Accommodating Child Victims of Sexual Abuse in the Courtroom: Selected International Perspectives

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Introduction

Academic texts frequently suggest methods, technologies and techniques through which the courts could improve the experiences of child complainants in sexual assault cases. Most of these academic articles focus on special measures to minimize re-traumatization (or "double victimization") of child complainants. Scholars emphasize the lack of developmentally-appropriate questioning techniques used in the courtroom, especially by defence counsel. Most academics suggest that further education could assist judges to build rapport with child witnesses, take time to explain the process to the children and intervene when questioning is inappropriate. The same training should be offered to prosecuting and defence counsel dealing with children.

Other suggestions include the development of a specialized court, such as the Family Violence Court established in Manitoba, the use of intermediaries to re-formulate cross-examination questions into developmentally-appropriate language and specific restrictions on the types of questions that may be asked during cross-examination.

Analysis

Canada

The pre-eminent Canadian scholar on this topic is Professor Nicholas Bala, who has authored or co-authored innumerable articles on the subject of child witnesses and child participation in the justice system. Other Canadian scholars include Ronda Bessner, Kang Lee, Rod Lindsay, Victoria Talwar and Rachel Birnbaum. For a good summary of the law in Canada regarding child witnesses, see M. Zuker, R. Hammond and R. Flynn, *Children's Law Handbook*, 2nd ed. (Toronto: Carswell, 2009), pp. 77-120.

Canadian scholarship in this area focuses mainly on the amendments to evidentiary laws and procedures over the past thirty years, such as the elimination of strict competency rules and the need for corroboration of a child's testimony. The requirement for judges to ask child witnesses about their understanding of an oath was removed. Warnings to the jury about the inherent frailty of children's testimony were rejected by the Supreme Court in *R. v. W.(R.)*, [1992] 2 S.C.R. 122. In *R. v. Khan*, [1990] 2 S.C.R. 531, the Supreme Court of Canada changed the laws regarding the admissibility of hearsay evidence so that the hearsay evidence of a child victim of abuse would be admissible if it was both reasonably necessary and reliable.

Several changes protect child witnesses from double victimization. Children are now permitted to testify from behind a screen or remotely through closed-circuit television (CCTV) to allow the child to avoid confrontation with their alleged attacker. Section 715.1 of the *Criminal Code* permits the use of a videotaped statement by a child victim if it is adopted by the child during testimony, which minimizes the need for a child to retell the story of their abuse. For articles on these evidentiary and procedural developments, see N. Bala and H. McCormack, "Accommodating the Criminal Process to Child Witnesses: L.(D.O.) and Levogiannis," 25 C.R. (4th) 341 (1994), R. Bessner, "Sensitivity of the Supreme Court to the Plight of Child Victims of

Sexual Abuse," 27 C.R. (5th) 189 (1999), N. Bala, K. Lee and R. Lindsay, "*R. v. M.(M.A.)*: Failing to Appreciate the Testimonial Capacity of Children," 40 C.R. (5th) 93 (2001) and N. Bala *et al*, "Bill C-2: A New Law for Canada's Child Witnesses," 32 C.R. (6th) 48 (2005).

Canadian scholarship confirms that these changes are moving towards a justice system that accommodates and understands the needs of child victims of sexual abuse. However, some articles suggest the need for additional adaptations. In "Judicial Assessment of the Credibility of Child Witnesses," 42 Alta L. Rev. 995 (2004-2005), N. Bala *et al* summarize the results of a limited study on the ability of judges, law students, child protection workers and other professionals to assess the credibility of children and an additional study on judicial attitudes regarding child witnesses. The authors conclude that better education for judges and professionals would improve their abilities to ask developmentally-appropriate questions and assess credibility in a developmentally appropriate manner.

This conclusion builds on the findings of J. Schuman, N. Bala and K. Lee in "Developmentally Appropriate Questions for Child Witnesses," 25 Queen's L.J. 251 (1999). In that article, the authors detail the linguistic, cognitive and emotional attributes of children during four stages of development: infancy, early childhood, middle childhood and adolescence. The linguistic development analysis includes details on vocabulary size, sentence structure, jargon, the use of imbedded phrases, tag questions and negatives as well as pronouns, prepositions and passive sentences. Children's cognitive abilities in relation to concrete and abstract ideas, numbers, colours, sizes and periods of time are also canvassed and the authors draw attention to special emotional considerations when dealing with adolescents.

In addition, the authors address the need for an introductory phase of questioning between the judge and the child witness, which establishes rapport between the child and the judge, allowing the child to relax and feel more comfortable. Although now somewhat dated (it refers to the former *Evidence Act* requirement to ask a child about their understanding of an oath), "Developmentally Appropriate Questions for Child Witnesses" is an informative article for judges and lawyers dealing with child witnesses.

Although there are additional Canadian articles on the subject, most pre-date the accommodating measures implemented by the most recent amendments to Canadian law. These articles do not look beyond those amendments, which are now standard practice in child sexual abuse cases.

Australia and New Zealand

The most progressive and forward-looking body of academic work in this area emerges from scholars in Australia and New Zealand. Prominent authors include Rachel Zajac, Anne (Annie) Cossins, Rita Shackel and Judy Cashmore. Like several Canadian researchers, these authors emphasize the importance of judicial leadership and intervention to prevent inappropriate and oppressive questioning; for example see J. Cashmore and P. Parkinson, "What Responsibility Do Courts Have to Hear Children's Voices?," 15 Int'l J. Child. Rts. 43 (2007) and A. Cossins, "Prosecuting Child Sexual Assault Cases: Are vulnerable witness protections enough?," 18 Current Issues Crim. Just. 299 (2006-2007).

Several articles focus on the dissonance between what clinical and social science research indicates about children's cognitive abilities and popular conceptions of these abilities. In R. Shackel's "Understanding Children's Medium for Disclosing Sexual Abuse: A Tool for Overcoming Potential Misconceptions in the Courtroom," 16 Psychiatry Psychol. & L. 379 (2009), popular myths about the disclosure of sexual abuse are dispelled. The author indicates that, contrary to popular belief, selection of a specific person to whom the victim discloses may not hold any special significance because a large portion of sexual abuse is disclosed inadvertently. Furthermore, abuse is often disclosed incrementally, so that what is perceived by adults in the judicial system as inconsistency is sometimes additional truth-telling. This cognitive dissonance is also explored in A. Cossins, "Children, Sexual Abuse and Suggestibility: What Laypeople Think They Know and What the Literature Tells Us," 15 Psychiatry Psychol. & L. 153 (2008) and R. Shackel, "Judicial Perceptions of Jurors' Understanding of How Children Respond to Sexual Victimisation," 14 Psychiatry Psychol. & L. 130 (2007).

Anne Cossins explores the interesting suggestion of specialization of judicial and legal professionals in her article, "Prosecuting Child Sexual Assault Cases: To specialise or not, that is the question," 18 Current Issues Crim. Just. 318 (2006-2007). In South Africa, for example, the Wynberg Sexual Offences Court deals exclusively with sex offences. Notably, the author paints a positive image of Manitoba's Family Violence Court, which has received very little attention from Canadian scholars. This provincial court utilizes specialized prosecutors who have expertise on the nature of the crimes and the requirements of vulnerable witnesses. Their consistent specialization in this area provides the stability needed to build rapport with child victims. Originally, this court was also intended to include specialized judges, but this was precluded by resource shortfalls. Along with arguing that a less adversarial process would be beneficial for child victims, Cossins concludes that the Manitoba Family Violence Court model would enhance the fairness and outcomes of child sexual abuse trials.

The topic of developmentally-appropriate questioning is canvassed by R. Zajac, J. Gross and H. Hayne in "Asked and Answered: Questioning Children in the Courtroom, 10 Psychiatry Psychol. & L. 199 (2003) and by R. Zajac and P. Cannan in "Cross-Examination of Sexual Assault Complainants: A Developmental Approach," 16 Psychiatry Psychol. & L. S36 (2009). Like their Canadian counterparts, these New Zealand researchers determined that children may lack the metacognitive skills to determine whether they have understood a question. Complex questions may serve to obstruct the truth rather than promote its discovery, as children will often answer a misunderstood question with an incorrect or nonsensical answer, because they do not realize that they did not comprehend the question. As such, the authors conclude that when dealing with child witnesses, cross-examination does not reliably uncover the truth.

The use of cross-examination in child sexual abuse cases is criticized in several articles. A. Cossins, "Cross-Examination in Child Sexual Assault Trials: Evidentiary Safeguard or an Opportunity to Confuse?," 33 Melb. U. L. Rev. 68 (2009) is an essential analysis of the effects of cross-examination on child witnesses, demonstrating that cross-examinations serve to confuse and upset children. Child witnesses are highly susceptible to suggestion, making leading questions an especially inappropriate technique. Furthermore, the author notes at p. 77 that educating judicial officers has little effect on the willingness of judges to intervene when cross-examinations become developmentally inappropriate.

Cossins demonstrates that improvements to the cross-examination process will promote the child witness's well-being and trial fairness, making five admittedly radical suggestions for reform. These suggestions include prohibiting suggestive questions or statements intended to persuade the child witness, prohibiting repetitive questions, prohibiting statements that accuse the child of lying or being a liar, restricting the use of prior inconsistent statements and allowing the participation of a court-appointed intermediary. The use of intermediaries is addressed in more detail below.

As can be seen in the previous paragraphs, scholars in Australia and New Zealand take a more progressive and radical approach to the implementation of reforms intended to benefit the child witness. Some of these reforms, such as the use of court-appointed intermediaries, have been implemented in other countries, including the United Kingdom and South Africa.

South Africa

South Africa was one of the first common law countries to legalize the use of intermediaries for child victims of sexual assault. Intermediary use is uniquely mandatory for child witnesses in South Africa. Intermediaries are trained independent persons who convey the general meaning of any question to a child witness in a manner that the child understands. Hostility and aggression is removed from the questions, protecting the child witness from re-traumatization, and the intermediary may rephrase or change the question so that the child understands what is being required. If counsel feel that their question was not asked, they may object and it will be rephrased and asked again. Accordingly, the intermediary functions essentially as an interpreter. In South Africa, these intermediary provisions withstood constitutional challenge. See K. Müller and M. Tait, "The Child Witness and the Accused's Right to Cross-Examination," 1997 J. S. Afr. L. 519 (1997) for an analysis of the use of intermediaries.

In "Judicial Management in Child Abuse Cases: Empowering Judicial Officers to be 'the Boss of the Court'," 18 S. Afr. J. Crim. Just. 41 (2005), South African scholars K. Müller and A. van der Merwe make a compelling argument for more frequent judicial intervention, a theme that resurfaces in several academic articles.

The United Kingdom and the United States

While British scholarship on this topic is much more limited than that emerging from South Africa, Australia and New Zealand, the laws in Britain were amended to permit the discretionary use of intermediaries for child victims of sexual assault, a provision which took effect in 2008. This change is regarded as controversial, and is criticized by the defence bar in the United Kingdom. For an examination of this and other amendments to British law affecting child witnesses, see J. Doak, "Confrontation in the Courtroom: Shielding Vulnerable Witnesses from the Adversarial Showdown," 5 J. C. L. 296 (2000).

In F. Raitt, "Judging Children's Credibility—Cracks in the Culture of Disbelief, or Business as Usual?," 13 New Crim. L. Rev. 735 (2010), the author examines strongly entrenched representations of children as prone to fabrication, exaggeration and dishonesty. In this article, the author notes that while special measures to assist child witnesses provide protection for those

children, they do nothing to prevent the debilitating effects of adversarial processes on children or shift present cognitive discourses on the credibility of child witnesses.

Another interesting resource on this topic is a 2010 PhD thesis submitted by Debbie Cooper, a candidate at the University of Nottingham, which canvasses the entire subject area in 339 pages and available online at http://etheses.nottingham.ac.uk/1319/1/DC_Complete_Thesis.pdf.

Internationally, scholars almost unanimously agree that the right to physically confront one's accuser in the courtroom is no longer an entrenched right in common law jurisdictions. In *R. v. J.Z.S.*, 2008 BCCA 401, the Court determined that an accused has no constitutional right to a face-to-face confrontation with their accuser, such that protection measures such as screens and CCTVs are constitutionally valid. Even in the United States, where the right to physical confrontation was entrenched by the Sixth Amendment, this right was determined by Justice O'Conner in 1990 to be finite, paving the way for provisions permitting children to testify by way of CCTV if certain requirements are met. For further discussion on the right to confrontation, see Doak, *supra*.

Conclusions

As this is only a brief summary of the most recent scholarship on the topic, many older relevant resources were beyond the scope of this paper. However, most academics, past and present, stress the need for additional and continued education of judges and lawyers on the developmental and emotional needs of child witnesses. If courts were specialized, only certain judges and lawyers would need to receive this education, which might reduce resource demands.

Several articles express concern regarding current cross-examination processes and suggest numerous improvements to cross-examination that would better reflect the needs of child witnesses. While some authors argue for increased judicial intervention, others focus on the elimination of certain types of questions or the elimination of cross-examination altogether. The use of intermediaries is another suggested technique that would adapt cross-examination to the developmental needs of the child witness. Further study on the appropriateness, in a Canadian context, of intermediaries, judicial intervention and modifications to cross-examination would add to the depth of the scholarship in this country.