

CHAPTER TWELVE

CHILD TESTIMONY

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The successful prosecution of a sexual or physical abuse case is dependent on the testimony of the victim, as the nature of the crime is that it is a crime against the person. However, with child victims, a number of obstacles present themselves when it comes to children giving evidence in court. We wish to make the following specific submissions in relation hereto:

(a) Multiple interviews and preparation of child victims

In paragraph 25 of the discussion paper, the Project Committee undertook a study of the comparative law and motivations for videotaped evidence, however for mainly practical reasons recommended against the use of videotaped statements as evidence. The issue of videotaped statements raises an aspect that needs attention and was only briefly touched upon by the Project Committee, namely interviewing techniques.

As far as the evaluation of a child's evidence is concerned, it has been said that the question involves the court deciding, in light of all the evidence, whether the child witness is trustworthy¹. This goes to the credibility of the child's evidence. There have been prolific international studies on child testimony and issues relating to credibility and suggestibility². Often children are found to be not credible, for example, because of inconsistencies in their oral evidence and their written statements. One of the main

¹ Le Roux and Englbrecht, *op cit*, p. 353

² Bottoms, B.L and Goodman, G.S. (eds) *International Perspectives on Child Abuse and Children's Testimony: Psychological Research and Law*, Sage Publications 1996

problems identified by studies has been the method of questioning the child. It has been noted that child interviewing specialists trained in child development result in improved fact finding and reduced trauma to the child³. Warren and McGough proceed to state that questioning a child victim should be aimed at avoiding biasing responses, encouraging spontaneous free-recall reports, avoiding specific and leading questions and using age-appropriate language. It has been noted that efforts to train interviewers have been included in law reform processes and that some American states such as Alabama and West Virginia have laws allowing judges to limit the amount of interviews a child can undergo⁴.

In South Africa there is no consistent approach to interviewing a child, and a child victim can be questioned by a range of police officials, prosecutors and social workers in the course of a particular matter. This can lead to confusion and apparent inconsistencies due to differing interviewing techniques. Police officers, forensic social workers and prosecutors should be trained and sensitised in interviewing techniques and should collaborate as soon as possible in order to form a clear strategy for the handling of a particular victim.

In addition, linked with the issue of interviewing techniques is the issue of witness preparation. It has been noted that a child who has been prepared for the courtroom experience and has become more comfortable in that environment might appear more confident, composed and credible⁵. Myers also notes that preparation can increase children's memory, reduce suggestibility and lower stress⁶.

³ Warren, A.R and McGough L.S " Research on Children's Suggestibility" in Bottoms, B.L and Goodman, G.S. (eds) *International Perspectives on Child Abuse and Children's Testimony: Psychological Research and Law*, Sage Publications 1996, p. 12-39

⁴ Myers, J.E.B. " A Decade of International Reform to Accommodate Child Witnesses: Steps Toward a Child Witness Code" in Bottoms, B.L and Goodman, G.S. (eds) *International Perspectives on Child Abuse and Children's Testimony: Psychological Research and Law*, Sage Publications 1996, p. 224

⁵ Kovera, M.B. and Borgida, E. " Children on the Witness Stand: The Use of Expert Testimony and Other Procedural Innovations in US Child Sexual Abuse Trials" in Bottoms, B.L and Goodman, G.S. (eds) *International Perspectives on Child Abuse and Children's Testimony: Psychological Research and Law*, Sage Publications 1996, p. 213

⁶ *op cit*, p. 225

It is therefore submitted that the Project Committee makes recommendations relating to the introduction of training and guidelines for prosecutors, police officials and forensic social workers relating to interviewing and preparing child witnesses. These recommendations can be included in a separate heading under rules of evidence or be included with the recommendations under joint intervention.

It is proposed these recommendations take the form of something similar to the following⁷:

“(i) Every sexual offences court shall create and maintain one or more multidisciplinary teams to investigate child sexual abuse and interview children who witness such abuse or who may be victims of such abuse.

(ii) In conjunction with both national and provincial state departments as well as private agencies or organisations, this multidisciplinary team and other professionals who interview children shall be provided with the necessary training.

(iii) Whenever it is necessary to interview a child regarding possible sexual abuse, efforts shall be made to have the child interviewed by a professional with training and experience in interviewing children.

(iv) Programs designed to prepare children to testify serve the interests of justice and are encouraged. The Department of Justice shall make the sexual offences courts and staff available for court preparation programmes. The fact that a child participated in a court preparation programme may not be used to impeach the child’s credibility.”

⁷ The se recommendations are drawn from a draft child witness code contained in Myers, J.E.B. “ A Decade of International Reform to Accommodate Child Witnesses: Steps Toward a Child Witness Code” in Bottoms, B.L and Goodman, G.S. (eds) *International Perspectives on Child Abuse and Children’s Testimony: Psychological Research and Law*, Sage Publications 1996, p.245-265

(b) Necessity of a finding of competence before testifying

The competency of a child to give evidence is determined by the common law. It relates to whether the child has sufficient intelligence, sense and reason in order to understand the difference between truth and falsehood and recognise that it is wrong to lie. This is determined by the presiding officer after he or she, as well as the prosecution and defence, have had an opportunity to question the child.

The Children's Rights Project is in agreement with the Project Committee's recommendation that a section be included in the Sexual Offences Bill establishing that any child in a sexual offence trial is competent to testify.

It is submitted that this is in accordance with Article 12(1) of the UN Convention on the Rights of the Child which states:

12.1 States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

There are two restrictions to the rights in Article 12(1) namely that the rights are only extended to children who are capable of forming their own views and those views are only given due weight according to the age and maturity of the child in question. Lücker-Babel states that the capacity of a child to form his or her own views does not mean that the child must be fully developed to do so, as the second limitation then applies - requiring a decision-making body to only give weight to those views in accordance with the age and maturity of the child⁸. She goes on to reason that the first step is then to determine whether the child is in a position to form a view on an issue in question, but not on the whole range of issues in a particular case⁹. Following this reasoning even a "infans" can participate where his or her feelings are interpreted by an appropriate expert¹⁰ and then those feelings are given due weight according to his or her age and maturity.

⁸ Lücker-Babel, M-F. "The right of the child to express views and to be heard: An attempt to interpret Article 12 of the UN Convention on the Rights of the Child", *The International Journal of Children's Rights*, Vol.3, Nos. 3-4, 1995, p. 397

⁹ *op cit*, 397

¹⁰ Lücker-Babel, *op cit*, 397.

Once the question of whether a child has the capacity to form an opinion has been determined, the question shifts to the weight to be given to that opinion. The two determining factors are the age (an objective determinant) and maturity (a subjective determinant) of the child¹¹. These two factors are of equal value¹². In addition, it is argued that the more serious the consequences of the decision are, the more the child's opinion needs to be considered having regard to the nature of the problem and the degree of interest it represents to the child¹³. Again, advocating a change in the culture of listening, Van Bueren states, in relation to these two tests:

“ For children truly to be heard the listener has to understand the language of the child in order to assess whether, in accordance with the Convention, the child is capable of expressing views. The sole test is that of capability, not of age or maturity.”¹⁴

However, the requirement of capacity to form an opinion can be in itself problematic if one looks at its practical implications. In a legal setting, Courts are often required to examine the legal competence of a child. In a seminal decision the House of Lords, in *Gillick v West Norfolk and Wisbech Area Health Authority*¹⁵, by realising a child's legal competence may be dependant on individual capacity as opposed to age, decided the matter by applying a test of maturity rather than age to hold that a child of sufficient understanding could consent to medical treatment despite being under a particular statutory age of consent. In deciding the matter, Lord Scarman stated that uncertainty in assessing whether or not a child was competent was the price that has to be paid to keep the law in line with social experience¹⁶.

In establishing whether what weight is to be attached to a child's testimony it is submitted that the competency of a child would be better determined if the presiding officer had regard to the age and maturity of the child and had the assistance of a child development expert in a particular case. Obviously it is clear in most cases whether a child is competent to testify, however in borderline cases, especially with

¹¹ Lücker-Babel, *op cit*, p. 399

¹² Van Bueren, G. *The International Law on the Rights of the Child*, Martinus Nijhoff Publishers, 1995, p. 136

¹³ Lücker-Babel, *op cit*, p. 399

¹⁴ Van Bueren, G. “ The United Nations Convention on the Rights of the Child: An Evolutionary Revolution” in Davel, C.J. (Ed.) *An Introduction to Child Law in South Africa*, Juta Law, 2000, p. 206

¹⁵ [1985] 3 All ER 402

¹⁶ at p. 425

young children, such expert evidence should be allowed and encouraged. In addition presiding officer's should receive training on child development issues in order to capacitate them to make informed decisions in this regard.

Therefore we submit that the words “ according to the child’s age and maturity” be inserted at the end of subsection (2) contained in paragraph 36.4.8 of the discussion paper and section 10(2) of the Bill.