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JUDICIAL ACTIVISM IN CHILD SEXUAL ASSAULT CASES

Introduction

The question posed by this paper is whether Judges should be more "hands on" in their approach to child sexual assault cases and the practicality of such a "hands on" judicial approach. In this paper the term judicial activism is not a reference to the role of appellant courts in moulding and defining the law, rather, it refers to the active involvement of trial Judges in pre-trial management and the trial process.

Judicial activism in the civil area has been encouraged over recent years, both in Australia and overseas, in order to promote the resolution of disputes, meaning a proactive approach to promoting settlement, to promoting alternative systems of dispute resolution and controlling costs. Notwithstanding the greater challenges presented by criminal trials procedural fairness within the context of a fair criminal trial is achievable. The honourable John Doyle AC, Chief Justice of South Australia in a paper delivered to the National Australasian Judicial Orientation Programme on 6 August 2000 opined:

> *"We must ensure that as an institution the judiciary is forward looking. We must aim to administer justice in a way that reflects contemporary conditions and is consonant with contemporary attitudes. But equally we must adhere to the principles on which the institution is founded. We must not unthinkingly adopt transient fashions or anything that would compromise the fundamental principles of justice."*

The recently released Report prepared by Judy Cashmore and Lily Trimboli entitled "*An Evaluation of the NSW Child Sexual Assault Specialist Jurisdiction Pilot*" provides valuable insight into potential problem areas of current practice and procedure in child sexual assault prosecutions. While there is legitimate scope for differences of opinion regarding some of the findings and observations the Report properly and usefully focuses attention on the need for better Court management in a number of problem areas. The goal of better managing court operations in all areas might be a relatively new concept, at least within the last ten years, but it is hardly revolutionary and is a reality that must and should be addressed despite natural judicial conservatism.

The desire to constantly seek new and better means to manage our Courts is a logical extension of the judicial goal of providing an efficient, ethical and effective system of criminal justice in which the community can have complete faith. The need for ongoing reform and improvement should not be justified by a desire to increase conviction rates or by beliefs that all complainants tell the truth or that all accused are guilty. Rather it is justified by the need to ensure procedural fairness to all witnesses (including the accused and defence witnesses) within the context of a fair trial where the Crown bears the onus and burden of proof and the accused has the benefit of a presumption of innocence. In my view, the Community will always maintain faith with a criminal justice system that strives for improvement while holding closely to the basic tenet of procedural fairness for all within the context of a fair trial for an accused.

Public perception of the judicial system is intrinsically linked to public confidence in the administration of justice. Effective judicial activism is likely to impact favourably on public perception and in turn on the level of public confidence in the system. In fact, judicial activism is one of the few ways a Court can impact public perceptions even if for no reason other than by reducing the occurrence of incidents likely to be the subject of unfavourable media coverage.

The question of judicial activism during child sexual assault trials goes to the heart of the role of the judiciary in criminal trials. Many judges in the criminal jurisdiction have adopted and still adopt a passive judicial role in that they allow trials to flow

without interruption unless called upon to adjudicate on an issue raised by either the Crown or defence – even if they are aware of witness trauma, mistakes, misconceptions, incompetence or omissions during the Crown or defence case. Minds may, and do, differ in respect to this passive approach. To my mind the role of a trial judge is to ensure a fair trial. In order to do so it is necessary, on occasion, to actively intervene to correct a mistake or misconception, raise an omission, enforce a Bar rule, or act to prevent unfairness.

Justice is not a game to be determined by the tactical approach, level of competence or experience of trial counsel. Justice is rarely advanced by an unsupervised adversarial system where opponents can adopt questionable tactical practices solely in the interests of their partisan cause. Intervening to ensure a fair trial process does not denigrate from, but rather, enhances the prospects of a fair trial.

Accepting that some judicial activism is appropriate, it then remains to determine the degree, frequency and nature of such activism. In my experience, child sexual assault cases regularly generate considerable potential for judicial activism. In fact during the last 20 years or so there has been a significant change in the approach of the criminal justice system to child sexual assault cases. It is a question of "How far have we come and how much further should we go?"

Historically judicial activism in child sexual assault cases has been prompted by legislative reform, although cultural factors have no doubt played some part in changed judicial attitudes to offences against women generally and children in particular. Fortunately, we have left behind the days when the uncorroborated word of a child was insufficient to sustain a conviction. On the other hand, it is all too clear that some suggested changes to the system seem to be based on the assumption that all complaints by children are truthful and that therefore all accused are guilty. Apart from the fact that such a gross generalisation is basically flawed this approach also fails to acknowledge the basic tenet of our criminal justice system that all accused are presumed innocent unless and until their guilt has been established by the Crown beyond reasonable doubt.

The momentum for change should not be this subjective belief that all children tell the truth or that all accused are guilty, but rather the need to ensure procedural fairness to all witnesses (including the accused and defence witnesses) within the context of a fair trial where the Crown bears the onus and burden of proof and the accused has the benefit of a presumption of innocence. This eminently desirable outcome of procedural fairness is very difficult if not impossible to achieve without judicial activism.

A fair trial process will ensure more informed jury decisions and therefore decisions that are more likely to be correct. It will also engender greater confidence in our criminal justice system and is likely to encourage genuine complainants while at the same time protecting the rights of the accused.

Case Management and Listing Practices

Judicial activism can and should begin with effective case management of child sexual assault trials. It must be accepted that lengthy trial delays or false starts are potentially very traumatic to accused and complainant alike. Delays before complaint and charge can be very detrimental to an accused and appellate courts have acknowledged this and juries are warned accordingly. However, from a tactical point of view an accused generally has more to gain from such delays and false starts after committal than a complainant. The longer the delay the greater the impact on a child and the more likely the complainant will decide she or he does not wish to proceed or does not wish to remember and the more damaging the memory loss.

Turning to some of the major issues highlighted in the Report it seems to me that there is no controversy in seeking to reduce delays. The Report identified a number of 'causes' of delay some of which it is not possible to prevent such as sudden illness of counsel, witnesses or accused. It should also be noted that a number of problems relate to prosecutorial management practices often outside the control or influence of the Court, for instance, where the Crown requires a complainant to be at Court or at the CCTV room well before the she or he could ever possibly be called to give evidence. However, a large number of 'causes' of delay can be prevented or minimised by better management practices.

Although it is not a panacea for all problems, effective case management is capable of addressing many of the issues raised. The difficulty is that case management is a fickle creature whose success, at least anecdotally, appears to depend upon the individuals (Judge, Crown and Defence counsel) involved, that is, their personalities, people skills, practical experience and commitment to the process. My experience is that it can be made to work but not without the co-operation of the main players. The bigger the caseload and the larger the pool from which Crowns and defence counsel are drawn the more difficult and less effective case management is likely to be. However, the potential of improved efficiency is well worth the judicial effort and the more familiar with it the legal profession becomes the more likely it is to produce results. The case management system I have implemented at the Parramatta District Court has been well received by the local profession and it is my experience that counsel from the city have adapted to the system reasonably well and generally in a fairly gracious manner.

An effective case management system can reduce the number of occasions a complainant is required to attend court and the time she or he is required to remain. It should ensure that all trials are prepared early and as well as possible. The first advantage of case management is that trial counsel, crown and defence, become involved well before the trial date. Such early involvement can result in pleas of guilty or directions for no further proceedings before, rather than on the day of trial. Once pleas on the day of trial are minimised trial listings can be reduced, which in turn reduces the over listing that can lead to "not reached" trials or changes of venue resulting in significant disruption and often trauma to child witnesses. Early and continued involvement of counsel through the case management process often leads to settlement of many issues before trial that would otherwise generally be decided by the trial judge during the course of the trial. This can significantly reduce the number and length of interruptions to the trial process thereby reducing the time a child witness is required to spend in the witness box or waiting to return to give their evidence.

For those issues that cannot be resolved and which have the potential to disrupt the evidence of a child witness, for example, rulings that may result in the need to edit the

child's video interview, case management can clarify the need for and arrange for necessary pre-trial hearing for such issues.

Judicial people skills

Awareness of the inhospitable nature of the courtroom environment, especially for children, is an essential starting point for any judicial officer. It is the judicial officer who determines the atmosphere within the court as our own experience with difficult or impatient judges has taught us. If a child is to feel comfortable the judge needs to be personable in her/his dealings with the child. She/he needs to readily, clearly and pleasantly introduce the child to the court process and to demonstrate approachability, fairness and understanding of the child's predicament.

These matters and others going to fairness of court processes do not depend upon any assessment of the reliability of the particular child witness. Ensuring fairness in the court process comes first and certainly before there is even an opportunity to assess the reliability of the witness. A judge who demonstrates these appropriate people skills should not be taken by reason of that fact to have formed any view at all about the witness and there is no reason why a jury can't be told that one of the judicial functions is to ensure procedural fairness and that in relation to children that means de-mystifying the court so that a child is confident and comfortable enough to be able to give their evidence. In any event, most of the groundwork involved in making a child comfortable can be done by the trial Judge in the absence of the jury. In my view, a jury will respect a trial judge who is sympathetic and reasonable with all witnesses and misunderstanding or suspicion of judicial bias is unlikely.

Logistics of Court attendance

Judicial activism can and should address the practical issues of court attendance by children. Use of remote location facilities should be encouraged. It is clear from the study that the physical improvements made to the District Court at Sydney West for instance have been well received and well worth the expenditure. On the other hand it

is also clear that the all too familiar facilities of most court complexes act as a disincentive to complainants, parents and staff alike. Judges should actively seek to minimise the waiting time for child witnesses and ensure that adequate adult support is made available. Appropriate comfort breaks should be enforced by Judges having regard to lower concentration levels, shorter attention spans and the greater impact of bodily needs upon children. Judges should ensure as far as is reasonably possible that each child witness is comfortable, understands what is to take place, understands how long it may take, and understands that they should indicate lack of understanding or need for a short break. Judges should monitor the emotional state of the child witness and take short breaks where necessary to prevent a child becoming over wrought.

It has been suggested that it should be the accused rather than the child witness who leaves the courtroom. It is argued that the accused loses nothing by watching the proceedings from a remote location. It is noted that instructions are rarely taken on the run and if that does occur instructions can be taken by the solicitor in the remote location, at the next adjournment, or during a short break granted specifically for that purpose. On the other hand, when the child witness leaves the jury are denied the opportunity of closely watching and assessing the child witness as she or he gives evidence. Most importantly it is said that the impact of cross-examination cannot be properly assessed when the child can only be seen on a television screen positioned across the other side of a large courtroom. It is true that the Crown bears the onus and burden of proof and it usually relies upon the jury's acceptance of the child as a witness of truth in order to prove its case. In these circumstances it seems legitimate to question the fairness of restricting the child witness's access to the jury (and vice versa) to a distant figure on a dehumanising CCTV screen metres away?

Linguistic Issues

It is very important that trial Judges recognize the need to monitor the language used by trial counsel when dealing with child witnesses. The language used should not be patronising or condescending but it needs to be pitched at the level of understanding of the particular child witness. The level of understanding can vary markedly from child to child. Accurately assessing a child's level of understanding is very challenging but it is very necessary. There can be no procedural fairness if a child

does not understand the question, if the question is ambiguous, if double negatives are used or if the question contains multiple propositions.

Judicial Education

Judges have different backgrounds, approaches and levels of insight. Some are more flexible than others. Some are more empathetic or attuned to others. Judges have different levels of experience with regard to adult complainants, child witnesses and even children generally. They have different levels of understanding in relation to issues such as cultural neglect, second language difficulties, gratuitous concurrence, suggestibility and problems associated with the concepts of sequence and time. Some Judges are more amenable to education than others.

An experienced Judge may well be aware of many or all of these issues but it is very difficult to see how it could ever be said that further education in relation to particular areas is unnecessary. There are many experts outside the law who can provide judicial officers with valuable insight in their particular area of expertise. For instance, a paper given at the Judges Induction programme that I attended in 2003 by a linguist dealing with the every day problems facing an interpreter was, I believe, for every Judge present, very informative, insightful and invaluable.

Continuing Judicial education should not be forced upon judicial officers but every judicial officer who is "fair dinkum" about their role in ensuring a fair trial and procedural fairness should welcome whatever assistance can be gleaned from experts in various fields from child development, mental illness to cultural issues and problem areas within the Aboriginal, Muslim or Pacific islander cultures, to name but a few.

The success of Judicial education will depend upon the receptiveness of judicial officers, the method and style adopted by those who sell it and the need for those experts who sell it to accept the legal constraints under which Judges operate.

Appellate approach to judicial activism

Over the last 15 years the appellate courts have required trial judges to become far more active in the trial process in terms of warnings required to be given to juries, especially in sexual assault trials (see for instance the warnings required by ***Longman –v- Queen*** (1989) 168 CLR 79; ***Crofts -v- Queen*** (1996) 186 CLR 427; ***Crampton –v- Queen*** (2000) 75 ALJR 133; ***Doggett –v- Queen*** (2001) 208 CLR 243; ***R-v-Murray*** (1987) 11 NSWLR 12; ***R-v-Johnston*** (1998) 45 NSWLR 362, ***R-v-Markuleski*** (2001) 52 NSWLR 82)).

Another example of appellate approval of judicial activism can be found in the area of cross-examination where a reasonably wide discretion to intervene was confirmed in ***Wakely v The Queen*** (1993) ALR 79 and ***R-v-TA*** (2003) 57 NSWLR 444. In ***R-v-TA*** Chief Justice Spigelman stated at 446:

> *"Judges play an important role in protecting complainants from unnecessary, inappropriate and irrelevant questioning by or on behalf of an accused. That role is perfectly consistent with the requirements of a fair trial, which requirements do not involve treating the criminal justice system as if it were a forensic game in which every accused is entitled to some kind of sporting chance."*

Judicial intervention in cross-examination

Legislative provisions

Although, legislative provisions vary from state to state regarding the regulation of cross-examination the Uniform Evidence Act 1995 contains a number of provisions that provide trial judges with reasonably wide discretionary powers to control cross-examination (see sections 29, 41, 42 and 192).

It is also important to note that the court has always been able to direct the attention of counsel to any appropriate Bar Rule or DPP guideline as a means of controlling inappropriate or irrelevant cross-examination.

In any consideration of judicial activism in terms of intervention during cross-examination it should be borne in mind that there is a considerable imbalance between professional lawyers and child witnesses. It is a very moot point whether the presently accepted defence questioning styles and methods, effectively test the efficacy of evidence. Arguably it is more likely that it allows lawyers to unfairly discredit evidence without providing any genuine enlightenment as to the truth or otherwise of testimony.

The need for judicial intervention in examination in chief does arise from time to time. A failure by a Crown Prosecutor to ask an essential question can raise significant fairness issues. Should a court simply wash its hands of responsibility in such instances with the result that a complainant is never given an opportunity to give the omitted evidence? Is the accused entitled to a technical acquittal as a consequence of legal error? How fair is that to the complainant? Bearing in mind the Community's two-fold interest in a fair trial, that is, fair to the Crown as well as the defence, is judicial intervention to provide the complainant with an opportunity to give the relevant evidence justified? In my view there is no procedural fairness to a child complainant if she or he is denied an opportunity to give evidence on a topic the absence of which grounds a technical acquittal. In my view, in the absence of the witness and the jury, the Court should draw the omission to the attention of counsel thus ensuring procedural fairness.

NSW Legislative amendments – s275A

In New South Wales the recent amendments to the Criminal Procedure Act focus the attention of judicial officers on what the new legislation terms '***disallowable questions***'. This focusing of attention is likely to improve the level of protection of complainants from inappropriate questioning. The legislation creates a new more extensive definition of '***disallowable questions***'**.** *Ethnic and cultural background, language background and skills, level of maturity and understanding* are now added

to the matters that a Court must take into account although it is highly likely that these matters would have been considered by a Court in any event.

More significantly the legislation provides that the duty imposed to disallow a disallowable question applies whether or not objection is made. In practice that will mean a duty to listen closely to the evidence and to make a determination in all appropriate cases (that is where a question may fall within any of the prohibited categories) as to whether the question is a disallowable question.

If having considered the section and the subject question a Court is of the opinion that the question is a disallowable question it MUST disallow the question. Previous provisions, including section 41 of the Evidence Act 1995, provided that a Court "MAY disallow" an offending question.

Traditionally trial Judges have been very careful about interrupting or restricting cross-examination. It is likely that this reluctance stems from concern about jeopardising a fair trial for the accused and/or concern regarding the approach to be taken by the Court of Criminal Appeal. The potential for mistake and the consequential ordering of a new trial are all too real and no trial Judge wants to make a mistake that may cause an accused and complainant to endure a re-trial. Anecdotally this seems to me to have caused trial Judges to err on the side of caution, which means to err in favour of the accused and permit questionable cross-examination from time to time.

Having regard to the terms of the new legislation it is apparent that a number of practical problems are likely to arise from the need for a Court to have some background information regarding a witness so as to be able to determine whether a question asked is a disallowable question. How does a Court assess whether a witness has any particular frailties? How are problem classes of witnesses identified? What is an acceptable method of informing oneself regarding the relevant characteristics of a witness? Of what can a Judge take judicial notice? Not all Judges are the same or even equal so how is consistency of approach assured? What is the best method of intervention? How does a Judge avoid destroying the credibility of the counsel who has asked the 'disallowable question'?

In a sense these problems have existed to one degree or another in the past whenever a Court has exercised its discretionary powers under the Evidence Act 1995. Taking into account, as a Court must under the new provision, characteristics such as *'age, education, ethnic and cultural background, language background and skills, level of maturity and understanding and personality'* is impossible unless a Court is provided with such information. Clearly, this may well be a problematic area. However, a common sense and reasonable approach may ensure that these problems rarely arise. Information of this type can often be provided to a Court by agreement between the parties. Sometimes it will be all too apparent from the evidence in chief. Other times it may be necessary for information to be elicited from a witness in the absence of the jury. Criminal trials produce practical problems everyday and yet solutions are usually found and implemented without any adverse impact on fairness.

Conclusion

In my view appropriate judicial activism is a positive thing and it would appear that it is here to stay. It seems to me that if judges are not prepared to voluntarily move with the times in terms of case management and procedural fairness issues, it is likely that our hands will be forced by the increasing use of legislation mandating judicial activism.

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