

## Shackling Our Youth – The Improper Use of Physical Restraints

*Norman J. Bossé, Q.C*

*Author's Note: This article represents my personal views and not those of any of the Departments or Agencies of the Province of New Brunswick.*

*Norman J. Bossé, Q.C., was appointed Child and Youth Advocate for New Brunswick on June 14, 2013. Bossé has had an extensive legal career with nearly 30 years as a practicing lawyer and served as counsel to the victims of abuse during the Miller Inquiry, which dealt with abuse at the Kingsclear Youth Training Center. As the Advocate for the Province of New Brunswick, Mr. Bosse is also a member of the Canadian Council of Child and Youth Advocates.*

As the Advocate for children and youth of New Brunswick, the practice of hand cuffing and the use of leg irons on youth who come before the courts and who are transported to the New Brunswick Youth Center (NBYC) in Miramichi greatly troubles me. Some people in this Province express the view that young offenders should be treated harshly in order to “teach them a lesson”. I have also heard this notion expressed by professionals who are charged with the care and responsibility for rehabilitating youth offenders in New Brunswick.

I argue in this article that the indiscriminate use of restraints is counter-productive to the rehabilitative objectives of the *Youth Criminal Justice Act* (“YCJA”). Moreover, the practice clearly undermines the principles contained in the Preamble of the YCJA which requires that the most serious interventions should be reserved for the most serious crimes. This practice is also in contravention of Article 37 of the *United Nations Convention on the Rights of the Child* which states in part that the use of “degrading treatment or punishment” is not permissible and should not be tolerated. We now know, and have enough valid research to prove, that the use of harsh methods in an attempt to “scare straight” young offenders is not effective and may even be damaging. Rates of recidivism have not been statistically reduced through the use of such practices. The use of shackles in any form, is a practice of doubtful positive reinforcement where our youth are concerned.<sup>i</sup>

I had a recent experience with a youth who was charged with some rather serious offences and who, due to circumstances that were most likely preventable, was placed at the NBYC for a period of more than one week. She was transported to the NBYC in a Sheriff's van in very cramped quarters, handcuffed and shackled in leg irons. When I interviewed this slight (98 pound) young girl and asked her how being treated this way made her feel, she answered that she felt like an animal and that the entire process was degrading.

In my experience, youth who have been remanded and transported to and from New Brunswick's Youth Detention Center, whether in an open or closed custody sentence, have been restrained with the use of handcuffs and leg restraints on all occasions without a risk assessment having been conducted. They are all treated the same - they are all restrained.

Why is this done? The simple and only answer I can obtain from the authorities is that this is “policy”.<sup>ii</sup> There is no risk assessment completed, there is no mercy shown to anyone. They are all treated the same way—all are shackled. That is the “fairness” of the “policy”, no doubt. However, as the Advocate for children and youth, I have asked myself and others these questions: Is this good for these young people? Is this rehabilitative in any way or measure? Is this how we want to treat some of the most vulnerable members of our families and society?

I suspect some people in our communities would answer “yes” to these questions - to “straighten these kids out”, to protect us from out of control youth or as a means of retribution for the offences they have committed. Well, what if they are not guilty of the offenses for which they are charged? Why are youth sentenced to “open custody” subject to these measures? What is the real risk of harm to their caretakers or the public if they are not restrained in this way?

As a starting point, should not the pivotal question be whether the use of shackles during courtroom appearances, regardless of the alleged offence or the projected security risk, is counterproductive to the goals of youth/juvenile rehabilitation?

The fact is that these practices are antiquated, not supported by research, and according to experts in adolescent development and psychiatry and childhood trauma are very likely harmful to the psychological and physical wellbeing of our children and youth.<sup>iii</sup>

It seems that judges, academics, and advocates in Canada and the US are coming to realize the negative consequences of this practice.

In a recent decision of the Newfoundland and Labrador Provincial Court, *R v Kalleo*, 2016 Can LII 7716 (NL PC), Judge John L. Joy ruled that the use of shackles on youth was against the law, unnecessary and detrimental. At paragraph 67, Judge Joy states:

“The most unreasonable and questionable cases are where [Police] habitually bring youth as young as 12 years old, women and old men into court in leg shackles. It is even more absurd when these are in-custody accused whom the Crown and Defence have agreed to release on undertakings or recognizances. There is a logical and human disconnect in these cases when we have a blanket policy on in-custody accused appearing in court in, at a minimum, leg shackles.”

In another decision, *R v WHA* (2011 NSSC 157), the Nova Scotia Supreme Court granted the accused’s request to have his leg shackles removed. The Court ruled that the jury would be inclined to conclude that the accused was guilty and dangerous if he was shackled with leg irons and, despite some safety concerns, allowed the accused to not be shackled in view of the jury.

In February 2015, the *American Bar Association, Criminal Justice Section* in its Report to the House of Delegates brought forward the following resolution:

“...RESOLVED, That the American Bar Association urges all federal, state, local, territorial and tribal governments to adopt a presumption against the use of restraints on juveniles in court and to permit a court to allow such use only after providing juveniles with an opportunity to be heard

*and finding that restraints are the least restrictive means necessary to prevent flight or harm to the juvenile or others.* In its report, the ABA states, “The most common argument in favor of indiscriminate shackling focuses on courtroom safety and order. Shackles are not necessary, however, to maintain either safety or order - both of which can be achieved with less restrictive means. These include, for instance, the presence of court personnel, law enforcement officers and bailiffs or locking the courtroom door to deter flight.”<sup>iv</sup>

Two noteworthy papers were published in 2008 on this subject: “*The Shackling of Juvenile Offenders: The Debate In Juvenile Justice Policy*”<sup>v</sup>, and “*Shackling Children in Juvenile Court: The Growing Debate, Recent Trends and the Way to Protect Everyone’s Interest*”.<sup>vi</sup> Both papers review the history of the use of restraints on juvenile or youth offenders and canvass recent developments. Both reach similar conclusions. The former states: “*Many Florida lawyers, child advocates and psychological experts believe shackling children is harmful and inconsistent with the rehabilitative goals of the Florida Department of Juvenile Justice*” (pg. 3). Furthermore, their research indicates:

“The practice of children appearing in court in chains is irrational, inhumane, degrading and an affront to the dignity of both children and the juvenile court proceedings; it may cause the child significant physical, mental or emotional health impairment; it is anti-therapeutic for the large number of children [...]; it may further traumatize children who have been previously victimized, especially when the restraint was a part of the abuse; [...] and it may contribute to the perception of the defendant as a criminal.” (pg.3).

The recommendation found in both of these research papers is clear - the blanket policies of shackling youth before the courts should be uniformly condemned and ceased. In circumstances where restraints are deemed necessary, the courts should consider each individual case prior to determining whether or not a youth should be shackled. Any such policy, however, should be limited to detained youth only.

In February 2015, the *American Academy of Child and Adolescent Psychiatry* published its “*Policy Statement on Mandatory Shackling in Juvenile Court Settings*”. The policy highlights: “*The practice of indiscriminate shackling adds to the trauma that many of these youth have already experienced. It is also unnecessarily demeaning, humiliating and stigmatizing. Mandatory or routine shackling youth is inconsistent with the rehabilitative goals of the juvenile justice system*”. The Academy’s final statement on this issue makes it abundantly clear that this practice should be discontinued forthwith: “[T]he *American Academy of Child and Adolescent Psychiatry* believes that the mandatory or routine shackling of juveniles in courtroom settings should be prohibited and that shackling should only be used in cases in which an individual determination has been made that such restrictive procedures are necessary to ensure and maintain safety.”

I refer again to *R v Kalleo*, where Judge Joy states (at para 71) that there is a presumption against restraints. Judge Joy’s description of the situation in Newfoundland and Labrador is eerily similar to what we experience here in New Brunswick. He advances, at paragraph 41 of his decision, the following;

“Trial courts in this province, and from what I have read about the Courts across Canada, have fallen so far away from the principles that lie at the foundation of our justice system against

prisoner restraints in court, that we daily tolerate the unreasonable restraint of prisoners without any assessment of their individual risk of escape or violence. Police and sheriff's officers receive training about assessing risk, but that training cannot receive practical application when they treat every prisoner as a high risk individual under a blanket restraint policy."

New Brunswick reported approximately 38,221 incidents of youth offences in 2014. Of those, approximately 23%, or 8,778, were of a serious nature, 29,443 or the vast majority were not. However, 100% of those who were brought before the courts for all offences were shackled by restraints consisting of handcuffs and leg irons. It is obvious to this writer that society tolerates that which does not affect it. However, these policies of indiscriminate shackling of our youth should cause a visceral reaction such that no one who is aware of this practice would tolerate it. Moreover, in light of the laws enacted and conventions (UNCRC) ratified by our Canadian government to protect children's rights to be free from harm, we should not tolerate this treatment.

Finally, to summarize, I again quote from the decision of Judge Joy in *R v Kalleo*:

"We should not, indeed we cannot, retreat into the false comfort of irrational and unnecessary security measure[s] that not only humiliate and diminish in-custody accused, but also diminish, confine, and humiliate ourselves when we embrace nameless, unreasoning, unjustifiable terror. If there is a real and substantial risk from a particular in-custody accused, then it is for the police and sheriff's officers and the Crown to present evidence of that risk in a court of law, and have a judge make a ruling."

The use of restraints on youth who are being transported by the sheriff's department to an open custody facility for processing and eventual placement in an appropriate setting is an abuse of authority bringing the system of justice into disrepute. We must change how we treat our youth. The present practice concerning the use of restraints and the shackling of our children and youth is patently unjust and potentially gravely harmful to their rehabilitation and psychological and physical wellbeing. Consequently, in my view, this practice violates the *UN Convention on the Rights of the Child* - Article 37(a): "*No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment...*"<sup>vii</sup>

I implore all of those who have the responsibility for the care of our youth to consider my arguments against the systematic use of restraints and move towards a more humane approach to caring for our children and youth by avoiding the use of restraints unless real and present dangers exist, a matter which should be determined by the courts and only employed if and when necessary.

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<sup>i</sup> Patricia Puritz, a senior defence youth defence lawyer and professor at American University Washington College of Law, in "*Shackling Juvenile Offenders Can do Permanent Damage to Our Kids*", *Washington Post*, November 13, 2014, states, "*Shackling is simply incompatible with the rehabilitative mission of the juvenile court. Children report feeling like a slave, animal or a criminal when shackled. This experience does not frighten them into compliance. On the contrary, child psychiatrists say that shackling is so damaging to a child's developing sense of self that it*

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*may well push him or her into further criminality. Research also tells us that young people are less likely to re-offend when they perceive that the juvenile system has treated them fairly."*

<sup>ii</sup> There is no written policy in the Sheriff's Department and I have received only verbal confirmation concerning their practice of shackling all youth no matter the youth, the offence or the circumstances.

<sup>iii</sup> *"Examining Therapeutic Utility of Restraints and Seclusion with Children and Youth: The Role of Theory and Research in Practice"* David M. Day, PhD. American Journal of Orthopsychiatry, 2002 Volume 72, No.2, 266-278.

<sup>iv</sup> American Bar Association, *Report 107A*, February 2015.

<sup>v</sup> E. Banks, A. Cowan, L. Fasig Center On Children and Families, University of Florida Levin College of Law, 2008.

<sup>vi</sup> B. Gallagher and J. Lore III, 12 *U. C. Davis Journal of Juvenile Law and Policy*, 453, (2008).

<sup>vii</sup> Also, Article 40 of the UNCRC states: *"States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society"*.