particular witness.<sup>147</sup>

The creation of an intermediary report, in which the intermediary describes the specific needs of the witness, allows counsel to modify their style of questioning and enables judges to intervene more confidently. Pre-trial hearings and rules established before trial allow all parties to understand what interventions are appropriate, reduces concerns during the trial, and improves the smooth conduct of the trial.

Intermediaries are available in other jurisdictions as well. New Zealand and a number of jurisdictions in Australia also allow intermediaries to be used in child sexual assault trials, but they have not been extended to adult witnesses with disabilities.<sup>148</sup> In South Africa, intermediaries were available only for child witnesses until 2007. In 2007, section 170A(1) of the *Criminal Law (Sexual Offences and Related Matters) Act* was amended to extend eligibility for intermediaries to some adults with disabilities, although disability is defined in terms of being under the mental age of eighteen years.<sup>149</sup>

In our view, it is problematic to define the need for an intermediary based on some notion of a particular mental age rather than on the supports the witness needs to have her evidence fully heard in court. The language of this legislation has resulted in some difficulties with the implementation of the law. The requirement that testifying would expose the witness to "undue" stress or suffering

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147. *R v Watts*, [2010] EWCA Crim 1824, [2011] 1 Crim LR 58 at 61.

148. See generally Annie Cossins, "Cross-Examination in Child Sexual Assault Trials: Evidentiary Safeguard or an Opportunity to Confuse?" (2009) 33:1 Melbourne UL Rev 68; Elisabeth McDonald & Yvette Tinsley, "Use of alternative ways of giving evidence by vulnerable witnesses: Current proposals, issues and challenges" (Victoria: University of Wellington Legal Research Paper No 2, 2011), online: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1885145](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1885145)> [Cossins]. The current status of intermediaries in New Zealand is uncertain, as the *Evidence Act 2006* removed the explicit reference to intermediaries and enacted a provision allowing for "communication assistance." If "communication assistance" is interpreted to include intermediaries, then the new *Act* may in fact extend the availability of intermediaries to both children and adults. (NZ), 2006/69, ss 80-81. See Emma Davies, Emily Henderson & Kirsten Hanna, "Facilitating children to give best evidence: Are there better ways to challenge children's testimony?" (2010) 34:4 Crim LJ 347.

149. (S Afr), No 32 of 2007 [emphasis added].



has been interpreted by the courts as imposing a very high standard.<sup>150</sup> In *S v Stefaans*,<sup>151</sup> the Cape High Court reasoned that since complainants in sexual offence cases are invariably exposed to severe trauma, “undue connotes a degree of stress greater than the ordinary stress to which witnesses, including witnesses in complaints of offences of a sexual nature, are subject to.”<sup>152</sup> Furthermore, the use of “may” in the statute leaves the magistrate with significant discretion to choose whether or not to involve an intermediary. Thus, even if testifying would expose the witness to undue trauma, the magistrate may still choose not to appoint an intermediary. There is some speculation that this has resulted in inconsistency in the use of intermediaries.<sup>153</sup>

Scotland has also considered introducing intermediaries.<sup>154</sup> However, under their common law inherent powers, courts are already using “appropriate adults” to act as intermediaries in some situations.<sup>155</sup> Although this practice is described as “widespread,”<sup>156</sup> it is difficult to find specific examples of the use of an “appropriate adult” in the courtroom or during cross-examination. Appropriate adults are envisioned as primarily providing aid during police investigations,<sup>157</sup> although the guidelines indicate that appropriate adults may be used in court:

2.5 The primary role of the appropriate adult is to facilitate communication, in addition to this their presence may also provide support and reassurance for an individual with a mental disorder (witness, victim, suspect, accused) at police interview, specific forensic procedures or examination, precognition and at court.<sup>158</sup>

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150. *Ibid*, s 170A(1).

151. [1999] 1 All SA 191, 1999 (1) SACR 182(C).

152. *S v Mangaba* 2005 (2) SACR 489 (W) at 187B, cited in Carmel R Matthias & F Noel Zaal, “Intermediaries for Child Witnesses: Old Problems, New Solutions and Judicial Differences in South Africa” (2011) 19:2 Int’l J Child Rts 251 at 257.

153. In *S v F* 1999 (1) SACR 571 (C) “a court went so far as to refuse appointment of an intermediary even after evidence by a psychiatrist that a child who had been raped was suffering from post-traumatic stress disorder.” *Ibid* at 258.

154. Scottish Government Justice and Communities Victims and Witnesses Unit, *Consultation Paper on the Use of Intermediaries for Vulnerable Witnesses in Scotland*, (Edinburgh: 2007), online: <<http://www.scotland.gov.uk/Publications/2007/10/09143729/0>> [Scotland, *Consultation Paper*].

155. Scottish Government, “Appropriate Adults,” online: <<http://www.scotland.gov.uk/Topics/Justice/law/victims-witnesses/Appropriate-Adult>> [Scotland, “Appropriate Adults”].

156. Scotland, *Consultation Paper*, *supra* note 154 at para 12.

157. Scotland, “Appropriate Adults,” *supra* note 155.

158. Scotland, *Guidance on Appropriate Adult Services in Scotland*, (2007) at para 2.5, online: <<http://www.scotland.gov.uk/Resource/Doc/1099/0053903.pdf>> [Scotland, *Guidance*].

Anecdotal evidence indicates that the extension of appropriate adults into the courtroom occurs on an ad hoc basis and with varying degrees of success.<sup>159</sup> England also has a codified appropriate adult scheme that does not extend to the courtroom.<sup>160</sup>

Canadian courts have recognized that witnesses with mental disabilities have a right to equality without discrimination in the courtroom.<sup>161</sup> As the British Columbia Court of Appeal has noted:

We must, of course, ensure that those with mental and physical disabilities receive equal protection of the law guaranteed to everyone by s. 15 of the *Canadian Charter of Rights and Freedoms*. This will sometimes require that their evidence be presented along with the evidence of others who are able to explain, support and supplement it, so that, to the extent that this is possible, the court will receive the account which the witness would have given had he or she not been disabled.<sup>162</sup>

We read this statement not as an expectation that non-disabled adults should be used to ‘fix’ the evidence of those with disabilities in order to make it ‘normal,’ but rather as an endorsement of the idea that access to justice must take into account systemic inequalities. The court goes on to note:

But the evidence will, of course, still have to meet the high standard of proof always required when criminal charges are involved, because the liberty of the accused, and the importance of guarding against the injustice of convicting the innocent, require in these cases as much as any other a “solid foundation for a verdict of guilt.”<sup>163</sup>

We believe the development of a program of trained intermediaries in Canada would improve the ability of this group of complainants to have their stories told to a court. Intermediaries could help with police questioning, plan the neces-

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159. British Psychological Society, “Response to the Scottish Government consultation: The Use of Intermediaries for Vulnerable Witnesses in Scotland” (2008) at 4, online: <<http://scotland.gov.uk/Resource/Doc/214745/0057298.pdf>>.

160. It is enacted in Code C of the *Codes of Practice*. Home Office, (1 November 2011), online: <<http://www.homeoffice.gov.uk/police/powers/pace-codes/>> [*Codes of Practice*]. The *Codes of Practice* are issued by the Secretary of State pursuant to power granted by section 66 of the *Police and Criminal Evidence Act 1984*. (UK), c 60, s 66.

161. The right to equality in legal proceedings also has international recognition in the *Convention on the Rights of Persons with Disabilities*, 30 March 2007, 2515 UNTS 3, 46 ILM 443, art 13,

13. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

162. *R v Pearson* (1994), 82 BCAC 1 at para 36, 36 CR (4th) 343 [emphasis added].

163. *Ibid* (citation omitted).

sary accommodations for the court process, inform the judge about possible difficulties the witness might experience in testifying, and assist in the direct and cross-examination processes. Careful use of intermediaries could increase the likelihood that a witness will be able to testify and have her evidence heard. In our view, this bolsters rather than detracts from the solid foundation underlying a guilty verdict and, as we discuss in more detail below in this Part, is entirely consistent with the fair trial rights of the accused.

Of course, we recognize that such accommodations will not solve all of the problems faced by women with mental disabilities who complain of sexual assault. The fact remains that as long as witnesses with mental disabilities tend to be equated with young children,<sup>164</sup> stereotyped as hypersexual<sup>165</sup> or as unable to tell the truth,<sup>166</sup> they will continue to face even more barriers in sexual assault prosecutions than other witnesses. In this context, we think it is important that the accommodations and testimonial supports offered to complainants in these cases be more substantive than a screen and a support person sitting nearby. We also think it is important that more active support, like intermediaries, be viewed not strictly as aid for persons with mental disabilities but as necessary guidance to allow non-disabled participants in the criminal justice system to overcome their own lack of knowledge so as to interact meaningfully with these complainants.

#### E. GIVING JUDGES LEGISLATIVE AUTHORITY TO INTERVENE TO SUPPORT WITNESSES

As mentioned earlier in the discussion of *Poutawa*,<sup>167</sup> there is precedent in other jurisdictions for instructing judges to take a more active role in preventing the kinds of questions that do not elicit useful evidence from a witness with a mental disability. Most Australian jurisdictions have legislation that directs trial judges to intervene when questions are inappropriate.<sup>168</sup> In New South

164. See e.g. ICH Clare & GH Gudjonsson, "Interrogative suggestibility, confabulation, and acquiescence in people with mild learning disabilities (mental handicap): Implications for reliability during police interrogations" (1993) 32:3 *British J of Clinical Psychology* 295.

165. See e.g. the trial decision in *R v Alsadi* (27 July 2011), Vancouver 213734-2-C (BC Prov Ct) and *Harper*, *supra* note 5 at para 16.

166. *Dinardo*, *supra* note 29 at para 6.

167. *Supra* notes 95-101 and accompanying text.

168. See Cossins, *supra* note 148 at 93. In 1995, the Australian Commonwealth, New South Wales, and Tasmania enacted uniform evidence acts, which included a provision giving judges the discretion to disallow misleading or intimidating questions, taking into account any mental disability on the part of the witness. Similar legislation is in place in all the other Australian jurisdictions, although they have not explicitly adopted the *Uniform Evidence Act*. For instance, *Evidence Act 1939* (NT), s 16 reads as follows:

Wales, for example, the court must disallow a question put to a witness in cross-examination if it:

- (a) is misleading or confusing, or
- (b) is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive, or
- (c) is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate, or
- (d) has no basis other than a stereotype (for example, a stereotype based on the witness's sex, race, culture, ethnicity, age or mental, intellectual or physical disability).<sup>169</sup>

The court must consider a number of factors, including mental and physical disability.<sup>170</sup> A question will not be disallowed merely because it challenges the truthfulness or the accuracy of the witness.<sup>171</sup>

The New South Wales legislation makes intervention mandatory; objection by opposing counsel is not required to trigger the duty to intervene. Queensland, by contrast, casts the authority to intervene in permissive terms.<sup>172</sup> While such a law does not on its own give judges all the tools they need to grasp what kinds of questions might be improper for a particular witness, it does make clear that the right to cross-examine is not unlimited and that a one-size-fits-all approach to cross-examination is inconsistent with substantive equality.

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#### 16 Disallowance of question

- (1) The Court may disallow any question that the Court considers to be misleading, confusing, annoying, harassing, intimidating, offensive, repetitive or phrased in inappropriate language.
- (2) In determining whether to disallow a question, the Court must have regard to:
  - (a) any relevant condition, attribute or characteristic of the witness, including:
    - (i) the age, maturity and cultural background of the witness; and
    - (ii) any mental, intellectual or physical characteristic of the witness; and
  - (b) if the witness is a child – the principles set out in section 21D.

In 2005, the *Uniform Evidence Act* was amended to remove the judicial discretion to allow improper questions, and the list of impermissible questions was expanded. The new uniform evidence act has since been enacted in New South Wales, the Commonwealth, the Australian Capital Territory, and substantially in Victoria. See e.g. *Evidence Act 1995* (Cth), ss 41-42.

169. *Evidence Act 1995* (NSW), s 41(1).

170. *Ibid*, s 41(2)(b).

171. *Ibid*, s 41(3)(a).

172. *Evidence Act 1977* (Qld), s 21, as enacted by *Criminal Law Amendment Act 2000 No 43* (Qld), s 45.

## V. TOWARDS THE FAIR TRIAL

In Canada, where the fair trial rights of the accused are constitutionally protected, opposition to the reforms proposed in this paper is likely to be grounded in section 7 of the *Charter*. The concern is that if cross-examination is fettered in any way, if it is rendered less aggressive, or if a third party mediates the questioning, then the accused's right to confront his accuser and to challenge the prosecution's case is diminished, thereby undermining his right to make full answer and defence under section 7. The Court has recognized that the right to cross-examine Crown witnesses "without significant and unwarranted constraint" is protected as part of the right to make full answer and defence.<sup>173</sup>

However, the Court has also made clear that while the right to cross-examine is important, it is not unlimited and must not be abused. Lawyers are not permitted to harass witnesses, to engage in misrepresentation or repetitiousness, or to ask questions the prejudicial effect of which outweighs their probative value.<sup>174</sup> Trial judges have broad discretion to ensure fairness and to see that justice is done.<sup>175</sup>

Our view is that an abstract consideration of the boundaries of the right to make full answer and defence through cross-examination is unhelpful. The Court recognized this in its discussion of the admissibility of hearsay evidence in *R v Khelawon*:

... the constitutional right guaranteed under s. 7 of the *Charter* is not the right to confront or cross-examine adverse witnesses in itself. The adversarial trial process, which includes cross-examination, is but the means to achieve the end. Trial fairness, as a principle of fundamental justice, is the end that must be achieved. Trial fairness embraces more than the rights of the accused. While it undoubtedly includes the right to make full answer and defence, the fairness of the trial must be assessed in the light of broader societal concerns.<sup>176</sup>

Those concerns include recognition that in the context of sexual assault, sections "15 and 28 of the Charter guaranteeing equality to men and women, although not determinative should be taken into account in determining the reasonable limitations that should be placed upon the cross-examination of a complainant ..."<sup>177</sup>

Where the sexual assault trial involves a witness with a mental disability, the right to equality must also include consideration of disability and sex as intersecting

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173. *R v Lytle*, 2004 SCC 5 at para 2, [2004] 1 SCR 193.

174. *Ibid* at para 44.

175. *Ibid* at para 45.

176. 2006 SCC 57 at para 48, [2006] 2 SCR 787.

177. *R v Osolin*, [1993] 4 SCR 595 at 669, 86 CCC (3d) 481 [emphasis omitted].

grounds of discrimination. Taking steps to ensure that witnesses with mental disabilities give as full and candid an account as possible enhances the fairness of the trial and the search for the truth. As one Australian judge has noted:

The difficulties encountered by complainants in sexual assault cases in the criminal justice system have been a focus of concern for several decades. Judges play an important role in protecting complainants from unnecessary, inappropriate and irrelevant questioning by or on behalf of an accused. That role is perfectly consistent with the requirements of a fair trial, which requirements do not involve treating the criminal justice system as if it were a forensic game in which every accused is entitled to some kind of sporting chance.<sup>178</sup>

Thus, we are of the view that giving trial judges the responsibility to intervene to ensure that witnesses are questioned fairly is entirely consistent with section 7 of the *Charter*.

The use of intermediaries may also be challenged as a limitation on defence counsel's ability to challenge a witness. In one particular case cited in the English pilot project, the intermediary asked that a complex cross-examination question be broken up into parts because she suspected from the response that the question had not been understood by a child witness. Defence counsel commented:

The intermediary must not interpose their sense of what doesn't fit on answers apparently inconsistent with the evidence-in-chief by dressing it up as "The witness did not understand the question." I was OK about this instance but it is a very fine line. An inconsistency may go to the heart of the defence case. It is the role of prosecution counsel to re-examine if there are inconsistencies in the child's evidence. There is also a concern that an intermediary's intervention after the child has answered could be a prompt to the child that he/she has "got it wrong".<sup>179</sup>

These concerns are understandable and it is important that intermediaries be well-trained and that defence counsel be given the opportunity to object if the intermediary's assistance risks rendering the trial unfair. Trial judges can be expected to be alert to this concern in weighing the evidence in a manner analogous to their control of re-examination by the Crown.

Finally, it is worth noting that all of these accommodations would properly be available to an accused person with a mental disability, and indeed some of the initiatives in other jurisdictions were designed for accused persons and in response to wrongful convictions. These reforms have the potential to assist all witnesses with mental disabilities in receiving equal treatment in the criminal justice system.

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178. *R v TA*, [2003] NSWCCA 191 at para 8, Spigelman CJ concurring.

179. Plotnikoff & Woolfson, *supra* note 138 at 55.

## VI. CONCLUSION

It is time for Canada to take a serious look at what can be done to improve access to justice for witnesses with mental disabilities, as other common law countries with a commitment to fair trial rights for the accused have done in recent years. Reforms should include the use of intermediaries, provisions that require judges to disallow improper questions, and the continuing education of all participants in the criminal justice system to increase their ability to treat witnesses with mental disabilities equally and fairly.

While these reforms could benefit any witness, our focus in this article is on the particular importance of this issue for complainants in sexual assault trials, most of whom are women. We know that these women experience high rates of sexual assault and that they are less likely to see their cases prosecuted. They face barriers and stereotypes, including a system for the oral testimony of witnesses through examination-in-chief and cross-examination that often fails to take into account their realities. Since the complainant's evidence is usually essential to a conviction, it is particularly important that we ensure a trial process that is truly fair and encourages the search for truth.