# Scottish Law Commission

RESEARCH PAPER

on

EVIDENCE FROM CHILDREN

Alternatives to In-court Testimony

in Criminal Proceedings

in

The United States of America

by

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Conferences I attended by courtesy of the organising committees were:

**Annual Meeting of the American Bar Association** held in San Francisco, California, 11-12 August 1987.

**Growing Through the Pain: Journey to Dignity** Parents United International Conference held in Santa Clara, California, 21-22 August 1987.

**Special Assault Seminar** co-sponsored by the American Prosecutors Research Institute's National Center for the Prosecution of Child Abuse and King County Prosecuting Attorney's Office held in Seattle, Washington, 23-26 August 1987.

**Symposium on Interviewing Children** sponsored by the National Center on Child Abuse and Neglect held in Washington DC, 1-3 September 1987.

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# Chapter I

## INTRODUCTION

> 'But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.'[1]

More than fifty years later, the proposition, so well stated by Justice Cardozos, is central to the problem facing both American and British legal systems in dealing with children as witnesses. When a victim of abuse, whether physical, sexual or emotional, the child usually is the only witness to the crime. This fact, it has been said, gives rise to major conflicts in the law and to the potential for 'secondary victimisation' due to the negative impact of current criminal justice procedures.[2] On the one hand, there is a desire to protect innocent victims of abuse from further abuse at the hands of the system that is supposed to bring the abuser to justice. On the other hand, there is a desire to ensure that those individuals accused of child abuse are provided every right afforded other criminal defendants. Developing legal measures that can achieve a sensitive balance between these competing interests is considered an urgent requirement for the growing number of cases compelled to participate in the judicial process.

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[1] Snyder v. Massachusetts 291 US 97, 122 (1934).

[2] M Avery, The Child Witness: Potential for Secondary Victimisation, Criminal Justice Journal Vol 7:1, 1983, p 1. See also D Libai, The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System, Wayne Law Review, 15, 1969.

Gibbens and Prince compared a selected court sample of child victims who were involved in criminal proceedings, with a random sample of child victims (who were not) and found that 73% of the court sample had behaviour problems and overt disturbances, compared with only 57% of the random sample. Some 56% of the non-court sample appeared to recovery quickly, but only 18% of the court sample managed to recover over the same period of time. T Gibbens and J Prince, Child Victims of Sex Offences, London: Institute for the Study and Treatment of Delinquency, 1963.

At the present time, the prosecution of child abuse is said to be frequently unsuccessful.[1] Mary Avery, among others, has written an impassioned plea for recognition of the profoundly disturbing effect that legal proceedings have on the emotional well-being of the child victim. 'Stigma, embarrassment and trauma to the child, sometimes with lifelong ramifications, are increased by involvement in the current judicial system' and may account for some resistance to reporting abuse.[2] Even before reaching the stage of judicial proceedings, the child often will have been severely traumatised by years of abuse and possibly threatened and warned of the consequences of disclosing the 'secret'. Furthermore, the perpetrator is likely to be a family member on whom the child is dependent and the guilt feelings of the child are themselves used by the abuser to keep the child quiet. The child is likely to be no more than 10 or 12 years old, although even very young children do know that what is happening to them is in some way wrong. The parents' and indeed society's first reaction on discovering that a child has been a victim of sexual abuse is to punish the child by punitive attitudes and by removing the child from the family. Even though this reaction seems illogical, many families blame the child for 'bringing this calamity

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[1] Fewer than 10 per cent of all child abuse cases proceed to prosecution - see US Department of Justice, National Institute of Justice, Research in Brief, November 1985. But on the other hand, one-half of all those arrested on charges of sexually abusing children are convicted, compared to one-third of all felony arrestees, see The Child Victim, US Department of Justice, 1984.

The number of cases proceeded against in the Scottish criminal courts is not available from the currently published statistics but they are said to be few (personal communication from the Crown Office, 1987).

[2] M Avery [fn 2, p 1 above] p 3.

down on us'.[1] This reaction occurs frequently in cases in which the abuser is a family member. Even in stranger abuse, where the parents are likely to react in an understanding and supportive manner, the child at the very least will be confused and frightened by the incident.

In order to minimise the problems that arise in the prosecution of child sexual abuse cases, efforts are being made, particularly in the United States, to find judicial procedures that are more sensitive to the needs of child victims and that are likely to improve the prosecution and conviction rates. These include keeping interrogation to a minimum, introducing a degree of informality into courtroom procedure, providing legal representation for the child witness, allowing the child's out-of-court statements to be introduced as substantive evidence under an exception to the hearsay rule, permitting the child to testify by means of audio-visual equipment thereby shielding the child victim from a crowded courtroom and, in particular, from confronting the accused. Underlying all of these approaches are certain assumptions about the psychological development and functioning of children. If, however, these assumptions are erroneous, 'an unwarranted and potentially dangerous situation may occur'.[2] In effect, they have the potential to impair, restrict or even to abolish the fundamental rights of the accused to a fair trial.

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[1] D Whitcomb, E R Shapiro and L Stellwagen, When the Victim is a Child, US Department of Justice, National Institute of Justice, August 1985, chap 2.

[2] S D Burke, Indiana's Statutory Provisions for Alternative Testimony in Child Sexual Abuse Cases, Indiana Law Review, vol 20, 1987, p 165.

How the American laws in practice will settle is at this point relatively unclear. The primary questions are in the process of clarification as decisions appear from the appellate courts, through experience of legal and clinical practice and in the findings of systematic research. But because many of the issues are very new and involve a number of disciplines, a relevant body of knowledge is especially hard to establish.[1] The experience of the United States in seeking improved methods of enabling children to testify, while not replicable elsewhere, nonetheless will help to establish a number of fundamental and generally acceptable principles that are equally relevant in a foreign jurisdiction.

The study reported here was carried out in the United States in August and September 1987. Its purpose was to review the operation of laws permitting the use of alternative techniques for prosecuting cases involving children as witnesses and, in particular, to ascertain how well a given approach works to protect the interests of innocent, accused persons, as well as considering how stress and other difficulties might be alleviated for the victim of sexual or physical abuse. The validity of the assumptions underlying these reforms are considered, with particular reference to current knowledge in the areas of child development and psychodynamics. In conclusion, the question raised for discussion is whether the experience of the United States suggests that there are just and humane alternatives to the way in which evidence from children is introduced in the Scottish criminal courts. One of the problems not troublesome in this country is the question of children's competence to be a witness. The law has evolved to a

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[1] J Bulkley, Introduction: Background and Overview of Child Sexual Abuse - Law Reforms in the Mid-1980's, University of Miami Law Review, Vol 40, 1985, p 18.

point where virtually all children are accepted as competent witnesses.

The primary focus is on the evidence of child abuse victims, particularly child sexual abuse, but the same principles might apply to vulnerable victims of any age such as the elderly, the mentally handicapped or mentally unstable, and the victim of a specially savage crime, since all may justify procedures to reduce the trauma they experience in the criminal justice system.

Information and impressions are drawn from interviews with the staff of policy making bodies, with child abuse specialists working in law enforcement, mental health and social service agencies, with academic researchers, and from papers received at national conferences organised by the American Prosecutors Research Institute, Parents United and the National Center for Child Abuse and Neglect.

## Chapter II

## STATUTORY REFORMS

### Hearsay evidence, videotape and closed-circuit television procedures

In the United States, efforts to make the criminal justice system more sensitive in its treatment of child victims have primarily focussed on special hearsay exceptions for such cases, videotaped interviews, video depositions of child witnesses and testimony over closed-circuit television. Other reforms include exclusion of the public from the courtroom during the victim's testimony; giving child sexual abuse cases priority on the court's calendar; permitting a support person to be with the child during all stages of the legal proceedings; directing law enforcement, social service agencies and prosecutors to conduct joint investigations in child sexual abuse cases, using a single trained interviewer.[1]

### 1. Hearsay Evidence[2]

Because child sexual abuse is often extremely difficult to prove, the state's ability to protect the child frequently turns on the child's trial testimony or on receipt of hearsay within an exception. Hearsay is defined as 'a statement made by someone out-of-court in court for the truth of what it asserts'.[3] The hearsay rule excludes such evidence because it cannot be cross-examined and is therefore considered 'less trustworthy than live,

[1] M Henry, States Act to Protect Child Victim/Witnesses, Youth Law News, May-June 1986, p 2.

[2] For detailed discussion of legal considerations inherent in special hearsay exception statutes, see J Myers, Child Witness Law and Practice, John Wiley & Sons, 1987, chap 5. Also R Eatman, Special Hearsay Exceptions, American Prosecutors Research Institute, 1986.

[3] John Myers, Legal Issues in Interviewing Children. Seminar on Interviewing Children. National Center for Child Abuse and Neglect, Washington DC, 1 September 1987.

in-court testimony'.[1] If, however, hearsay falls within an exception to the hearsay rule, it may be admitted as substantive evidence. Although there are numerous exceptions to the hearsay rule, Myers[2] notes only a handful that are relevant to child witnesses. These include: present sense impression, excited utterance, complaint of rape, then-existing mental, emotional or physical condition, statements for purposes of medical diagnosis or treatment, the residual exception[3] and the child victim hearsay exception.

In many cases, the victim's out-of-court statements do not satisfy the requirements of a traditional exception. Unless there is a catch-all exception, the evidence must be excluded, regardless of its reliability. Legislatures in a growing number of states have responded to the limitations of the existing hearsay exceptions by enacting a special hearsay exception for victims of child sexual abuse. These statutes authorise admission of any reliable out-of-

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[1] John Myers [fn 2 p 6 above] p 326.

[2] Ibid.

[3] Federal Rules of Evidence 803(24). The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

> (24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

court statements by children of specified ages. Unlike the 'residual exception' which is to be used 'sparingly and in exceptional cases', the child victim statutes are 'intended to reach out and embrace as much reliable hearsay as possible'.[1]

The assumptions underlying the creation of child sexual abuse hearsay exceptions are that, under certain circumstances, a child's early out-of-court statements are often the only evidence available, corroborating physical evidence may be absent or inconclusive, the child may be unavailable as a witness having retracted the true report of sexual abuse due to guilt, fear of reprisal, or anxiety that the offender will be sent to prison. A child's early statements are considered to be more reliable than in-court testimony, since they are generally made close in time to the event, and the child's psychological state, under the pressure of cross-examination, may impair the ability to testify at trial.

In 1982, the Washington legislature enacted a child victim hearsay

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[1] John Myers [fn 2 p 6 above] p 373.

exception[1] which has served as the model for statutes in other states. Under the Washington-type statute, evidence which is sufficiently reliable may be admitted if the child testifies at trial and is subject to cross-examination. If, however, the child is unavailable as a witness, the hearsay can only be admitted if 'there is corroborative evidence of the act'. The corroboration requirement is in addition to the 'reliability' requirement. Evidence which is sufficiently reliable may be excluded unless there is sufficient corroboration of the act. Corroborative evidence includes eyewitness testimony, testimony by another child victim, an admission or confession by the defendant, physical evidence that the child was abused, expert psychological testimony that the abuse occurred, or any other independent evidence which corroborates the child's statement. Most statutes require that corroboration be of the underlying act: one, namely Arizona, specifies that the corroboration be of the statement itself.

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[1] 9A.44.120. Admissibility of Child's Statement - Conditions

A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by anotner, not otherwise permissible by statute or court rule, is admissible in evidence in dependency proceedings under Title RCW and criminal proceedings in the courts of the state of Washington if:

(1) The court finds, in a hearing conducted outside the presence of the jury, that the time, contact and circumstances of the statement provide sufficient indicia of reliability: and

(2) The child either:

(a) Testifies at the proceedings; or

(b) Is unavailable as a witness: Provided, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act. A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement.

As is true regarding the residual hearsay exception [see page 7], the defendant will receive notice of the prosecution's intention to offer the statement far enough in advance of trial so that defence counsel can prepare to challenge the reliability of the child's statement.

## 2. Videotape and Closed-Circuit Television Procedures [1]

Many professionals who work with abused children believe that the trauma of the legal system can be reduced and the accuracy of the evidence increased by permitting children to testify by means of audio-visual equipment. The proponents of video testimony argue that some children should be permitted to testify in comfortable, non-threatening surroundings, away from the foreboding courtroom full of strangers. They further stress the need to let children testify outside the presence of the accused.

> 'When the setting involves a relative accused of sexual abuse the child becomes guilty, anxious, and traumatised. In most cases, she will have been exposed to both pleasant and abusive associations with the accused. As a consequence, she has ambivalent feelings. Anger against the relative is opposed by feelings of care, not only for him but also for other family members who may be harmed by a conviction. There is guilt as well as satisfaction in the prospect of sending the abuser to prison. These mixed feelings, accompanied by the fear, guilt, and anxiety, mitigate the truth, producing inaccurate testimony. The video arrangement, because it avoids courtroom stress, relieves these feelings, thereby improving the accuracy of the testimony.'[2]

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[1] For an excellent account of the operation of video procedures, see P Toth and M Whalen (eds), Investigation and Prosecution of Child Abuse, American Prosecutors Research Institute, 1987, chap IV.

[2] J Myers [fn 2 p 6 above] p 386.

An increasing number of states has statutes authorising video testimony by child witnesses in sexual abuse cases. These commonly permit one or more of three types of video testimony; videotaped interviews, video deposition and contemporaneous testimony by means of closed-circuit video equipment. No two statutes are exactly alike, and new statutes regularly are being considered by different state legislatures.[1]

(i) Videotaped interviews [2]

At August 1987, nineteen states had enacted legislation providing that videotaped interviews of children be admitted in evidence. Some are limited to child sexual abuse only, while others apply to other crimes against children as well as to specified civil proceedings. No statutory authority is required merely to videotape a child's statement. If offered as substantive evidence that the abuse occurred, the videotape would be inadmissible hearsay in pre-trial and trial proceedings unless the statute includes specific conditions for its admissibility. These provisions are:

> 'No attorney for either party is present when the statement is made.
>
> The recording is both visual and aural and made on videotape, film, or other electronic means.
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> The equipment is capable of making accurate recordings, the operator of the equipment is competent, and the recording is accurate and has not been altered.

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[1] R Eatman and J Bulkley, Protecting Child/Victim Witnesses, National Legal Resource Center for Child Advocacy and Protection, Feb 1986.

[2] For a full account of videotaping of interviews and court testimony see K MacFarlane and J Waterman, Sexual Abuse of Young Children, The Guilford Press, 1986, p 164-193.

> The statement is not made in response to questions designed to lead the child to make a specific statement.
>
> Every voice on the recording is identified.
>
> The interviewer is present at the proceeding and available to testify or to be cross-examined by either party.
>
> The defendant or his attorney is given the opportunity to view the recording before it is offered into evidence.
>
> The child is available to testify.'[1]

Toth and Whalen note:

> 'Even if a statement meets these statutory criteria, still it must satisfy the requirements of the Sixth Amendment [to the Federal Constitution] and state constitution confrontation clauses which afford a criminal defendant the "right to be confronted with the witnesses against him".'[2]

In a small number of states, videotaped statements are included within a special hearsay exception (Arizona, Kentucky, and Texas). Under these statutes, videotaped interviews by police officers and mental health workers may be admissible, despite the fact that neither defendant nor the defence counsel was present at the interview. Naturally, when counsel and client are not in attendance, there is no face-to-face confrontation and no cross-examination, the lack of which raises serious constitutional questions, as held by the appellate courts in Texas.[3]

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[1] P Toth and M Whalen [fn 1 p 10 above] VI-2.

[2] Ibid.

[3] On 1 July 1987, the Court of Criminal Appeals held that the Texas statute permitting the admission in evidence of videotaped interviews of child victims of sexual abuse was unconstitutional - Long v. The State of Texas No 867-85.

Commentary

There are very mixed views on the merits of the videotaped interview. Some regard it as a useful way of memorialising the child's early statement. An early statement or interview, recorded soon after the incident, is thought to capture the essential detail, the intense emotion and immediacy of the child's account of the experience, often absent from later reports. The child's demeanour, facial expressions and gestures are preserved. If the interviewer's behaviour or the child's story is later questioned, the recording can provide a verbatim account of the early interview. The tape can be used by others involved in the case and thereby spare the child from repeating accounts of the alleged abuse. The judge can make use of the videotape to assess whether or not to allow special procedures such as closed-circuit or a closed courtroom. It may be admissible at trial, depending on the circumstances, as either a prior inconsistent statement or a prior consistent statement, or could possibly be used as part of the basis for expert testimony at trial.

> 'In San Diego jurisdiction we use the social worker's tape not in lieu of the child but for preparation, to freshen the child's memory, in consistent and inconsistent statements. A child who reports a molest is generally taken to a hospital, examined by a paediatrician and interviewed by a social worker which is videotaped. A copy of that videotaped interview is then provided by the law enforcement officer who then brings it to the District Attorney who reviews it at the time he makes a decision whether or not to prosecute. The District Attorney has to make the tape available to the defence attorney in discovery so that he can view it ahead of time also. There are mixed views as to whether that is a good or a bad idea in terms of videotaping. The most negative view is that every single word is accurately preserved. If the child later says anything inconsistent they can point to exactly what was said. If there was any problem in the

> interrogation process - in other words, if the questioning were overly suggestive or leading or aggressive, that is going to be demonstrated on tape, so it can be used negatively. For the same reason, it can be used positively. The tape is usually recorded shortly after the victim has disclosed so the affect and demeanour at the time of questioning are more helpful to prosecution in terms of demonstrating that the child is telling the truth. If the interviewers are trained and good their interviews will not be that bad.'[1]

Because the agreement of the parties to use someone else's interview is hard to obtain, multiple interviews may not always be avoided. The development of trust and mutual understanding between professionals is considered essential to the effective use of these procedures.

> 'It only prevents multiple interviewing if the people who must have access to the child, primarily law enforcement - police, prosecutors - but also hospital and social services agree to accept the person doing the videotaping and the videotape itself, the credibility of that person, the techniques of that person, and the things they elicit. Few places actually get their act together well enough. For videotaping to reduce interviewing there has to be a willingness to give up some of their turf or prerogative.'[2]

It is widely believed that an effective videotaped interview may be instrumental in getting guilty pleas to charges of physical abuse or sexual victimisation. This is not so far supported by statistical evidence. However, an early guilty plea is especially desirable in a child abuse case, since it spares the child further involvement in the criminal justice system and any incidental trauma or confusion that might result from the possibility of an acquittal at trial.

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[1] Harry Elias, Deputy District Attorney, Chief, Child Abuse Section, San Diego, California: interview on 23 August 1987.

[2] Kee MacFarlane, Director, Child Sexual Abuse Diagnostic Center, Children's Institute International, Los Angeles: interview on 13 August 1987.

'One thing all of us here who have worked on this issue have supported is the videotaping of interviews. We have never encouraged the use of videotaped interviews as evidence. If you get a good videotaped interview you can keep the child from ever having to testify because you get guilty pleas. I say this in speeches, although I have never seen a single study to support that, because we don't have any data. I have to go on instinct and anecdote: we don't know, but we have prosecutors tell us that they have shown videotaped interviews to defence attorneys and that results in a confession.'[1]

There are a number of potential negative consequences to the use of videotaped interviews which have tended to make prosecutors in particular wary about their use. For example, children are often ill-at-ease with recording equipment and may be apprehensive about disclosing abuse. Because young children are likely to find the equipment distracting, their ability to concentrate on giving their report may be seriously impaired. Moreover, a child's disclosure of abuse generally is progressive, the report is rarely complete at the initial interview, even if skilled professionals are involved. An interview later in the process runs the risk of being challenged when it is realised that it took several meetings with the child to elicit the information recorded in that interview. Videotaping every interview is not practicable and, moreover, it may give the impression that the child is providing inconsistent narratives where disclosure is progressive and details seem to change.

'The question is at what point do you turn on the video camera. Do you wait until you have talked to the child two or three times and you are really confident about what the child is going to say, and then ask the child now to tell it to the camera? It's a problem.'[2]

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[1] Howard Davidson, Director, National Legal Resource Center for Child Advocacy and Protection, Washington DC: interview on 27 August 1987.

[2] Ibid.

Because under state discovery rules, a criminal defendant has a right of access to any of the victim's written or recorded statements, if the prosecution plans to offer the victim as a witness, the defendant will undoubtedly have access to the child victim's videotaped statement. The timing of such access to victim statements varies, with some discovery statutes mandating disclosure before trial begins, some during trial and some requiring the prosecution to disclose such statements only after the victim has testified on direct examination.

> 'The issue of videotaped interview confidentiality is very unclear. I doubt there is a child sexual abuse prosecution in the country in which the defence counsel, if they have any sense of what they are doing, is not trying to discover legally whether there are those kinds of interviews. We had a day care centre operator in this area who had been convicted of sexual abuse of a child and the child testified on CCTV. She got convicted and two days ago she hired a new lawyer who went back to court and made a motion to have the court reverse her conviction on grounds of incompetence of counsel. The basis for the claim of incompetence was the lawyer had never made a demand for material relating to earlier interviews with the child. Her lawyer at the time of the trial, who had never before handled a child sexual abuse case, didn't go beyond what the prosecutor knew about, such as interviews conducted by social workers and therapists. The judge denied the motion for a new trial but she is appealing that decision. These change of lawyer tactics are becoming very common.'[1]

If the videotaped statement contains a denial, a recantation, or is incomplete, it can be used in an attack on the child's credibility by showing alleged prior inconsistencies in the child's evidence. An ineffective videotaped interview can be used by the defence also to show that the child was coached into telling a fanciful and exaggerated story after initial denial or reticence. If the

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[1] Howard Davidson, fn 1 p 15 above.

statement takes the form of an interview, the interviewer's conduct and expertise are likely to come under the closest scrutiny. The use of leading questions - felt by some to be necessary with very young children - is likely to support the view that the child's allegations have been obtained by suggestion or coercion and, as a result, are unreliable. Hence, it is firmly believed that 'a verbatim visual record of an interview, especially one that is poorly conducted or otherwise ineffective, may provide the defence with strategies or opportunities that otherwise would be unavailable'.[1]

> 'When children have not yet disclosed, it takes a lot more to get it out of them. You ask them lots of questions about different things and when you get closer they clam up. That requires the interviewer to be leading - it's difficult. That kind of interview in many ways argues against videotaping, because I don't care how good an interviewer you are, it is going to be full of stuff that the defence is going to try to kill you on in terms of being suggestive and leading. The first half is going to be full of denial and avoidance. The defence will say you are badgering.'[2]

If a number of different professionals record their interviews with the child, the chances of recorded statements appearing inconsistent will increase as will the chances of the interviewers questioning the child in inappropriate ways.

> 'But the videotaped interview certainly has its value if you know what you are doing. Obviously the more it appears that you are coaching the children the more difficult it is. Essentially there are two kinds of interview: one is for the purpose of gathering legal evidence and the other is a therapeutic, diagnostic interview and they are incompatible. Often what has happened is that therapists have been co-opted by the prosecution and made to do the work of the prosecutor.'[3]

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[1] P Toth and M Whalen [fn 1 p 10 above] VI-8.

[2] Kee MacFarlane, fn 2 p 14 above.

[3] Howard Davidson, fn 1 p 15 above.

An experienced prosecutor[1] expresses some of her reservations regarding videotaped interviews:

> 'The States where they have used them the most have been Texas, New Mexico and California and they are very happy with them. I come from Washington State where videotaped interviews are not used very often. It is a good way of documenting exactly what went on in an interview, but the drawbacks of video are the way it is used by the defence attorneys. There are practical issues with it too. It is impossible to videotape every contact with the child where the child might discuss abuse. When you don't videotape every contact with the child, you present to the jury a skewed picture of what the whole content of the revelations were. They are going to give a lot more weight to what is in the interview and they are going to ignore testimony about contacts that are not on the video, and the defence will urge them to do that in many cases. You cannot assure the quality of videos: I cannot tell you the number of times I have seen videos where the sound is no good or where someone forgot to turn the sound on and they have taken no other notes about the interview and it is hard for them to remember.
>
> I have found that kids are uncomfortable often if they know about video equipment (that's another issue, do you have to tell them they are being videotaped?). Alternatively, they may want to play with the video and play with the camera. The biggest fear of prosecutors who don't like videotaped interviews is the lack of control over who interviews and how they interview. For instance, in some jurisdictions social workers videotape interviews without any consultation with the prosecutor. Yet that becomes the main piece of evidence which determines whether or not you can go ahead with the case.'

Kee MacFarlane, a leading social worker, who has more experience in videotaping than anyone in the country, concludes:

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[1] Patricia Toth, Senior Attorney, National Center for the Prosecution of Child Abuse, Legal Issues in Interviewing Children, Paper presented at Symposium on Interviewing Children, Washington DC, 1-3 September 1987.

> 'A decision to videotape an alleged victim of child sexual abuse should not be made on the grounds that the equipment is waiting in the closet and someone is available to operate it. Issues associated with its use, such as: who can or must consent to the taping and to the viewing of the tapes; how should the consent form be designed; who owns the tapes and who may have copies; and how the tapes will be protected and used, should be carefully researched. Decisions should be made with full knowledge of the potential consequences that relate to each situation.'[1]

(ii) Video deposition

The majority of statutes authorising the admission of videotaped testimony at trial in lieu of the child's testimony refer specifically to a child victim's deposition.

> 'After charges are filed, before trial, the child comes in, in private, and has a videotaped deposition which means all of the standards of evidence would be in effect: there would be two lawyers, perhaps a magistrate and usually no defendant. The tape would be used instead of live testimony.'[2]

Video depositions, if offered for use at a trial, are hearsay and are not admissible unless they come within an exception to the hearsay rule. Several states have enacted statutes which provide for taking a videotaped deposition of a child and for admitting the deposition at the trial. These statutes in effect create a new exception to the hearsay rule. Myers, however, indicates that the hearsay aspects of these statutes are not well developed.

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[1] Kee MacFarlane, Diagnostic Evaluations and the Use of Videotapes in Child Sexual Abuse Cases, Miami Law Review, Vol 40: 135, 1985.

[2] Kenneth Freeman, Research Fellow, US Department of Justice, National Institute of Justice, Washington DC: interview on 28 August 1987.

> 'Most of the statutes do not grapple in so many words with the hearsay aspect of video depositions. Rather, the statutes treat depositions as the 'functional equivalent of testimony at trial'. A few statutes expressly recognise the hearsay issue, and state that the deposition comes into evidence as prior testimony.'[1]

Rule 15 of the Federal Rules of Criminal Procedure and similar state rules provide for the taking and use of depositions but make their admission at trial subject to other rules of evidence, such as, the hearsay rule.[2]

The videotaped testimony statutes often describe the whereabouts of the defendant while the child is testifying. The majority specify that the defendant must be able to see and hear the child and communicate with defence counsel while the child testifies, but that the child should neither see nor hear the defendant. Some require a finding of trauma or harm to the child in order to prevent the child from seeing or hearing the defendant while testifying on videotape. Iowa's statute is unique in that it requires informing the child that he or she can be seen by the defendant. Ohio provides that the child victim and the defendant view each other on monitors while the testimony is given (similar to the

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[1] John Myers [fn 2 p 6 above] p 387-388.

[2] Rule 15 provides in part:

(a) When taken Whenever due to exceptional circumstances of the case it is in the interests of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition ...

(e) Use At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence if the witness is unavailable, as unavailability is defined in Rule 804(a) of the Federal Rules of Evidence, or the witness gives testimony at the trial or hearing inconsistent with his deposition.

two-way closed circuit procedure described below). These variations are said to have a bearing on the effectiveness of the procedures.[1]

Commentary

Video deposition statutes are the most widely available and are quite favourably regarded. The testimony may be taken in a relatively informal setting, a comfortable environment, outside the courtroom and outside the presence of the public, press and jury. Most statutes allow a support person for the child - parent, friend or guardian - to be present in the room when the child testifies. Where the defendant is excluded or the child is required to testify without seeing or hearing the defendant, the child is spared the anxiety he or she may feel from testifying in close physical proximity to the defendant. It can also be used to refresh the victim's memory, as evidence of a prior consistent statement, or as substantive evidence of abuse (a prior inconsistent statement) where the victim is recanting at trial.

A videotape presenting the child as a credible witness may induce a guilty plea, thus avoiding further proceedings.

> 'By making these sorts of things available, the stronger cases may often not go to trial because we can present a strong set of evidence that convinces the accused and attorney that this is not a case they stand to do better on if they go to trial.'[2]

On the negative side, Anne Hyland[3] observes:

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[1] P Toth and M Whalen [fn 1 p 10 above] VI-8.

[2] Donald C Bross, Executive Director, National Association of Counsel for Children, C Henry Kempe National Center for Prevention and Treatment of Child Abuse and Neglect, Denver: interview on 13 August 1987.

[3] Anne Hyland, Child in the Courtroom. Paper read at Special Assault Seminar, Seattle, 23 August 1987.

> 'A videotaped image of a child testifying lacks the immediacy and persuasive impact of a child's live in-court testimony. The jurors observe the child's image instead of the child in person, removing the victim and the story one step farther from reality.'

Testimony videotaped prior to trial enables the defence to prepare its case in the knowledge of crucial testimony. If further evidence comes to light after the videotaping of the testimony, the defence may have a right to cross-examine the child further in another session. This defeats the purpose of recorded testimony, that is, sparing the child from repeating accounts of the abuse. Certain statutes permit the defendant to be present in the room with the child while testifying on videotape or closed-circuit. The defendant's physical proximity, which is often closer to the victim than in the courtroom, can be intimidating and defeat the purpose of the exercise.[1]

(iii) Closed-Circuit or Contemporaneous Video Testimony

A substantial and growing number of states provides that the trial testimony of child witness victims may be taken in a room other than the courtroom and be televised simultaneously by closed-circuit equipment in the courtroom to be viewed by the court and the finder-of-fact in the proceeding. The statutes treat the closed-circuit, sometimes called contemporaneous video testimony, as the functional equivalent of live, in-court testimony.

Toth and Whalen[2] describe three basic statutory approaches which vary according to the different views that are held about the defendant's right to attend or participate in the proceedings:

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[1] P Toth and M Whalen [fn 1 p 10 above] VI-8.

[2] P Toth and M Whalen [fn 1 p 10 above] VI-3.

1. Defendant present: the defendant is present in the room while the child testifies.

2. One-way approach: the defendant can observe and hear the child's testimony but the child can neither see nor hear the defendant.

3. Two-way approach: the defendant can observe and hear the child's testimony and a television monitor projects the defendant's image into the room in which the child is testifying so that the child sees the defendant's face while he or she testifies.

The decision to use the one-way approach or to allow the defendant to be present in the room with the child while the child testifies, in a number of states, depends on the judge's view of the likely trauma to the child. In America, these approaches, like video depositions, have been questioned because of possible violation of the defendant's right to confront the witness.

One-way shield

Only the Iowa statute, at present subject to appeal in the United States Supreme Court, provides that the defendant may be placed behind a one-way screen or mirror 'that permits the party to hear the child during the child's testimony, but does not allow the child to see or hear the defendant'.[1] This statute appears to be the only one of its kind, but numerous commentators have endorsed

[1] See Coy v. Iowa, Brief of the American Bar Association as Amicus Curiae In the Supreme Court of the United States, October 1987, No 86-6757.

the use of such one-way shields.[1] The Bill recently enacted in Canada, but not yet proclaimed in force, amends the Canadian Evidence Act to provide that the judge may 'order the complainant to testify behind a screen or other device that would allow the complainant not to see the accused'.[2]

Commentary

Contemporaneous video testimony is said to have very few advantages over video deposition, except that the hazards of memorialising a child victim's testimony before trial (ie defence preparation, newly discovered evidence) are not present in this alternative. It has the merit of allowing the child to testify in a more relaxed environment than the courtroom, outside the physical presence of the jury, spectators and, in some states, the defendant. When objections and arguments interrupt the proceedings, the child can be protected from possible confusion merely by switching off the monitor.

However, the disadvantages of this approach are that a televised image of the child victim testifying is less powerful and convincing than live in-court testimony, the child is removed from the room where everything is going on, may be intimidated by the

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[1] See for example J Y Parker, The Rights of Child Witnesses: Is the Court a Protector or a Perpetrator?, New England Law Review 17, 1981-82, p 643. Also D Libai, The Protection of the Child Victim of Sexual Offenses in the Criminal Justice System, Wayne Law Review, 1969, p 1017.

[2] Bill C-15 The House of Commons of Canada, 1987.

presence of the camera and other equipment and may have difficulty in concentrating on a face and voice coming from a television monitor over a prolonged period of time.[1] Furthermore, the jurors may interpret the child's need for protection as an indication of the accused's guilt.

Sandra Smith, Municipal Court Judge in Stockton, California is strongly opposed to this method:

> 'Closed-circuit contemporaneous video, which would allow the child to be in a room separate from the defendant, but available for viewing through a monitor, has problems almost too multitudinous to address. First, it poses grave constitutional concerns revolving around the defendant's right to confront and cross-examine witnesses. Putting that concern aside, an experienced trial attorney would know that in any kind of an assault case it is imperative that the trier of fact be able to see and relate to the victim. Keep in mind that the jury sits for a period of time in the same room with the defendant who looks like anyone else. Molesters do not have a large 'M' tatooed on their foreheads - they look like members of the jury, the jury members' mothers, fathers, little brothers. Further, they do not molest children in the presence of the jury. Consequently, over the period of time that it takes to try a case, the jury gets to 'know' a defendant. In this case familiarity does not breed contempt. Familiarity breeds pity and concern. If this pity and concern are not tempered in the jury's collective mind by the victim and the victim's pain, then human nature will favour the person (defendant) who has become real to them.'[2]

Kenneth Freeman comments on the contrasting perspectives of judges and prosecutors:

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[1] Kee MacFarlane, fn 1 p 19 above.

[2] S B Smith, The Child Witness, in: Representing Children: Current Issues in Law, Medicine and Mental Health, National Association of Counsel for Children, 1987, p 3.

> 'Two-way closed-circuit television is very popular in the United States. A judge's view with regard to it is much different from prosecutors. Prosecutors might say, 'We like that because it helps the victims and we think that it is an effective way of presenting evidence and presenting the prosecutor's side of the case'. Judges might say, 'How much does it cost? Does it interfere with my courtroom? Does it turn the proceedings into a circus? Does it give undue emphasis to the taking of that particular kind of testimony and, thereby, cause prejudice to one side or the other?'. We try at the Institute of Justice to be mindful not only of the rights of the accuser but also of the rights of the accused so that we don't want to get so wrapped up in protecting the rights of the victim that we convict innocent people. Judges have, I think, a greater stake in seeing to it that the process of the trial is fair to all sides.'[1]

In the Coy v. Iowa case, now before the US Supreme Court, a screen was placed between the two witnesses and the defendant. At all times the defendant could see the two girls as they were testifying but when the girls looked up at the screen they could not see the defendant. At all times the judge and the jury could see the children while they were testifying. Howard Davidson expresses strong reservations about this method:

> 'The one-way screen is very much cheapter to use than closed-circuit television but my colleagues and I are very unhappy about the procedure where they put a screen in the courtroom. What they did in the Coy case was hawl in the screen, turn the lights down and shine the light on the screen. Despite the fact that the judge instructed the jury that they were to draw no inference from use of the screen procedure, it raises some real concerns that jurors are going to be unable to see this objectively and will view it as the state having had to take these steps to protect this child from this bad man. That is very different from putting the child in another room and having the child testify by closed-circuit television. There is something about putting the screen in the courtroom between the two of them that is even more suggestible of

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[1] Kenneth Freeman, fn 2 p 19 above.

> the defendant's guilt. Yet, Kee MacFarlane has said that what kids are really scared of in testifying in court is that the defendant is going to leap across the desk and kill them. She believes that, having heard it from kids. If that is the case, then the screen does make sense.'[1]

(iv) Legal and practical issues in the use of videotape and closed-circuit television procedures[2]

It is generally understood in America that these innovative approaches cannot and should not be used in all child abuse cases as a substitute for a child's live trial testimony. Logistical and legal impediments limit their effectiveness. The following are some of the legal and practical issues that require to be considered.

(a) Authorising video testimony

Many of the video statutes require the prosecution to show that the use of such an alternative is necessary or that the child victim would suffer emotional trauma or harm if the procedure were not adopted. Some states enumerate factors which the court is to consider in evaluating the need for video testimony (Appendix A). Those close to the child, such as relatives, friends or teachers, may provide information on the child's reaction to the abuse and about behavioural indications that the child fears the defendant or fears giving evidence in court in the defendant's presence. A therapist or an expert who has examined the child for this purpose could offer expert testimony that the child would be incapable of giving evidence in the normal courtroom setting. Different states have adopted different standards. In California, an

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[1] Howard Davidson, fn 1 p 15 above.

[2] This section is based on P Toth and M Whalen [fn 1 p 10 above] VI-9/15.

expert testimony requirement is incorporated in the statute authorising two-way closed-circuit television at trial. It is believed to be unlikely that most courts will require expert testimony to establish a child's unavailability or inability to testify under normal conditions, but that such testimony would be persuasive in protecting the procedure in any ensuing appeal.

Kenneth Freeman[1] explains the meaning of 'necessity' in the American legal context:

> Necessity has to be that it is the only way that the evidence can be presented. The alternative is dismissal of charges. There are two standards in the United States: the **subjective standard** and the **objective standard.** Under the **subjective standard** we have this so-called psychological harm to the victim. This says that we have a psychiatrist examine the child and come into court and testify that this child would be psychologically harmed by testifying and therefore it is necessary, to avoid that harm, to bring in closed-circuit television. That is subjective because twenty-five different psychiatrists will give twenty-five different opinions because no one in the world can say what is going to happen inside another human being's head in a court room situation. I don't like it, not only because it is inexact, but because the process of determining psychological harm is as traumatic or potentially as traumatic to the child as testifying. If you are going to allow the prosecution to bring in a psychiatrist who says this child is going to be traumatised, then the defence is entitled to have their psychologist or psychiatrist to present the opposite. So we have all these hearings that are very undesirable. Subjective standard is in my view very unsatisfactory. **Objective standard,** on the other hand, is to take those things that everyone can agree upon as being a reason for having the procedure. For example, if a child breaks down and is unable to continue and refuses to come back into the courtroom then we can all tell that the child is going to be unable to testify and our alternative is dismissal of the case. So, if the judge makes a finding that the child is unable to continue based on what the judge has seen then that would be one thing under objective standards. Another would be if the

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[1] Kenneth Freeman, fn 2 p 19 above.

> defendant has threatened the child with great bodily injury if the child testifies. That is something we can all agree upon and would be qualifying. Another would be if a weapon were used or threatened, anything that is so intimidating that you could say that the defendant by his conduct waives his right to confront. It is my own opinion that objective standards are better because then we don't need to bring in anyone from outside. It is just a question of deciding on what are those objective standards, and agreeing upon them. The goal of the legislative body should be to develop objective standards. So once there is a showing of necessity based on objective standards then we use it.'

(b) Constitutional rights

Videotaped and closed-circuit testimony statutes raise troublesome constitutional questions around confrontation, the principal one being whether the confrontation clauses require giving the defendant the opportunity for a physical 'face-to-face' encounter during the victim's testimony. The two-way approach generally has been found to satisfy all but the most literal interpretation of a 'face-to-face' confrontation. The one-way approaches are more vulnerable to constitutional attack. The issue is expected to be addressed in Spring 1988, when the United States Supreme Court will determine whether use of these alternative procedures to help a child to testify (not just the one-way mirror but all procedures) violate the defendant's federal constitutional rights, not only confrontation but also the right to a fair trial.[1]

(c) Timing of videotaped interviews

Since the child victim may not reveal the full story of the alleged abuse initially, or at any single interview, it has to be determined at what stage or at which interview the child's statement should be videotaped. It would be impractical as well as expensive to

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[1] Coy v. State of Iowa, fn 1 p 23 above.

videotape every meeting with the child; also difficult to ensure quality, cataloguing, preservation and storage of the videotape.

If a child is interviewed prematurely, the resulting statement may be ineffective and even jeopardize a criminal prosecution. Yet, a videotaped recording or statement made after repeated interviews undermines the purpose of limiting the child's involvement and may also be criticised by the defence as 'selective' videotaping. If the child's statement is convincing, the defence will argue that it is because of whatever was said earlier to the child, and since the prior contacts are not on tape, the videotaped statement should be disregarded. Likewise, if there are any imperfections in the videotaped statement, the defence will argue that any other evidence about unrecorded statements should be ignored, and the tape is the only evidence to which attention should be paid. Thus, the question of when to videotape is a difficult issue to resolve.

(d) Selecting the interviewer

Before determining which agency or professional should interview the child, those involved should examine state confidentiality, privilege, and non-disclosure laws. Such laws may prevent agency personnel or professionals, such as the child's therapist, from disclosing information to other agencies or from later testifying in court, unless they first obtain waivers of confidentiality or privilege from the child or from the child's parents or guardian. Since the interviewer is likely to be called as a witness at trial, the interviewer and participants should be chosen accordingly.

(e) Issues of ownership and availability

Any videotape made for investigative purposes is a potential threat to the child's privacy. Steps need to be taken to limit the unnecessary distribution of or access to the tape. In states that provide for the admission into evidence of videotaped interviews, ownership and access to the videotapes are governed by statute.

(f) Follow-up

Agencies responsible for recording the child victim's statements on videotape are advised to monitor the impact of the videotaped statements on the disposition of cases. A high yield of guilty pleas or eventual convictions may indicate that the videotaping of statements is an effective adjunct to prosecution. Opposite results could suggest otherwise.

(g) The importance of procedures

Professionals should collaborate in developing procedures for identifying cases in which a videotaped interview is appropriate, and for ensuring that the videotaping fulfils its intended functions of minimising the child's involvement in the investigation and court proceedings and of enhancing the effectiveness of prosecution. Videotaped interviews should not be done haphazardly or unilaterally. Professionals considering the use of videotape to record interviews with children must recognise that doing so will have certain consequences for the ability to prosecute a case, and must consult with each other to co-ordinate efforts. The procedures developed should require interviews to be conducted by trained professionals who are familiar with child interviewing techniques and are sensitive to the legal implications of recording

an interview on videotape. Since there will be statutory limits to the admission of the videotape as evidence, local authorities should ensure that these procedures are incorporated into any interviewing policy.

(h) Planning and preparation for videotaped and live closed-circuit testimony

Proper use of videotaped and live closed-circuit testimony requires both intelligent planning and the availability of necessary personnel and equipment. The prosecutor must first determine which of the various alternatives will best serve the child and the prosecution. If, for example, the child is fearful of testifying in front of strangers in open court but is not particularly anxious about the defendant's presence, a court order excluding all spectators from the courtroom might suffice rather than resorting to either videotape or closed-circuit television. When the courtroom environment is the cause of the child's anxiety, videotaped or closed-circuit testimony might be more suitable.

A number of law enforcement authorities (police and prosecutors) maintain a central or regional facility for videotaping interviews and testimony of child victims. Such a system lends continuity and uniformity to the process, reduces costs and delays occasioned by an ad hoc approach, and makes innovative technologies more accessible to regions which may not have the skilled professionals or resources available elsewhere.

Arrangements need to be made for the storage and ultimate disposition of videotapes. Some of the statutes provide that if the videotape is part of the court record, it is subject to any court protective order to safeguard the victim's privacy. In the absence

of any such safeguards the details of the child's trauma can be disclosed indiscriminately.

(v) Summary

The aim behind all technical devices for introducing children's evidence is to avoid the child experiencing the trauma of appearing at trial, particularly confronting the accused, the judge, the jury, the press, the public and other court personnel, and being required to disclose highly sensitive and often painful and embarrassing experiences. The statutory schemes vary widely across the United States but, in general, prescribe procedures for using videotape to record pre-trial interviews or statements of child victims, to record full scale depositions or other testimony of child victims, and for using closed-circuit television simultaneously to broadcast live testimony of child victims from one room to another during trial. No two statutes are exactly alike, and new statutes are being considered regularly by different state legislatures.

It should be noted that there is as yet no empirical evidence by which to evaluate these procedures and no consensus about their utility in the court.[1] However, it seems evident that they are in themselves no panacea and cannot work without skilled personnel practising collaboratively; despite their admirable intentions, procedures alone cannot be expected to substitute for thoughtful handling of cases, nor to solve problems that are inherent in their management.

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[1] Some effort is currently being made. Of particular interest is the three-year study of case-processing and its effects on children in four jurisdictions being conducted by Deborah Whitcomb at the Education Development Center Inc, Newton, Massachusetts in collaboration with the University of North Calorina, and the American Prosecutors Research Institute. Also work by Gary Melton, Professor of Law and Psychology at the University of Nebraska.

## Chapter III
## SUPPORTING THE EVIDENCE FROM CHILDREN

Besides expanding the hearsay exceptions to permit the admissibility of out-of-court statements of young child abuse victims, and allowing the use of videotaped and contemporaneous television testimony, many states have sought to facilitate convictions in the criminal court by some other means. These include the abolition of the legal requirement of corroboration, and the use of expert witnesses.

### 1. Corroboration

The traditional rule in American courts was that in sex offence cases, testimony of the victim was not itself sufficient proof of the offence; it had to be corroborated. The corroboration generally relates to the commission of the offence, not the identity of the offender. American prosecutors report no special difficulty in establishing the identity of the abuser.

By summer 1987, however, all states had abolished this legal requirement of corroboration for child victims in trials of sexual assault.[1] In changing the law this way legislators have dismissed a rule that is based on false assumptions about the nature of sex related cases and complainants, since there is little evidence to support the claim that children frequently make false reports of sexual abuse.[2] A further intention behind abolishing the corroboration rule has been to facilitate prosecution by removing one of the principal legal barriers and thereby bringing more sex offenders to justice. However, it is generally believed that although corroboration is no longer a legal necessity, it remains of utmost importance to prosecutors concerned with having sufficient

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[1] Howard Davidson, Director, National Legal Resource Center for Child Advocacy and Protection, Washington DC: interview on 28 August 1987.

[2] Laura Lane, The Effects of the Abolition of the Corroboration Requirement in Child Sexual Assault Cases, Catholic University Law Review, Col 36: 793, 1987.

evidence to convince a judge or jury that the abuse took place.[1]

Abolition of the traditional rule is not, however, an unmixed blessing for the prosecution, since the corroboration requirement may lead judges to admit questionably admissible evidence: its abolition may unduly restrict the scope of acceptable evidence. This is a particularly troublesome problem if the judge is required to give special cautionary instructions to the jury regarding the credibility of children.

Abolition presents problems for the defence as well. Where the child's testimony is the sole evidence the defence will have to work harder to place that testimony in doubt. As a result, the child may be subjected to closer scrutiny during the investigatory stages, and perhaps to a more rigorous cross-examination.

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[1] 'Trial judges frequently require corroboration if the victim's testimony is uncertain or unclear, a result which seems justified. In a criminal case especially, where the hearsay statements of the child are often the most damning evidence against the accused, a corroboration requirement is sometimes appropriate.' - John Myers, Child Witness Law and Practice, Wiley & Sons, 1987, chap 5.

## 2. The expert witness [1]

Expert testimony is one of the tools increasingly being used in an effort to obtain convictions in child abuse cases. The law is already familiar with expert evidence from physicians concerning physical trauma to children in abuse cases. The subject has become more controversial, however, with resort to psychiatrists, psychologists and social workers who offer testimony concerning emotional and behavioural aspects of sexual abuse. Interestingly, these developments relate to accused persons as well as victims and are among the most significant innovations taking place in the United States.

The prosecution may tender the testimony of an expert concerning characteristics or profiles of persons known to be sexual abusers of children, and then seek to support the case by showing that the particular accused fits the pattern. This evidence has almost always been rejected by the courts.

The prosecution has been more successful with expert testimony regarding children. The issues these experts have addressed include

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[1] A rich American literature is available on the subject of the expert witness. For an excellent recent commentary on general problems with admitting psychological expert evidence in legal actions, and the legal requirements for admitting expert opinions see J Bulkley, Psychological Expert Testimony in Child Abuse Cases, in: Sexual Abuse Allegations in Custody and Visitation Cases, American Bar Association, 1988.

the credibility of the child's testimony, the truthfulness of children generally and what is sometimes called 'syndrome testimony' (described below), which, similar to unsuccessful testimony about offenders, describes characteristics of abused children to which a particular child can be linked.

Testimony of truthfulness has met with a mixed reception by the courts. Expert testimony on the credibility of an individual child victim, focusing on that expert's opinion that the child is telling the truth, has been frowned upon by many appellate courts, while testimony that children generally do not lie about abuse has been similarly rejected by appellate courts more often than not. There are, however, a few courts which have allowed opinion testimony regarding the credibility of child abuse victims.[1]

How syndrome testimony is treated may depend upon its significance at a particular trial. This testimony often describes typical 'traits' such as sleep disruption, encopresis, guilt, increased fear or other characteristics or behaviour associated with children who have been abused.[2] It is generally admissible to counter defence arguments that the child should not be believed because of delayed disclosure, prior recantation, inability to recount specific incidents, or any similar fact likely to be misinterpreted by the jury if not explained by an expert. If the expert testifies that certain behaviour (eg delayed disclosure or recantation) is not inconsistent with abuse, the opinion and reasons for it would be

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[1] P Toth and M Whalen (eds), Investigation and Prosecution of Child Abuse, American Prosecutors Research Institute, 1987, chap V.

[2] Post Traumatic Stress Disorder (PTSD) is a diagnosis found in the Diagnostic and Statistical Manual of Mental Disorders. It is used by professionals to diagnose symptoms displayed by patients. Victims of crime can suffer from PTSD and develop characteristic symptoms, usually involving involuntary behaviour changes.

Child sexual abuse syndrome is a broader term that is sometimes used to describe common patterns and dynamics of sexually abusive relationships between children and adults, as well as characteristics commonly seen in children who have been sexually abused. See Roland Summit, Child Sexual Abuse Accommodation Syndrome, Child Abuse and Neglect, Vol 7:177, 1983.

admissible in most states.[1] With such testimony the expert does not offer an opinion as to the ultimate issue, (that is, whether the child nas been abused or not) but, instead, simply shares information with the jurors to give them an informed framework in whicn to judge the child.

Syndrome testimony is likely to be rejected, however, if it is offered only to prove that a particular child, because she fits the pattern, nas been abused.

> 'The fine line that the courts have created in determining whether such evidence is admissible at trial is illustrated by a Colorado Court of Appeals opinion, People v. Lucero, 724 P 2d 1374 (Colo Ct App 1986): the court permitted a police psychologist to testify as to her perception of the typical incest family, but stated that was only admissible when it did not include the expert's opinion on whether the family in question was a typical incest family.'[2]

In addition to providing an informed framework in which the jury can evaluate a child victim, expert testimony about behavioural concepts and typical behaviours or reactions of sexual abuse victims may be relevant for a number of other reasons. Specific behaviour changes may satisfy the corroboration requirement of a child hearsay statute. Toth and Whalen[3] quote the following case:

> 'A three-year old boy suddenly demonstrates fear of being left alone with men, begins naving nightmares, and deliberately urinates and defecates on the floor despite having been toilet trained for some time. At the same time his mother notices redness of his anus when bathing the child, although by the time the child has disclosed the

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[1] R Roe, Expert Testimony in Child Sexual Abuse Cases, University of Miami Law Review, Vol 40, 97, 1985.

[2] P Toth and M Whalen [fn 1 p 37 above] V-41.

[3] P Toth and M Whalen [fn 1 p 37 above] V-36.

> cause, a medical examination will neither yield any further evidence nor completely rule out abuse. The child tells his mother that the neighbour 'stuck his weenie in my butt' after a favourite aunt had told him that if something were wrong he should tell his mum. Although the child also tells the police and a therapist about the abuse, he is too frightened to answer questions in the courtroom and is thus deemed incompetent to testify and unavailable as a witness.'

According to Toth and Whalen, expert testimony could be used here to explain why and how the child's unusual behaviour was consistent with behaviour one might see in an abused child. This evidence, together with the redness of the anal area, could be used as corroboration, justifying admission of the child's out-of-court statement under a statutory hearsay exception.

In addition, expert testimony related to behavioural changes may be relevant to help determine the approximate time at which the abuse occurred.

The evolving law in this subject has been well summarised by McCord[1] who concludes that:

> 'An expert diagnosis that a child is the victim of sexual abuse offered to prove that abuse occurred should not be admitted because the testimony is not demonstrably reliable, may be difficult to effectively cross-examine or otherwise put into proper perspective and, if believed, will be dispositive or virtually dispositive of the case. The use of an expert's testimony vouching for the complainant's credibility by the opinion that the complainant is telling the truth should also be inadmissible for the same reasons. An expert's vouching for the complainant's credibility by an opinion that it is rare for a child to fabricate or

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[1] David McCord, Expert Psychological Testimony about Child Complainants in Sexual Abuse Prosecutions: A Foray into the Admissibility of Novel Psychological Evidence, The Journal of Criminal Law and Criminology, Vol 77, No 1, 1986.

fantasise a claim of sexual abuse should not be admitted because of its tendency to overwhelm the jury on the key issue in the case. However, use of an expert opinion to ennance the complainant's credibility by explaining the complainant's unusual behaviour should be admissible because generally the defendant has made this testimony necessary and it is not, even if believed, dispositive or virtually dispositive of the case. Another type of expert opinion used to enhance the complainant's credibility, by explaining either the capabilities of the particular child or the capabilities of children in general as witnesses, may be available to prosecutors.'

Finally, the views of experienced prosecutors:

> 'I am a real proponent of using experts: we use them all the time. We use them always for 'lack of trauma'. If I have a jury trial and I have no physical evidence of intercourse and there is an allegation of rape, we have very committed doctors who will come and testify, and explain to the jury that lack of trauma is as consistent with sexual abuse as trauma, or maybe even more so. It is extremely important to educate the jury. You have to be careful if you have a weak case because the jury may think you are trying to buttress your case with experts.'[1]
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> 'We get no help from our children's hospital: they are not prepared to get involved. They are not qualified to make examinations on children and don't know what to look for.'[2]

A child advocate's view:

> 'There is no substitute for experts. Deciding who is an expert in a child sexual abuse case is one of the most important decisions for a court and I don't think that credentials alone tell us how much weight to give to an individual: we ought to be throwing some people out. There is no scientific basis to profiles of perpetrators. We are not talking about disorders in the usual way. Many people feel that having sex with children is not abnormal; no test

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[1] Mimi Rose, Assistant District Attorney, Philadelphia: interview on 23 August 1987.

[2] Prosecutor at Special Assault Seminar, Seattle on 12 August 1987.

> is going to rule. We tend to look for people with large experience in dealing with children and how they can talk about their evaluation. We are not going to let them say this happened or if didn't happen: rather if a child's credibility is attacked - if, for example, a child changes his or her story - then there is good reason for someone knowledgeable about post traumatic stress disorder to testify. We are very suspicious of people who do litmus tests. That is different from the syndrome and pattern evidence which we think experts are good at talking about.'[1]

The broad lines of development in this important body of law have been laid out and it is expected that further judicial opinions will elaborate the topic.

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[1] Donald C Bross, Executive Director, National Association of Counsel for Children, C Henry Kempe National Center for Prevention and Treatment of Child Abuse and Neglect, Denver: interview on 18 August 1987.

## Chapter IV
## SUPPORTING THE CHILD WITNESS

The laws of a number of states permit child witnesses to have protection and support throughout the proceedings.[1] This might include the use of a support person, such as a victim-witness assistant, a 'guardian ad litem', or an interpreter; alternative court procedures and practices, and the use of anatomical dolls and other types of demonstrative evidence in court.

### 1. Support person

To reduce the stress that may be generated by the courtroom environment and to increase the accuracy of the child's evidence, some have found it helpful to allow a support person to be present while the child testifies. The support person may be a relative or friend or alternatively a professional victim-witness assistant. Their role is to guide the child through the criminal justice process, which can include familiarising the child with the courtroom, its principal players and basic requirements of the legal system. The support person may stand close to the child or, with very young witnesses, may be seated on the witness chair with the child on her lap. These practices may be objectionable, however, if it appears that the support person is prompting or coaching the child or that the arrangements cause the jury to feel over-protective towards the young witness. Myers[2] advises:

> 'Clearly, in this area there should be no hard and fast rules; the sound discretion of the trial judge governs. The danger of coaching is eliminated by the simple expedient of directing the support person to refrain from such activity, and the jury may be instructed not to accord special significance to the presence of the support person.'

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[1] Deborah Whitcomb et al, When the Victim is a Child, US Department of Justice, National Institute of Justice, 1985, chap ix.

[2] John Myers, Child Witness Law and Practice, John Wiley & Sons, 1987, p 422.

The support person could, of course, also be a witness, and in the California statute, this possibility is addressed. This statute provides that in such cases the testimony of the support person is to be taken before that of the child. During the support person's testimony the child is not to be in the courtroom.

2. Guardian ad litem or child advocate

The support person also may be a 'guardian ad litem', a person who has broader responsibilities than looking after the child in the courtroom. The guardian ad litem would be responsible for advising the court and helping the child to safeguard his or her best interests in the whole process, not merely the courtroom proceeding.

While it is common American practice to assign a guardian ad litem in civil cases of child abuse and neglect, it is much less common in criminal trials. The recent upsurge of interest in their appointment in criminal cases springs from the desire to allow careful examination of the unique problems of the individual child in relation to the criminal justice process, to protect the child victim from courtroom trauma and to assure greater co-ordination between the civil child protection and criminal case involving the same child. The aim is to provide added protection to the child victim without undue cost or interference with the prosecution or defence. Hardin,[1] after exploring the range of practical and legal issues involved, concludes that in the United States, 'providing guardians ad litem for child victims in criminal cases is an important experiment that should be continued, expanded and carefully studied'.

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[1] M Hardin, Guardians ad litem for Child Victims in Criminal Proceedings, Journal of Family Law, University of Louisville School of Law, Vol 25, 4, 1986-87.

Donald Bross[1] strongly supports the use of a guardian ad litem for the specific purpose of protecting the child witness before, during and after a criminal trial. He suggests tnat their duties should include 'vigorous objection to confusing, intimidating and irrelevant cross-examination, and in general, speaking up for the child witness at trial'.

The United States Department of Justice is currently conducting a study of tne potential role of the guardian ad litem in criminal proceedings.

> 'In a system where you don't have vertical prosecution (see page 53) you have to have someone, whether that be a guardian ad litem or a victim advocate, assigned to be with the child from the beginning of the proceedings.'[2]
>
> 'We are exploring the law in terms of what a guardian can do in criminal proceedings. There's now a great deal of case law where defence brings up the question of dual prosecution if the guardian is a lawyer, for example. In general, the role of the guardian in criminal court is similar to the role in civil court, except the guardian does not nave standing in the criminal court. In every state we have looked at, the guardian's role is determined at the judge's discretion and, in some cases, that does not let them be a party to the proceeding at all. In other jurisdictions, they have been permitted limited participation. Their main role, once they are appointed by the court, is to bring issues regarding the child's welfare to the attention of the court.'[3]

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[1] Donald Bross, Protecting Child Witnesses, in: D Bross and L Micnaels (eds) Foundations of Child Advocacy, Bookmakers Guild Incorporated, 1987, p 124.

[2] Kenneth Freeman, Research Fellow, National Institute of Justice, Washington DC: interview on 28 August 1987.

[3] Carol Petrie, Research Associate, National Institute of Justice, Washington DC: interview on 28 August 1987.

'There is no problem with a non-family case where the child already has a support structure: but if you have a situation where a family member has done the abusing there is no support structure for the child: we have an isolated child. The guardian ad litem programme is one where, as a prosecutor, I have two different feelings. On one hand, I need the guardian because when I have a child isolated from parents in foster care, I need some other person to speak up for the rights of the child and, say, limit the number of times the defence has access to the child. As a prosecutor I cannot do that. As a prosecutor in the United States if I control access to the child then I am controlling access to the accused to the evidence against him or her, which would be improper. But if I see outrageous benaviour, I welcome having someone to call upon and that person to have discretion to do whatever they thought necessary in the best interests of the child. If that person is part of the court, the matter can be brought to the attention of the court. Sometimes a guardian ad litem can get in my way, the typical situation being where I want to present my case in court (because that is my obligation), and where it is accepted by all that it is not in the child's best interests to go to court. The guardian ad litem will come in and try to inhibit prosecution. If I step back from being a prosecutor, and I assume my role as one at the Institute of Justice trying to decide what is best, a guardian ad litem is a very nice balance to the needs and requirements of the prosecutor and can be something that serves the court, because, again, the court's interest is in not only seeing that justice is done but also seeing to it that justice is equally distributed: justice is not only for the accused but also for the accuser.'[1]

3. Use of an interpreter to enhance communication

Many young children experience communication difficulties in a formal court situation either because their language is not understood or because they cannot be heard. Very young children, it is known, often use a 'private' language that can be understood only by a parent but is not within the comprehension of a judge

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[1] Kenneth Freeman, fn 2 p 44.

or jury: literally these children speak a foreign language. Because of timidity or embarrassment, others are unable to raise their voices above a whisper. 'Their testimony is lost on the trier unless it can be amplified.'[1] The inability of some children to communicate what they know raises the question of whether an interpreter may be appointed. 'If lack of interpretation would necessitate loss of a child's testimony, the answer should be in the affirmative.'[2]

> 'It is clear that testimony must not be allowed to fail if some process of interpretation is available. The conditions under which it is to be resorted to are the simple dictates of cautious commonsense ... interpretation is proper to be resorted to **whenever a necessity exists,** but not till then ....'[3]

Normally it should be someone disinterested in the case who should be appointed, perhaps a relative, teacher, child psychologist or some other individual who is familiar with the child's language.

> 'The evidence suggests that the trial process is very hard on children. If you think it is wrong to put adults in situations where we stretch their adult capacities beyond their limits, then why should it be right to stretch a child beyond his or her limits in a courtroom setting. By having an interpreter there you decrease the chances of the child being kept in an excrutiatingly uncomfortable position for a long period of time and then be expected to tell the truth. Another thing is that children may be very accurate but confused. You need to have people with understanding of the developmental level and of the difference between an acceptable and confusing question.'[4]

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[1] John Myers [fn 2 p 42 above] p 90.

[2] John Myers [fn 2 p 42 above] p 91.

[3] J Wigmore, Wigmore on Evidence. Reprinted in J Myers [fn 2 p 42 above] p 91.

[4] Donald Bross, Executive Director, National Association of Counsel for Children, C Henry Kempe National Center for Prevention of Child Abuse and Neglect, Denver: interview on 18 August 1987.

If no alternative is available, the court may appoint a parent to interpret for a child witness. 'In doing so the parent should be strictly admonished to limit translation to the literal words spoken by the child.'[1] Unless the translation is 'continuous' as opposed to 'subsequent' there is a risk that the interpreter will forget the words spoken by the child or will inject biased or incorrect information. There should be no attempt by the parent to suggest what the child 'really means', nor should the parent attempt to reformulate the questions put by the court. 'As an interpreter, the parent is a conduit for information, nothing more.'[2]

## 4. Altering courtroom practice

It is a widespread belief that many children are intimidated by the traditional courtroom setting, are confused about the proceedings and about the people involved. These may hinder the truth-gathering process. A number of techniques are used to make testifying less formidable and information easier to elicit. These include creating a courtroom that is designed to respond to the child's size, limited capacity to communicate, and special need for comfort, support and reassurance; exclusion of witnesses from the courtroom; rearranging the furnishings to accommodate children; allowing in-chambers testimony, recesses and postponements; excluding the press and the public from the proceedings; and giving these cases priority in the court calendar.

> 'There are few objections to the introduction of a degree of informality designed to reduce a child's anxiety and lead to more complete and more accurate testimony. Defendants in criminal cases will be hard pressed to argue

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[1] John Myers [fn 2 p 42 above] p 93.

[2] Ibid.

that such minor tinkering with traditional trial practice violates the due process clause. The matter is eminently one for discretion.'[1]

5. Delays in the trial

Children have a short attention span and limited powers of concentration: they need time to rest and regain composure. Trial courts have broad authority to recess proceedings. However, the research evidence strongly suggests that postponement or continuation can prolong anxiety and memory loss.[2] It is essential for the court, therefore, carefully to evaluate the needs and capabilities of young witnesses and try to strike a sensitive balance between any adverse impact likely to be caused by postponement and the need for delay.[3]

6. Demonstrative evidence as an aid to testimony[4]

Young children are often most comfortable using dolls to act out certain events. If they are at the pre-verbal stage, use of the dolls will enable them to communicate. The adults may also be more comfortable if the child makes use of dolls. At the trial itself a doll may be used as an aid to the child's testimony, provided that the child has indicated that she recognises the doll as being anatomically correct or its correctness has been otherwise authenticated.

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[1] John Myers [fn 2 p 42 above] p 423.

[2] Lucy Berliner, Interviewing Children. Paper presented at the Special Assault Seminar, American Prosecutors Research Institute, Seattle, 23 August 1987.

[3] John Myers [fn 2 p 42 above] p 425.

[4] 'Demonstrative evidence' refers to physical things such as pictures, diagrams, objects whose admissibility depends upon their being authenticated by a live witness.

Dolls are used also in preparing children to testify. However, caution must be exercised to ensure that pre-trial preparation with dolls does not degenerate into a coaching session in which the adult uses the dolls to show the child what happened. For a witness to narrate about the child's use of the dolls before trial, a hearsay exception may be necessary.

Dolls are not the only type of demonstrative evidence used with child witnesses. Much the same explanatory effect can be achieved through use of diagrams of the human body. It is also considered proper in some cases to permit a child witness to draw a picture of an event. The use of in-court drawings and other props usually is left to the sound discretion of the judge.

Myers[1] concludes:

> 'When courts consider altering the courtroom or some aspect of trial practice to accommodate a child's needs, several factors need to be evaluated. Will the proposed alteration prejudice the party against whom the child testifies? Will the jury be confused? More importantly, will the modification focus unwarranted attention on the child's testimony, cause the jury to credit the testimony more than it should, or engender improper sympathy for the child? Does the child really need special accommodation? To what extent, if at all, does the modification inhibit cross-examination? Does the modification consume too much trial time? Could the child's needs be accommodated through more traditional means such as recesses?'

Important legislation in this regard would clarify that judges have authority to make arrangements to support the child in response to these inquiries.

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[1] John Myers [fn 2 p 42 above] p 424.

## Chapter V
## SYSTEMS APPROACH

It is widely recognised that the strength of the supporting services is crucial to the effectiveness of the legal procedures. Hence, in many states community teams have been developed to work together in preparing the child for court and to provide services. Some are exploring the feasibility of bringing the criminal and civil proceedings closer together in intra-family abuse. In Sacramento, California the setting up of a Pilot Children's Court is intended to facilitate communication between the various agencies with responsibilities in this area. The most progressive community programmes are those spearheaded by prosecutors who, conscious of the importance of reducing multiple interviews and controlling the number of agencies badgering the child, have set up multi-disciplinary teams to deal specifically with child abuse cases.

### 1. Integrating civil and criminal court functions

Civil proceedings and criminal prosecution cannot of course be merged into the same process but even satisfactory co-ordination of the civil and criminal court functions is very rarely achieved. One consequence of this problem is inordinate delay whereby 'too many children are held hostage in long-term foster care while the juvenile and criminal justice systems get their acts together'.[1]

In 1980, the American Bar Association, recognising the fragmentation issue, urged the establishment of guidelines for referral of child protection cases to law enforcement agencies, the co-ordination of police and child protective service agency

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[1] Howard Davidson, Reforms in the Legal System's Handling of Child Abuse Cases. Paper presented at Probation Officers' Conference, Huntsville Alabama, 1986.

investigations, and the use of a court appointed guardian ad litem for the child to protect the child's interests in the criminal court.[1]

For example, Judge Edwards[2] calls for an integrated approach:

> 'Underlying the system's problems is a philosophical disagreement about what we are about. We often have people making decisions coming from different positions, different philosophical bases, making the right decision for that system but in conflict with what another person in another system is doing for that same child, arising out of that same instance. In other words, we don't have a whole picture of what's going on here. We could be doing better. Very often, information created in the juvenile court is not collected in the criminal court. The judge in the criminal system is making a decision about a child and he may not have the most important information about the child at all. He is making a punishment decision relating to the adult, and that might be appropriate from everything that person knows, but some of the critical questions from my perspective are what happened to the child in juvenile court. Is there something that can be saved after this molest has taken place? If so, then perhaps we won't send him to prison. The judge making that sentencing decision must know what is going on in the juvenile court. We should not permit judges to make sentencing decisions without having this information ... We should take a more holistic look at our legal system so that this kind of family orientation can be more reflected in our law.'

However, some critics of criminal court intervention in child abuse cases have taken a more extreme position, and have seen the solution to fragmentation in a principle that criminal prosecution against an intra-family abuser only be authorised if the judge

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[1] National Legal Resource Center, Child Abuse and Neglect Litigation - A Manual for Judges, US Govt Printing Office, 1980.

[2] Leonard P Edwards, Supervising Judge, Juvenile Court, Santa Clara County, California in address to Conference of Parents United, Santa Clara, California, 21 August 1987.

hearing the civil case certifies that a prosecution would 'not unduly harm the interests of the child'.[1] These critics view the criminal justice system as invariably rebrutalising battered children, and argue that with two different types of simultaneous proceedings involving the same child, decisions in one case too easily undermine those of the other, and also force the family to endure prolonged, continued court proceedings, carrying on possibly for years.

Children's court concept

A bold attempt to co-ordinate criminal and civil proceedings is being sponsored in California by the office of the Attorney General.[2] In 1986, the Child Victim Witness Protection Act, established a committee, the Witness Judicial Advisory Committee, to conduct a specified study concerning child victims and witnesses, including the methods of establishing a Child Victim Witness Court Pilot Project. The study and recommendations are to be submitted to the legislature in October 1988. The design of a Court Pilot Project will include modification of existing judicial practices and procedures and the establishment of a specialty court. The special Children's Court will hear all criminal and civil actions arising out of an allegation of child abuse. [Appendix B]

> 'Co-ordination is extremely critical when cases involving young children are being heard simultaneously in criminal, juvenile and/or family courts. Traditionally, these separate legal systems have had very little to do with one another. As is being done in some communities, greater efforts must be undertaken to resolve protective, custodial, and

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[1] Recommended by the drafters of the 1977 Institute of Judicial Administration/ABA, Standards Relating to Child Abuse and Neglect.

[2] Attorney General John K Van de Kamp, Commission on the Enforcement of Child Abuse Laws, Final Report, April 1985.

criminal issues within the context of one system or set of proceedings that involve the same child or children.'[1]

A legal scholar comments on integrating the proceedings:

> 'A civil case cannot be tried together with a criminal prosecution as if they were separate counts in one indictment. The procedures and issues cannot be mixed. But the evidence needed in each type of case is similar and efforts to have each draw upon a single set of encounters with the child should be encouraged.'[2]

2. Vertical prosecution

In most prosecutors' offices the various stages of litigation are handled by different lawyers. For example, one group of attorneys is responsible for preliminary hearings, while another group tries cases. In such offices the attorney who prepares a child for a preliminary hearing is not the one to take the child to trial. An increasing number of prosecutors are now utilising what is called 'vertical prosecution' whereby a single attorney is responsible for a case from initial interview through trial. Myers[3] notes the advantages of these arrangements for child victims:

> 'Vertical prosecution is an excellent way of preventing the child from having to repeat the details to several prosecutors, and also contributes to a better rapport between one prosecutor and the child.'

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[1] Michael Jett, Children's Court Pilot Project, Concept Paper, Office of the Attorney General, Sacramento, 1985.

[2] Professor Sanford J Fox, Boston College Law School: interview on 3 September 1987.

[3] John Myers, Child Witness Law and Practice, John Wiley & Sons, 1987, 2.3.

## 3. Child-centred community approaches

Research evidence and relevant clinical experience strongly suggest that the best response to child abuse is a co-ordinated community approach.[1] The aim is to provide a setting where information can be shared to form a more complete view of the child and family, and the specific response needed from individual professionals and agencies.

Despite interest across the country in developing co-ordinated responses to child abuse, much of the information about implementation is still anecdotal.[2] Toth and Whalen[3] summarise the common objectives:

(a) educating all disciplines involved in responding to child abuse reports on the dynamics of children and the criminal justice process,

(b) establishing and maintaining consistent reporting practices,

(c) providing better quality investigations and eliminating duplication of effort,

(d) ensuring sensitive treatment of the child victim and her family throughout the investigative and trial process.

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[1] P Toth and M Whalen (eds), Investigation and Prosecution of Child Abuse, American Prosecutors Research Institute, 1987, chap VII.

[2] For a full account of the Sexual Assault Center, Seattle, Washington and of the Child Protection Center, Washington DC see Exemplary Projects, National Institute of Justice, 1987.

[3] P Toth and M Whalen, above.

Multi-disciplinary team review

This involves bringing an individual case before a group of multi-disciplinary professionals to share ideas and generate suggestions on how best to handle it. It is thought to be an extremely effective approach which not only directly assists the victim and family but also provides an impetus for improving the community's overall response to the child abuse problem. Not all communities can adopt this approach for a variety of reasons, including that the sheer size of many jurisdictions and the massive volume of reports make it impracticable. In light of such considerations, large jurisdictions limit the use of this approach to extremely difficult or unusual cases.

The community approach [1]

A number of communities have developed a variety of programmes to improve their response to child abuse. Each has a slightly different composition or function. One of the most significant developments in the field is represented by the National Children's Advocacy Center programme in Huntsville, Alabama which serves to centralise and unify the pre-trial process.[2] By written agreement, the community agencies involved in these cases refer all reports of child sexual abuse to the Center and co-ordinate their activities through the Center. Thus, rather than visiting police departments, social service offices, hospital emergency rooms and mental health treatment facilities, and the prosecutor's office, children come only to the Center to be interviewed. Children are made to feel that the Center is their special place.

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[1] For an account of the development of the 'community approach' see R Cramer, The District Attorney as a Mobiliser in a Community Approach to Child Sexual Abuse, Miami Law Review, Vol 40, 2099, 1985.

[2] Courtney Turvie, District Attorney, Huntsville, Alabama, currently seconded to the National Institute of Justice, Washington DC to work on a project related to these co-ordinated approaches: interview on 29 August 1987.

The Center itself is located in a house not far from the courthouse and was chosen because it symbolised a non-institutional approach to the handling of child abuse cases.

Careful attention is given to the interview which may take place in any of three rooms, each designed for a different age group, including a playroom for very young victims. Since children often do not tell the full or complete story at a single session, interviews may be conducted in stages. Facilities are available for videotaping the interview although this is now rarely necessary. Because most cases result in guilty pleas and there is no trial, the initial interview with the child is often the only one required. At the completion of the interview, the family are referred for therapy in appropriate cases. Therapy sessions are held initially at the Center, since the programme designers believe that the child's introductions to agency staff and representatives should occur on the child's 'turf'.

An important component of this programme is the weekly team review session at which every case is presented and decisions are made regarding referrals to therapy and recommendations for criminal prosecution. Currently these sessions are attended by police, prosecutor, social worker, victim advocate and treatment professionals.

Inter-agency co-operation is looked upon as critical to the effectiveness of child abuse investigations and prosecutions. Whether a community creates a multi-disciplinary team to review all child abuse reports, establishes procedures to govern agency responses or adopts another approach to co-ordination is a matter for each jurisdiction to decide.

'But, decide it must. The crime of child abuse is too complex to investigate and too far reaching in its effects on victims to be dealt with effectively by any one agency. Working together, however, multiplies your chances of success in protecting child victims and holding offenders accountable - truly an area where the whole is greater than the sum of its parts.'[1]

[1] P Toth and M Whalen [fn 1 p 54 above] VII-11.

## Chapter VI

## THE DEVELOPING CHILD

### Special considerations regarding child witnesses

When a young child is the only witness to an alleged assault, as in physical and sexual abuse, questions arise about the child's ability to give reliable and accurate evidence. The important question to ask in considering change is whether particular investigative and trial techniques can enhance a young child's reporting skills, while maintaining appropriate concern for the rights of the accused. Although many significant areas still are under-researched, the body of established knowledge on child development and dynamics does suggest that children's ability to answer questions about witnessed or experienced events is better than both law and common belief formerly recognised, and that even very young children can respond to the demands of testimony when questions are posed in a developmentally appropriate way.

1. Memory

No matter how or in what form information is stored, in order to be an effective witness, the child must be able to demonstrate retention of material by recognition, reconstruction or recall.[1]

'Recognition is the simplest form of remembering because it requires only that we perceive an object as something that was perceived previously.'[2] Recognition memory develops very early in life, and even babies can remember how to perform simple acts if they are reminded what to do. Studies generally have found that

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[1] Nancy Perry, Child and Adolescent Development: A Psycholegal Perspective, in: John Myers, Child Witness Law and Practice, John Wiley & Sons, 1987, p 459.

[2] John Myers, Child Witness Law and Practice, John Wiley & Sons, 1987, 3.14: citing D Shaffer, Developmental Psychology, 1985, 3.14.

recognition improves rapidly as children mature.[1] It is reasonable to conclude that by the time they reach school age, children's recognition memory will be very good, at least for simple stimuli. Five year olds are as good as adults in recognising familiar objects. However, children are less proficient with more complex stimuli, those requiring 'skilled scanning and registration of information'.[2] This limitation is important in the legal context, for witnesses often are asked to testify regarding complex events.[3]

'Reconstruction memory is a specialised method of retrieving material from memory which involves reproducing the form of information that was seen in the past.'[4] Reconstructing the scene of a crime is an example. In a sexual abuse case, a young child may be able to employ reconstruction memory accurately to demonstrate what happened by using anatomically complete dolls. Memory can also be facilitated by asking questions about the events in the sequence in which they occurred, or by recreating the 'physical or cognitive context' in which the event transpired. Not surprisingly, on complex tasks, such as reconstructing a crime from photographs, the reconstruction performance of young children declines.[5]

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[1] For discussion of eyewitness testimony by children, see S Ceci, M Toglia, and D Ross (eds), Children's Eyewitness Memory, Springer-Verlag, 1987.

[2] Perlmutter, Continuities and Discontinuities in Early Human Memory Paradigms, Processes, and Performances, in: R Kail and N Spear (eds) Comparative Perspectives on the Development of Memory, 1984, 253.

[3] Nancy Perry [fn 1 p 58 above] p 490.

[4] Ibid.

[5] Ibid.

'Recall is the most complex form of memory. It requires that previously observed events be retrieved from memory with few or no prompts.'[1] It is the form of retrieval often required of child witnesses. Unlike the simpler forms of memory retrieval, recall ability is strongly age-related. Perry and Teply draw the following conclusions from research:

> 'In the context of a legal interview or examination, when children are simply asked to tell what they remember about an event, the quality of the narrative of older children will be better than that of younger ones, but neither will give as full a narrative as an adult.'[2]

However, even though children report less than adults, they are just as accurate:

> 'It would be erroneous to assume that younger children necessarily have poorer recall than do older children or adults. In some cases, younger children can provide more accurate information. The important point is that because of their limited ability to use memory strategies, children often know more than they can freely recall. When children begin to use memory strategies efficiently, however, their ability to transfer material through the memory system improves dramatically.'[3]

Hence, if children are asked to freely recall an event it is the completeness of their account and not the accuracy of it that will be less well developed than in older children and adults.[4] Furthermore, since even young children have sufficiently developed

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[1] Nancy Perry [fn 1 p 58 above] p 490.

[2] Perry and Teply, Interviewing, Counselling and In-Court Examination of Children: Practical Approaches for Attorneys, Creighton Law Review, 18, 1984-85: cited in Nancy Perry [fn 1 p 58 above] p 491.

[3] Nancy Perry [fn 1 p 58 above] p 493.

[4] R H Flin, G M Davies and Y Stevenson, Children as Witnesses: Psycholegal Aspects of the English and Scottish System, Medicine and Law, 6: 288, 1987.

ability to remember past events, simple, direct, non-leading questions are believed to be a viable means of finding factual information from them.[1]

If the material to be recalled is part of children's everyday life, their recall improves. It has been shown that when three and four years olds were studied in their own homes they demonstrated impressive standards of recall about their experiences. These referred both to spontaneous recall and answering an adult's questions.[2] Thus, child witnesses will be able to show adequate memory if they are questioned about elements of their daily life and about subjects within their particular sphere of knowledge. Their memory power will deteriorate rapidly, however, when they are asked to use 'internal cues' that require 'systematic searches of memory' and the reporting of only those items that fit specific criteria, that is, 'when they are asked to make judgements about their memories'.[3]

Children sometimes recall information that was not actually part of the story, but that is consistent in meaning with what they were told - a phenomenon referred to as 'elaborated recall'.[4]

The problems of missing information and elaborated recall can be troublesome when a child gives evidence. In fact, among older children and adults, elaborated recall may even be a greater

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[1] Perry and Teply, Interviewing, Counselling and In-Court Examination of Children: Practical Approaches for Attorneys, Creighton Law Review, 18, 1984-85: cited in Nancy Perry [fn 1 p 58 above] p 491.

[2] Todd & Perlmutter, Reality Recalled by Pre-school Children, in M Perlmutter, ed, New Directions in Child Development, No 10, 1980.

[3] Nancy Perry [fn 1 p 58 above] p 492.

[4] Ibid.

problem, as these individuals tend to draw inferences from what they experience. As a result, they sometimes remember details that never occurred. For example, adults are more likely than young children to recall that a room became dark when told that a light switch was turned off.[1]

Children are said also to experience difficulty in putting events in the order in which they occurred. For events of central importance, however, the capacity of even very young children to place them in temporal sequence is remarkably well developed.[2]

2. Suggestibility

Research evidence shows that all witnesses may be subject to suggestibility in certain ways. Loftus and Davies,[3] in a survey of existing studies, found that there is little evidence to support the conclusion that children of five years and over are substantially less reliable or more suggestible than adults. The authors conclude that if children are more suggestible than adults, the reason is not due solely to age, but more to an interaction between age and other variables such as interest in the event, time factor involved, language sophistication and type of recall given (eg written, multiple choice, free recall or recognition).

> 'Whether children are more susceptible to suggestive information than adults probably depends on the interaction of age with other factors. If an event is understandable and interesting to both children and adults, and if their

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[1] E Hall, M Lamb and M Perlmutter, Child Psychology Today, 234, 1986.

[2] R Gelman, Cognitive Development, in: M R Rosenzweig and L W Porter (eds) Annual Review of Psychology, 29, 1978.

[3] E F Loftus and G M Davies, Distortions in the Memory of Children, Journal of Social Issues, 40, 1984.

> memory for it is still equally strong, age differences in suggestibility may not be found. But if the event is not encoded well to begin with, or if a delay weakens the child's memory relative to an adult's, then age differences may emerge. In this case the fragments of the event that remain in the child's memory may not be sufficient to serve as a barrier against suggestion, especially from authoritative others. Of course, if the child's grasp of the language is so weak as to make him or her oblivious to the subtle implications in the suggestive information, then the child may be immune to the manipulation, regardless of the interest value or memorability of the stimuli, or the loss of an accurate memory record.'[1]

Children are unable to remember peripheral details completely but their memory for the central event is quite precise and accurate. Even young children are relatively difficult to lead with suggestive questioning about matters they view as important. Suggestions about peripheral information are more likely to be adopted by children than are suggestions about central details.[2]

Understanding the factors that increase suggestibility provides insight into methods that may guard against the influence of suggestion. A child whose memory for an event is weak may be more suggestible than a child whose memory for the same occurrence is strong.[3] Memory is strongest (often most accurate) at the time of the first interview.[4] The more time that elapses between the event and the first interview the less a person can recall about that event. Hence, the importance of recording the early statements that children make soon after an event is

[1] E F Loftus and G M Davies, fn 3 p 62 above.

[2] G S Goodman and R S Reed, Age Differences in Eyewitness Testimony, Law and Human Behaviour, Vol 10, 1986.

[3] E F Loftus and G Loftus, On the Permanence of Stored Information in the Human Brain, American Psycnologist, Vol 35, 1980.

[4] J Lipton, On the Psychology of Eyewitness Testimony, J Applied Psychology, 62, 1977.

experienced.[1]

Children more than adults are likely to be influenced by the authority of the interviewer. In the case of child witnesses, the questioner (police, prosecutor, or judge) is likely to be perceived as possessing high status. Very young children may want to obey the authority figure, even if it means sacrificing accuracy for obedience. Older children may want to please or appear co-operative and will say what the questioner wants to hear.[2] It is well known that during the interval between the event and trial, the child may be subjected to multiple interviews by police officers, lawyers and other adults. The accuracy of the child's recollections may be distorted by the interview process, during which the adults suggest variations of the acts encoded in the child's memory. Indeed, in the case of Holloris v. Jankowski, an eight year old testified that he had talked to so many lawyers that he no longer had an independent recollection of what transpired.[3]

A biased interviewer can also lead to memory distortion. Helen Dent[4] has found that, regardless of an interviewer's experience with children, the least accurate reports were obtained from child witnesses when the interviewer held pre-conceived notions about what had happened.

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[1] D Jones and McQuiston, Interviewing the Sexually Abused Child, The C Henry Kempe National Center for the Prevention and Treatment of Child Abuse and Neglect, Vol 6, 1986.

[2] R L Cohen and M A Harnick, The Susceptibility of Child Witnesses to Suggestion, Law and Human Behaviour, Vol 4, 1980.

[3] John Myers, Child Witness Law and Practice, John Wiley & Sons, 1987, p 80.

[4] H Dent, The Effects of Interviewing Strategies on the Results of Interviews with Children, in: A Trankell (ed), Reconstructing the Past, 1982.

While children, like adults, are susceptible to the effects of suggestibility under certain circumstances, it is unusual for children completely to fabricate a series of events. For example, children rarely fantasise or lie about the central incidents of a sexual assault. Goodman and Helgeson note that 'the few cases in which fabrication has been documented involved a host of undesirable interviewing practices ... eg parental influence, suggestive questioning, highly excessive and repetitive interviews, lengthy courtroom testimony, and questioning about peripheral detail'.[1] The message is that, while young children rarely fabricate incidents on their own, they may succumb to suggestive coaching and questioning by adults with preconceived notions of what happened.

As a guard against suggestion, generally speaking, it is advisable to refrain from suggestive questioning of children. Whenever leading questions are used, the interviewer runs the risk of eliciting inaccurate statements.[2] This risk may be especially high when questioning cognitively sophisticated children who understand the subtler nuances of language. If leading questions must be used, it is as well to ensure that only mild suggestion is offered.[3] There are times when mild suggestion may be beneficial. For example, if a mild suggestion is offered but the child responds with a spontaneous report which differs from the suggestion, the prosecutor can have somewhat greater confidence that the report is accurate. Kee MacFarlane believes that leading questions sometimes are necessary in sexual cases in order to break a

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[1] G S Goodman and V Helgeson, Child Sexual Assault: Children's Memory and the Law, University of Miami Law Review, Vol 40, 1985.

[2] G Melton Children's Competency to Testify, Law and Human Behaviour, Vol 73, 1981.

[3] N Perry [fn 1 p 58 above] p 499.

frightened or embarrassed child's silence.[1]

3. Emotional and social development

Children who have experienced severe trauma or have observed horrifying incidents are likely to regress emotionally to an immature level. Child witnesses frequently come into this category. Often, they may be children whose psycho-social development has been delayed by failure to have their needs met in early years. These factors will affect the child's ability as a witness. For example, children who have not developed secure relationships with adults will have difficulty trusting those responsible for the investigation and, as a result, they may be reluctant witnesses. Children who have not acquired confidence in their own abilities may make uncertain and doubtful witnesses. Others may have an over-active sense of guilt which may make them reluctant to talk, even about innocuous subjects.

The research that there is does not appear to take account of the emotional and social factors in development that the child brings to the abuse event. Much work remains to be done that can draw upon such influential material as Erikson's research and writing on child development.[2]

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[1] K MacFarlane, Diagnostic Evaluations and the Use of Videotapes in Child Sexual Abuse Cases, University of Miami Law Review, Vol 40, 1985.

[2] See, for example, E H Erikson, Childhood and Society, Penguin Books, 1965, and E H Erikson, Identity and the Life Cycle, Faber, London, 1968.

4. Communication skills

The limited research into children's communications that has been done suggests that 'unfamiliar listeners' are at a marked disadvantage in communicating with young children. For example, naive adults have difficulty agreeing in their interpretations of what young children have said and their perceptions of child speech are significantly influenced by their expectations of what the child would say in certain situations. Thus, there is reason to expect unfamiliar adults such as jurors to have considerable difficulty understanding the verbal communications of young children.

Adults must often depend on those known to a young child for translation of the child's speech or at least confirmation that the word the child uttered was what the unfamiliar adult thought it was. Without such interpretation the possibility that unfamiliar adults will mistakenly construe the child's words certainly must be entertained, particularly given that the context of interrogation and testimony may lead the listener to assume that the child's utterance was about a legally relevant event.

5. Effects of stress on children's evidence

Children's emotional reactions on experiencing crime, especially crime with high personal impact such as sexual abuse or homicide, and the resulting effect on children's ability to function as accurate witnesses is another important issue to consider. Research in this area is inevitably limited by the difficulty of replicating very high levels of stress under laboratory conditions. However, valuable knowledge has been derived from the

retrospective reports of children who have had extremely frightening experiences.[1] These suggest that severe stress does not result in poorer memory performance overall, but that it interacts with the type of information about which children are questioned: namely, children in the stressed condition have better recall than controls for central information, but are significantly less accurate in their ability to remember peripheral information.[2]

Other research has shown that intimidation and stress can decrease a person's willingness and ability to retrieve information from memory.[3] Anxiety may inhibit some children from telling their stories accurately under stressful circumstances, for example, when the defendant is in the courtroom. Nancy Perry observes:

> 'In order to optimise the chance of obtaining accurate reports from children, intimidation and stress should be avoided. Every effort should be made to help the child to feel comfortable. Techniques such as videotaping one interview (rather than subjecting the child to numerous interviews), allowing a supportive parent or advocate to remain with the child during interviewing and in court, conducting the interview in the child's home, and conducting the interview through one highly trained,

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[1] Leona Terr reports a series of interviews with children who were victims of a Californian mass-kidnapping. While travelling home in a school bus twenty-six children and their driver were abducted by three armed, masked men who drove them around for 11 hours and then buried them. The children escaped after 16 hours. Terr reports that 5-13 months after the event the children remembered the incident, even if they misperceived who did it and in what order events occurred. See L C Terr, The Child as Witness, in D H Schetky, E P Benedek (eds), Child Psychiatry and the Law, Bruner/Mazel, 1980.

Pynoos and Eth note that children who witness homicide remember the details vividly. See R S Pynoos and S Eth The Child as Witness to Homicide, Journal of Social Issues, Vol 40, 1984.

[2] Nancy Perry [fn 1 p 58 above] p 493.

[3] G S Goodman and V Helgeson, fn 1 p 65 above.

neutral questioner (rather than a variety of adversarial professionals) may help to reduce the child's level of stress.[1]

6. Jurors' perceptions

Some concern has been voiced that the use of videotechnology in child abuse cases may mislead the jury and deprive the defendants of due process. Defence attorneys have suggested that juries may be unable to judge witness credibility in some instances in which their testimony is presented over a television monitor, whether live testimony via closed-circuit or a deposition recorded on videotape. In summarising the research in this area Melton[2] notes:

> 'For example, if a child responds to facial expressions of others in the courtroom, this information probably would be unavailable. Also, the camera operator might affect jurors' perceptions, even inadvertently, by choice of camera angle and shot (eg zooms and pans). More generally, the few studies available of effects of videotaping suggest that both the televised presentation itself and variations in such presentation (eg black and white vs colour) affect jurors' attention and their perceptions of witness credibility and attractiveness. In the face of such evidence, plausible objections may be made to televised testimony on grounds of violation of the rights to trial by jury, due process and a fair trial.'

Questions have also arisen about the effects on jurors of observing that the defendant, unlike other witnesses, is not permitted to confront the child face-to-face, and whether this implies guilt or dangerousness on the part of the defendant.

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[1] Nancy Perry [fn 1 p 58 above] p 499.

[2] G Melton, Detours to Less Travelled Paths in Child Witness Research, in: Ceci, Toglia & Ross (eds), Children's Eyewitness Memory, Springer-Verlag, 1987, p 212.

## 7. Summary

The challenge that needs to be met is the integration of the judicial system with our knowledge of the developing memorial, linguistic and intellectual, and social capabilities of children. Technical procedures, innovative court practices and the use of interview scripts, prompts and other practice tasks, all have some promise for helping younger children to optimise their response to a witness interview and in maximising the value of their testimony. In his masterly overview of current knowledge, Melton[1] concludes that the accuracy of children's evidence is a function of the relationship between the age of the child and the nature of the task.

> 'Children's statements are likely to be more accurate if obtained by direct questioning, the temporal sequence of events is closely followed, external memory aids are used and the questioner assumes responsibility for clarifying the child's understanding of inquiries and for clearing up inconsistencies in the child's account. Conversely, the same children are likely to perform poorly when a global narrative of the account is solicited or the temporal order of events is violated. Furthermore, the child's familiarity and ease with the role of the examiner, the purpose of the enquiry, and the setting in which it occurs are also part of the context that is likely to be predictive of children's testimonial competency and credibility. Because cross-examination occurs at the end of a series of pre-trial interviews, the quality of the children's evidence can be undermined or bolstered depending on the skill of these early interviews. If the investigators are sensitive to the needs of the child, to the impact of the task demands, to the importance of a relaxed and informal setting and to the need for confirming and checking as the child goes along, the child's evidence could be more complete and accurate by the time of reaching the trial. The jury needs

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[1] G Melton and R Thomson, Getting out of a Rut: Detours to Less Travelled Paths in Child Witness Research, in: Ceci, Toglia & Ross (eds), Children's Eyewitness Memory, Springer-Verlag, 1987.

also to be sensitive to the techniques that might be used by the defence to undermine the child's confidence and to confuse the evidence. The extent to which this happens is an important area for future research.'

## Chapter VII
## CONCLUSIONS AND RECOMMENDATIONS

Having set out to identify and analyse current efforts in America designed to make the criminal justice system more sensitive to the needs of child witnesses while continuing to safeguard the rights of the accused, this report has reviewed those developments that are most relevant to an evaluation of the need for change in Scotland.

Gary Melton, in an address to the American Psychology Law Society in 1986, questioned whether the need for procedural reform had been persuasively demonstrated.[1] He argued that, even in areas where the prosecutorial policy is to file criminal charges, because of plea bargaining and family court options, most child victims do not testify in open court, and therefore there is no need to be concerned about the child as an in-court witness. Furthermore, clinical impressions suggest that when they do testify, some children find the experience 'empowering rather than traumatic'. Many prosecutors believe that if children can withstand depositions or other out-of-court testimony, they also can meet the challenge of live testimony under conventional rules of procedure. Also, courtroom audiences are rarely present and, when present, seldom are perceived to trouble child witnesses.[2]

In America, the need for change is broadly accepted but not uniform. One area where disagreement is observable relates to the use of videotaped testimony. Although use is increasing,

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[1] Gary Melton, Detours to Less Travelled Paths in Child Witness Research, Children's Eyewitness Memory, Springer-Verlag, 1987.

[2] D Whitcomb, E R Shapiro and L D Stellwagen, When the Victim is a Child: Issues for Judges and Prosecutors, United States Department of Justice, National Institute of Justice, 1985.

prosecutors especially tend not to like technical devices. They are costly to operate and, besides, prosecutors strongly believe that their most effective case involves placing the child on the witness stand:

> 'The child who can tell her story in that situation must surely be telling the truth: it is best for the prosecution when there is a live witness.
>
> 'With the prosecutors there is a certain amount of bravado and ego building and they see the technical devices as crutches which they would prefer not to use. And again, we have no idea how jurors feel. However, there are lots of cases possible only with the use of closed-circuit television.'[1]

How the defence lawyers feel is rarely discussed. According to Melton,[2] they are grossly under-represented at national symposia on sexual abuse. Howard Davidson[3] speculates that defence lawyers have mixed feelings about the changes.

> 'The defence attorneys have reason to be concerned about the balance of the scales that may have been tipped too far in the direction of the rights of the child. I say you have to look at how the scale used to be. The child had almost no rights and it was impossible to bring cases to trial. Now the scales are more even. The guidelines of the American Bar Association [ABA] were a compromise hammered out between the prosecution part and the defence part of the ABA. So you will see some of the positions are conservative, very cautious. On video depositions and the use of hearsay they don't go as far as some writers.
>
> The defence has reason to be concerned that the hysteria over child sexual abuse will result in the conviction of innocent people. We have no data on that. Defence

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[1] Howard Davidson, Director, National Legal Resource Center for Child Advocacy and Protection, Washington DC: interview on 27 August 1987.

[2] Gary Melton [fn 1 p 72 above] p 209.

[3] Howard Davidson, above.

> attorneys are very critical of the use of experts who attempt to explain recantation and other behaviours, although they have their own experts. There are no absolutes in this field and there are cases that are totally mystifying, totally incredible. We don't know what to believe. Defence attorneys are saying that we are making it too easy to convict, that the truth telling process is best borne out by having the accuser sit across from the accused, look the accused in the eye and say 'he did this to me'. But there is no question that there are people who have been wrongfully convicted: I don't for a moment doubt that. But, on balance, we know there is absolutely no reason to discount the thousands of children who have been sexually abused and whose perpetrators of abuse have been brought to justice because of improvements in the law. I have never heard a defence attorney suggest doing away with child abuse laws generally, although they would like to see some of these evidentiary reforms struck down.'

In view of the speed with which reforms have been introduced in the United States, the hesitancy in some quarters about how much need there is for reform and the fundamental importance of the matter they try to effect, it is surprising that so little systematic study has been made of what the pre-reform reality is and what results reform produces. Gary Melton reminds us that our present knowledge is limited largely to anecdotal reports from four cities studied in a project for the United States Department of Justice.[1] No systematic time series or cross-jurisdictional comparisons of the effects of new statutes are available.[2] Despite the paucity of research-based knowledge, there are a number of objectives that arise from American experience that should be reflected in Scottish law and procedure or considered further by the Commission.

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[1] D Whitcomb, E R Snapiro and L D Stellwagen, fn 2 p 72.

[2] Research currently in progress includes: a three-year study of case processing and its effects on children in four jurisdictions being conducted by Deboran Whitcomb at the Education Development Center Inc, Newton, Massachusetts in collaboration with the University of North Calorina, and the American Prosecutors Research Institute. Also Gary Melton, Professor of Law and Psychology, University of Nebraska, and the National Center of Jewish Women, New York are studying the impact of various procedural techniques on juries and on others involved in the criminal justice process.

## 1. RULES SHOULD BE DEVISED TO GOVERN THE INTERVIEWING OF CHILD SEXUAL ABUSE VICTIMS AND OTHER VULNERABLE WITNESSES

(a) **Interviews should be conducted as soon as possible after the abuse occurred.** Research evidence strongly suggests that if children are questioned appropriately soon after the event, tney can provide accurate evidence. Even though they will report fewer details than adults, these will be just as accurate. Early interviews also reduce the chance of extraneous information being introduced. When memory has faded children, like adults, are open to suggestion, especially if that is made by an authority figure.

(b) **Interviews should be kept to a minimum number.** There are great advantages to minimising the number of interviews. Testimony will be more accurate since the child's recollection of what happened will not be supplanted with information suggested by authoritative adults. Fanciful descriptions of events are less likely to intrude. The child's account will retain its spontaneity and freshness, and will be all the more convincing when admitted at trial. The child is more likely to be co-operative if privacy is respected. The child will be spared the trauma of reliving the abusive experience a number of times over. Security of videotapes will be easier to achieve.

(c) **Interviews should be conducted by the same person who is specially trained for the purpose.** A good interview is probably the single most important part of any investigation. An interview that is ineptly conducted,

nowever, may cause the child to withdraw and jeopardize the entire prosecution. The interviewer must have an ability to communicate effectively with children and an understanding of the needs of the legal system. Standards of practice and relevant training need to be devised and applied.

## 2. ANATOMICALLY DETAILED DOLLS AND OTHER PROPS NEED TO BE AVAILABLE FOR USE DURING PRE-TRIAL INTERVIEWS AND IN THE COURTROOM

Dolls and other props will assist the child to communicate information or illustrate wnat happened. 'As long as the child can be cross-examined effectively, and an accurate record is made of the child's non-verbal testimony, the child should be permitted to proceed in the manner that allows the child to testify fully and accurately.'[1]

## 3. THE JUDGE SHOULD BE GIVEN DISCRETION TO ADMIT THE CHILD'S TESTIMONY BY CLOSED-CIRCUIT TELEVISION

Children are said to be intimidated by a large courtroom full of strangers. They are also fearful of confronting the abuser in court, especially if that person is a family member or otherwise is well known to the cnild. Indeed, the court appearance itself is said to be the most bewildering and traumatic part of the process.

Equally, there is evidence to suggest that children react negatively to being isolated from the action and that 'some are helped psychologically by the public authoritative vindication of their

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[1] John Myers, Child Witness Law and Practice, John Wiley & Sons, 1987, p 89.

original statement'.[1] At least one research study has reported that children's mental health improved after testifying in court.[2]

In light of this kind of conflict it may be that the use of closed-circuit testimony should be permissible only if the judge finds that to proceed otherwise is likely to produce harm to the child.

## 4. THE LAW SHOULD PERMIT THE CHILD TO HAVE A SUPPORT PERSON PRESENT THROUGHOUT THE PROCEEDINGS

In child sexual abuse cases, the child as a witness for the prosecution would undoubtedly be subject to the same sort of preparation for testifying as would all other witnesses. However, children as witnesses present special problems which may call for the support of a person skilled in communicating with children and understanding their predicaments in these cases, who can assist the child in participating in that preparation. It may also be important when the child gets to the courtroom to have that person present, perhaps even physically close, during the time that the child is testifying. Although one would normally expect a parent to undertake this kind of supportive role, in intra-family sexual abuse cases family members may be quite inappropriate and another person may have to be appointed.

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[1] L Berliner and M K Barbieri, The Testimony of the Child Victim of Sexual Assault, Journal of Social Issues, Vol 40, 1984, 125.

[2] Reference to a study being conducted at the University of North Carolina. In: L Berliner, Interviewing Children. Paper presented at the Special Assault Seminar, American Prosecutors Research Institute, Seattle, 23 August 1987.

## 5. CONSIDERATION SHOULD BE GIVEN TO THE APPOINTMENT OF A GUARDIAN AD LITEM IN CRIMINAL CASES FOR THE CHILD ABUSE VICTIM

In some cases it may be proper to expand the role of a person supporting the child so as to include responsibilities to the court for looking after the child's best interests. In the United States, the appointment of a guardian ad litem for child victims in criminal proceedings is increasingly favoured to fill this need. Their responsibilities also could include assisting in obtaining greater co-ordination between the civil protection proceedings and the criminal case in which the same child may be involved.

In Scotland, this opens up the possibility for extending the role of 'safeguarders' who at present are active primarily in care and protection referrals to the children's hearings system and to the sheriff court.[1] Given appropriate training, a 'safeguarder' could help to ensure that throughout the criminal proceedings the interests of the child are fully protected. They might also provide an important link with the children's hearings system where, at an earlier time, measures may have been taken to protect the child.

## 6. THE POSSIBILITY SHOULD BE INVESTIGATED FOR GREATER CO-ORDINATION BETWEEN CIVIL AND CRIMINAL PROCEEDINGS

The value of co-ordination between the civil and criminal side of child abuse cases is uncontroversial. That greater co-ordination can

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[1] Joseph Curran, Safeguarders in the Children's Hearings System (Section 34A, Social Work (Scotland) Act 1968), Central Research Unit, Social Work Services Group, Edinburgh, 1988.

be achieved than is presently the case seems also to be beyond controversy. Efforts to achieve this kind of co-ordination in America should be monitored and the results evaluated.

## 7. THE JUDGE NEEDS TO BE GIVEN AUTHORITY TO ADMIT HEARSAY SUCH AS THE CHILD'S PRE-TRIAL VIDEO-TAPED INTERVIEWS AND DEPOSITION

Out-of-court statements made by child victims of sexual abuse should be admissible for the truth of what they assert, provided that certain conditions are satisfied that protect the interests of the accused. For example, the child should be required to testify at the proceedings and be subject to cross-examination about the statement, unless the court finds the child 'unavailable'. The court should also require that the out-of-court statement possess 'particularised guarantees of trustworthiness'. Finally, the accused should be given ample notice of the intention to use the hearsay.

A video deposition in which there is regard to safeguarding the rights of the accused may be admissible without satisfying all of these conditions. For example, if the child is unable to testify at the trial because of some traumatic response to the courtroom, it may be proper to admit the deposition. If the supporting services for the child are implemented, then cases in which the child is unavailable for this reason ought to be infrequent.

## 8. THE RULE REQUIRING CORROBORATION OF A VICTIM'S TESTIMONY SHOULD BE ABANDONED IN CHILD SEXUAL ABUSE CASES

There are no reports of any injustice following abolition in the United States. The fact that it has been uniformly abandoned is a strong indication of the feasibility of this sort of change.

## 9. THE LAW SHOULD ALLOW EXPERT TESTIMONY TO BE INTRODUCED WHERE IT WOULD BE HELPFUL TO THE JUDGE OR JURY

With tne development of scientific knowledge concerning children and the effects that trauma nave on them, information is available for the trial of child sexual abuse cases that should be utilised. Expert testimony not only can produce just results but can serve to lessen tne need for the child herself to testify in some cases.

## 10. THE LAWS NEED TO ASSURE THAT TRIALS ARE SPEEDY IN ALL CASES WHERE CHILDREN APPEAR AS WITNESSES

Prolonged delay between the event and the time for testimony can result in memory loss, and deficits in memory can be compounded by misleading suggestion. The need is especially pointed in child sexual abuse wnere there are firm grounds for believing that delay in bringing the case to trial is the most significant single factor affecting the child's emotional well-being.[1]

## 11. TRADITIONAL COURTROOM PROCEDURES SHOULD BE MODIFIED WHERE CHILDREN ARE INVOLVED

The physical arrangements of the court can be important. The aim should be to make the experience of testifying in court less stressful for the child. Some changes will not require statutory reform - reducing the size of the audience, changing the formal appearance of the courtroom, allowing the child regular breaks, permitting the child to sit next to or even on the lap of a trusted adult. Where necessary to relieve the child of the trauma of

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[1] L Berliner, fn 2 p 77 above.

facing the accused, the seating should be arranged out of line of vision or a simple screen should be introduced to the courtroom to shield the child from the accused. The public and the press should be given an opportunity to view the proceedings through a television monitor set up in another room. Some other changes will require legal reform - removing the accused during the child's testimony, closed-circuit television testimony - all of which involve difficult policy decisions cognisant of the accused's rights.

## 12. STEPS SHOULD BE TAKEN BY THE COMMISSION OR OTHER BODIES TO ENSURE THAT WHATEVER RECOMMENDATIONS ARE ADOPTED AND IMPLEMENTED ARE PROPERLY EVALUATED

The expectation with which recommendations are brought forward is that their adoption will produce change. It is necessary that research be undertaken in order to gather data and otherwise monitor the effects of these changes on courts, on the hearings system, if possible on children and in other respects, in order to make sure that the anticipated changes are the ones that occur and that unanticipated changes may be recognised.

The same recommendations can and perhaps should be applied to proof proceedings before the sheriff under the children's hearings system. The same considerations of protection of the child and for the quality of the evidence would appear to suggest this, although the issue has not been thoroughly explored.

If the goal is to allow evidence from children in criminal cases to be gathered so as to enhance and preserve its quality and admitted in court by procedures that induce least trauma for the child, and at the same time safeguard the rights of the accused, then some changes to the Scottish criminal justice system appear

to be necessary. Only a few are likely to require statutory reform. Some others may require modification or creation of new rules of procedure by the judges. The essential tasks are to create a climate and a facilitating structure for good professional practice, both at the investigative stage and in court, to allow a choice of procedural techniques that will accommodate the special difficulties and vulnerabilities of individual witnesses.

Sound legislation and clear rules of procedure, while being important, need to be supplemented by a clarification of professional roles and responsibilities and by the development of the knowledge and skill that are called for. In the final analysis, all of these factors are important for the handling of individual cases. No reform should be undertaken that would interfere with dealing with children on the basis of their individual and particular circumstances. As has been observed, there are few hard and fast rules and wisdom seems to lie in the appropriate use of options.

> 'There are so many possibilities. Anything that is automatic is probably not good. The real question is under what circumstances do you say it is not necessary to have the child in court. I have no simple answer or formula. The only satisfactory approach is case by case and child by child, without hard rules that require or disallow a given technique. Any time we can give ourselves more options we have a better chance of justice. No child deserves less.'[1]

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[1] Donald Bross, Executive Director, National Association of Counsel for Children, C Henry Kempe National Center for the Prevention and Treatment of Child Abuse and Neglect, Denver; interview on 18 August 1987. See also, Donald Bross, Protecting Child Witnesses in: D C Bross and L F Michaels (eds), Foundations of Child Advocacy, Bookmakers Guild, 1987.

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## APPENDIX A

## FACTORS INDICATING NEED FOR VIDEO TESTIMONY

1. Age

2. Level of development

3. Capacity to comprehend the significance of the events and to verbalize about them

4. Fear of the defendant

5. Handicap or disability

6. Child is particularly susceptible to psychological harm from testifying

7. Child experienced a psychological reaction to the abuse which is beyond the norm

8. The child blames himself for the abuse

9. Number of times the child has been required to testify or submit to interviews

10. Child's behaviour or reaction to previous interviews

11. Threats of serious bodily harm to the child or to family members made by the defendant

12. Threats of incarceration or deportation made by the defendant

13. Threats of removal of the child from the family made by the defendant

14. Threats of dissolution of the family made by the defendant

15. Use of a firearm or other deadly weapon

16. Nature of the acts, heinous or aggravating circumstances

17. Bodily injury inflicted on the child

18. Conduct by the defendant or by counsel during a hearing or trial that causes the child to be unable to continue

19. Nature of the relationship between the defendant and the child

20. Defendant occupied or occupies a position of authority over the child

21. The child's custodial situation

22. Attitude of other family members toward the acts and/or the child

23. Act is part of an ongoing course of conduct over an extended period of time

24. Defendant, at the time of the act, was living in the same household as the child

25. Defendant has ready access to the child

26. Defendant is providing substantial support to the child

27. Child has been a victim of abuse before

28. Whether the emotional trauma of further testimony would render the child medically unavailable

29. Whether the child manifests symptoms associated with post traumatic stress disorder or other mental disorders, including re-experiencing events, fear of their repetition, withdrawal, regression, guilt, anxiety, stress, nightmares, enuresis, lack of self-esteem, mood changes, compulsive behaviours, school problems, delinquent or anti-social behaviour, phobias or changes in interpersonal relationships

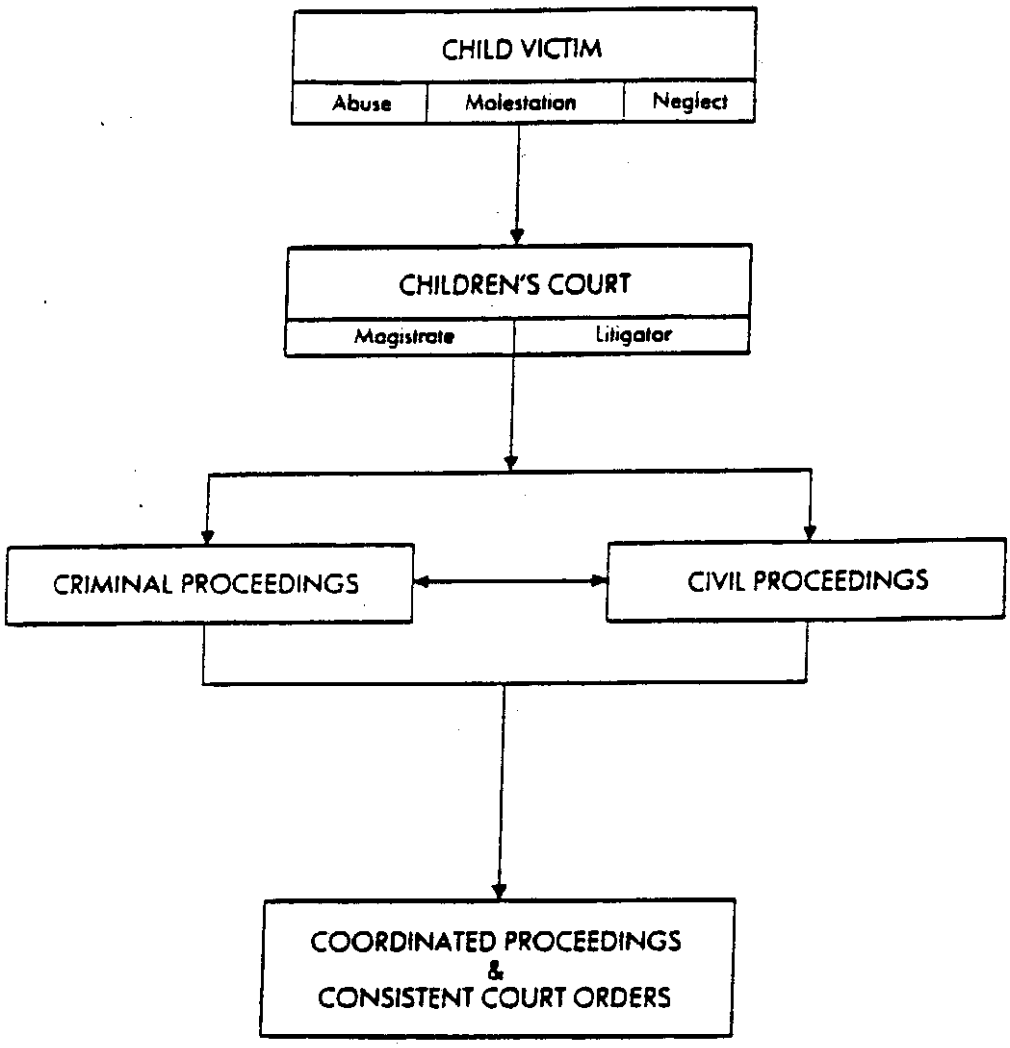
30. Whether testifying in court will result in serious emotional distress such as that the child cannot testify accurately or completely.

Source: John Myers, Child Witness Law and Practice, John Wiley & Sons, 1987, p 391-392.

APPENDIX B

Source: Micnael Jett, Children's Court Pilot Project, Office of the Attorney General, State of California, 1985

## CHILDREN'S COURT CONCEPT

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