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COURTS ASSESSING CHILDREN'S EVIDENCE

Dr Tod Wakefield, Psychiatrist (Bardon Specialist Group, Bardon, Queensland)

1. Just how much weight should we be giving to what children say in the witness box? I will not presume to discuss the finer points of the law in relation to this, but would instead aim to cover the scientific literature in this area, particularly as it relates to the younger child.

2. When children appear in court it is usually as a witness in a criminal trial. Most often, such witnesses are also the victims of one form of abuse or another. Sexual abuse of children is a serious societal problem. In the USA in 1991, there was an annual reporting rate of just below 1% of all children under 18. Only one quarter of these allegations were subsequently substantiated. By 1996, this figure had doubled, and by 2003 it had probably increased even further. The incidence of physical abuse allegations is higher again. Even these may be an underestimation of the level of prevalent abuse, as many cases go unreported. Conservative estimates suggest that one in five girls and one in ten boys are sexually abused before they reach 18.

3. The incidence of younger children appearing in court appears to be on the rise. This increase has led to growing comment from both academics and legal practitioners about how best we can facilitate children's ability to give evidence. Over the past decade, many Australian jurisdictions have legislated to modify the court process to better facilitate this. In Queensland the *Evidence Act 1977* (QId) was amended to allow children to give evidence by closed-circuit television, for the accused to be obscured from the child's view while giving evidence and allowing for support persons to comfort the child in court. These changes are important in that they allow children to testify in less threatening circumstances and hence, may improve the quality of the testimony and reduce the level of distress induced by the process. However, they are secondary in nature to the more fundamental issue of whether the child is capable of testifying in the first place.

4. For as long as children have appeared in court there has been debate as to whether they are both competent and credible witnesses. This dates as far back to the Salem witch trials when, in 1692, twenty perpetrators were put to death on the evidence of children, who later publicly recanted their evidence. Even as recently as the 1980s, an English lawyer contended that children are unreliable, live in a make-believe world, are easily influenced by others, fail to understand the need to speak the truth and, I quote, "sometimes behave in ways evil beyond their years". It is not surprising then that the issue of competency is one which is reserved almost exclusively for child witnesses.

5. Traditionally, the concept of competency has had a dual identity. On the one hand, competency has referred to the child's inherent capacity to give reliable evidence and as such has been closely linked to notions of cognitive development. It has been associated with questions about the child's ability to remember the events in question, to distinguish fact from fantasy, to give evidence free from the

suggestion of others, and to have the language skills necessary to relay the evidence. On the other hand, competency has also been bound in notions of moral development, and before the court would allow the child to take an oath, it would have to be satisfied that the child had the requisite moral competency to do so. Hence, the court needed to be satisfied that the child could appreciate the different between the truth and a lie, the importance of telling the truth in court, and have knowledge of what penalties may await them should a lie be told. Nevertheless, the distinction between concepts of credibility and competency are less clear in practice, ie the issue of what makes a child competent is closely linked to how an individual judge views the credibility and reliabiIity of an individual child witness and, children in general.

6. To this end, Cashmore et.al. discussed judicial attitudes to child witness in New South Wales. In that study, judges and magistrates were surveyed in relation to their perceptions of child witnesses. One of the most salient aspects of their findings was the large degree of variability in the respondents perceptions. This variability included the presumed ages at which children are considered competent to testify, ranging from seven to 15 years, and the types of questions asked by the judge and court to determine this competency. There exists very little empirical data to help us evaluate whether current legal practice in determining competency in accordance with what is known about children's level of cognitive and moral development at various ages. It would certainly appear that legal practice and psychological research have not kept pace with each other. Given the conservative nature of the legal system there is always a tendency for the court's to rely on past practices to the exclusion of modern research. There is no single definition of competency that has been universally accepted in the literature. What definitions do exist are a combination of psychological variables and legal requirements. The concepts recognised in most studies can be broadly categorised in two classes:

- those pertaining to the ability and willingness to speak the truth — i.e. moral development, and
- those pertaining to the possession of adequate cognitive skills to remember and relay the evidence accurately — i.e. cognitive development.

7. Moral development has three capacities, including the ability to distinguish truth from falsehood, the ability to understand the duty and need to tell the truth in court and the propensity of children to make false allegations. Cognitive development has seven capacities:

the possession of sufficient perceptional capacities at the time of the relevant event to allow accurate encoding of the details;

the possession of sufficient memory capabilities to enable encoding of details;

the ability to store and retrieve the relevant memory traces between the occurrence of the event and when testimony is given;

sufficient receptive language to understand questions and sufficient language and expressive capacity to relate the evidence in court;

sufficient intelligence to be able to organise the events in meaningful recollections;

the ability to distinguish reaIity from fantasy; and

the ability to be resistant to suggestibility.

8. I plan to cover most of these factors fairly briefly before moving onto the more interesting areas of suggestibility, the ability to differentiate between reality and fantasy and the propensity of children to tell lies. Lastly, I'd like to outline what clinicians look for when trying to outline varying allegations that have been made by child witnesses.

9. Firstly, intelligence is measured in a standardised fashion across the world by the Weschler Intelligence Scale for Children (WISC). Any psychologist can perform this test and give a standardized score relative to same age peers. The mean for this is 100, which is at the 50th percentile. The standard deviation is 15, so that if a child has an IQ of 115, he or she is brighter than 85% of their peers. Alternatively, if a child's IQ is 85, the child is brighter than only 15% of their peers. At 130, it is 97th percentile and at 70, the 3rd percentile. Other cognitive variables, such as memory, can also be measured on standardised instruments by psychologists, but we have to be aware that there may be a significant time difference between the alleged offence and the testing so results may need to be extrapolated retrospectively. We know with a fair degree of certainty that memory skills improve with age and that the memory of even very young children may be accurate over a long period if the content of the memory makes sense to them or it is a salient or personally meaningful event. Age differences in visual memory are far less pronounced than those found in verbal memory. Professor Nurcombe found that pre-schoolers remember as much as adults when the task does not emphasise verbal recall and is in response to specific questions. A speech pathologist can accurately report on a witness's expressive and reception language abilities. Perhaps the onus here is on the judge to monitor the language used when a child witness is being questioned, making sure the child is answering the questions we think he or she actually is. For. example, a child can be asked whether he or she understands any terms used.

10. Moving onto suggestibility, this is broadly defined as the degree to which children's encoding, storage, retrieval and reporting of events can be influenced by a range of social and psychological factors. Not all children who take the stand tell the truth. Although some might be motivated to lie, others genuinely believe they are telling the truth. When a child falsely believes that a certain event has occurred, what has happened? There are two possibilities;

a. The child's original memory has been changed by information that has been provided before, during or after the event, such that the original memory trace has been erased or overwritten;

b. The child has confused the source of information, recognising an event is familiar while failing to remember whether this familiarity is internal, ie. (imagined), or external (i.e. actually observed).

11. In an American study, the average child who enters a court room has been formally interviewed between three and eleven times before the appearance. Who know how many informal interviews by parents, friends or therapists they have also experienced? Consequently, there is plenty of opportunity for outside influences to be brought to bear on their testimony. So how do we test for this suggestibility? Ceci and his group from the Cornell University in the USA are probably the most respected academics in this field. I'd like to describe some of their work today. A study was set up to look at the effects of stereotyping and repeated, misleading questioning. They did this with children aged between three and six and used four groups. In each group, an actor visited the group for two minutes and did nothing. The children were interviewed five times over the next ten weeks and in the last session, were specifically asked about two events that had not occurred. Despite the actor's doing nothing, the children were asked whether he had ripped a book and spilled some ice-cream. In the control group where no outside influences were brought to bear on the children, most recalled fairly accurately what occurred. ln the

younger children (three to four year olds), 10% said that the actor had ripped the book and spilt the ice-cream, 5% went on to say that they saw him do it and 3% maintained this falsehood when challenged. Compared to the five to six year olds, only 3% said he did it, 2% saw it and none of them maintained their claims when challenged.

12. In the second group, the children were told the stereotype that the actor was clumsy and that they should watch him closely. This probably compares with people in the midst of a Family Court dispute who are anxious that the other parent may do something untoward and the children are warned of this possibility. In the younger group (three to four year olds), with stereotyping and suggestions of clumsiness, 42% recalled him spilling the ice-cream, 19% actually saw him do it and 11% maintained their story when challenged. In the five to six year olds, 14% recalled it happening, 11% actually saw him do it and 2% maintained it when challenged.

13. In the third group, the children were interviewed in a highly suggestive manner. The interviewer took the position that the man had actually done something wrong and said things like, "do you remember when he ripped the book?" "Do you think he did it on purpose or was it an: accident?" thereby creating the assumption that he did it. When questioned in this fashion, of the younger children, 52% said that he did it, 38% saw him do it and 11 % maintained this. In the younger children, 35% said he did it, *11%* saw him do it and 8% maintained it when challenged.

14. The final group got both pre-event stereotyping and subsequent suggestive questioning. Of this group 73%. almost three quarters of the group said he did it, 44% saw him do it and 20% maintained their story. Even the older group had difficulty resisting that approach with figures of 32% saying he did it, 12% seeing him do it and 8% maintaining the story when challenged.

15. To see if the children's allegations were convincing, a thousand experts, researchers and clinicians were shown videos of the file interviews and asked to judge credibility. The overall credibility rating of these so-called experts were lower than one would expect by using chance. The least accurate children were considered the most accurate.

16. We've seen what happens if children are misled. But what happens if the interviewer is? In most forensic matters the interviewer is not blind to the case information when the interview commences and may fall into the trap of only testing hypotheses that are consistent with this view. In one experiment, an experienced social worker was asked to interview children and given inaccurate information about what they would find. If they were only given accurate information the social worker was correctly informed in over 90% over interviews but if misinformed, 34% of the younger children and 18% of the older children assented to inaccurate leading questions. Two months later, a second social worker was given the first social worker's notes and re-interviewed the children. The children not only continued to assent to the false information, but did so with increased confidence and perceptional embellishments.

17. But what if you repeatedly interviewed children without suggestion? A group of three to six year olds were questioned weekly for three months about real and imagined events and then asked to think "really hard" before answering. Forty-four percent of three to four year olds and 28% of the five to six year olds assented to false information at the first interview. By ten weeks, 58% of the younger ones and 42% of the older ones remembered false events as actually occurring, usually with detail and coherent narrative. Even after the experiment was over, 20% of the children were not able to be convinced by either parents or researchers that the event had not occurred. Once again, outside professionals could not identify which statements were true and which were false.

18. Even if you take children aside and ask them to visualise a false event repeatedly, one quarter to one third will actually believe that it really happened. So why do children assent so readily to false events? They perceive adults, especially parents as co-operative, trustworthy and not deceptive. They try to provide the type of information they think is being requested by adults. They think that adults always ask honest, logical questions that have an answer. As such, they tend to provide an answer, any answer, rather than "I don't know'. This is even given to questions like "is milk bigger than water?"

19. Critics of the above experiments would argue that children would be more resistant to false suggestions if the events were more salient to them. A group of five year old children visiting their paediatrician for an annual check-up and immunisations were interviewed. One half were interviewed suggestively four times over the next year about who did what. Eventually, by the end of the first year, half of them assented to the false assertions that the research assistant had given them the needle, rather than the doctor. Only 16% of the control group assented to this.

20. What about genital events which are even more personal and more likely to be seen in the courtroom? A group of three year olds who saw the paediatrician were interviewed immediately following the consultation. Of the children who had not had a genital examination, 55% demonstrated on an anatomically-correct doll the processes of genital insertion and other inappropriate actions, even though their parents were in the room with them and nothing had happened. Of interest, 75% of female children gave misleading information about imagined inappropriate examinations.

21. So much for suggestion. What about lies? Forget what Piaget stated, even children as young as three can lie. They are more likely to do this to avoid punishment or embarrassment, rather than gain reward, but they will lie quite readily. In distinguishing reality from fantasy, younger children have far more fragile boundaries and more difficulties distinguishing between what was actually experienced and what they imagined, especially if these events are similar. Ie. try to get a girl to tell the difference between touching her nose and imagining she touched her nose. Even eight year olds have difficulty distinguishing between actions they saw another perform and what they imagined they saw them do, but have no trouble if different actions or actors are involved.

22. So what do we as professionals do when we're confronted with these types of allegations? There are a numbed of steps in any assessment. We should obtain a history from the child, collateral information from as many sources as possible, including parents, as well as audio tapes of videos and transcripts. We assess the child's verbal capacities and memory for neutral events. If they can't remember what happened at Christmas or Easter or their birthday, what are they really capable of remembering? We try and assess the child's capacity to distinguish truth from falsehood and then test the child's memory of the alleged even. Try to test the child's resistance to suggestion and often obtain psychological testing to see how intelligent they are. In attempting to assess the validity of allegations we look for both psychiatric and psychological symptoms that would be consistent with abuse, ie. are the symptoms valid? We consider the validity of the content and context of the allegations. Up to 40% of those who have been abused have no symptoms. In others we may find, non-specific psycho-pathology or Post Traumatic Stress Disorder symptoms, dissociation, emotional deregulations, such as hyperarousal, impuIsivity, hyper-activity, poor concentration, low frustration tolerance and fits of rage. We may find precocious sexual behaviour, poor interpersonal boundaries, distortion of personality development, low self-esteem, self-blame, stigmatisation, a sense of helplessness and/or passivity, a lack of trust or sense of betrayal. While assessing content validity, we look at the stated history of abuse, the realism consistency, lack of organisation, amount of detail, and peculiarity of content, hesitancy, appropriateness of affect, language and resistance to suggestion. In considering contextual validity we look at the context of the disclosure, the circumstances of the initial report, previous investigative techniques used, looking particularly at lengthy or frequent interviews,

suggestions, leading questions, inducement or coercion. In addition, we attempt to exclude alternative explanations for the allegations, such as incompetence. If the child is found to be incompetent, the rest if moot. Has the child misinterpreted what happened? Has the child or an adult in their surrounds delusional (usually a symptom of a psychotic illness that is rare in children and occasionally manifests in carers), confabulation (i.e. the child can't remember anything so they make it up to fill in the gaps), fabrication, displacement of events or symptoms onto other events or situations, inadvertent indoctrination (constantly listening to someone criticise and then picking up on it), deliberate indoctrination or emotional contagion (child has picked up on what's been happening). If allegations of abuse are made spontaneously, in a non-threatening, non-suggestive atmosphere (not after repeat interviews), if the adults who had access to the child are not motivated to distort the child's recollections through relentless and potent suggestions, and if the original report remains highly consistent over a period of time, the child should be judged as being capable of providing relevant information.

23. In summary, it is possible to mislead a significant proportion of young children in believing that they experienced fictitious events to the point that the witness is so believable that even the most experienced clinician is duped. While younger children are more at risk of these errors, even three year olds can do quite well when they are not interviewed suggestively. Thus when adults who have access to young children do not attempt to usurp their memories through repeated suggestions, even very young children can do well. The suggestibility of a child is dependent upon a very large range of cognitive and social factors as outlined above. Are they so much more suggestible than an adult so as to:

i. Render them an obstacle to the court's truth-seeking process;

ii. Always require competency hearing; or

iii. Require judges to give juries cautious instructions about their special reliability risk.

24. The answer to the first question is a qualified no. While they are more suggestible, many are able to provide a rich array of reliable testimony. Is a competency hearing required? This depends upon the age, maturity and cognitive abilities of the child, the allegations, their evidence and the attitude of the defence. As a rule of thumb, teenagers need a cursory examination at most, but as the chronological age decreases, the needs test and its rigorousness decreases. Children under ten or twelve certainly require this form of testing particularly in a criminal court. With regard to the last question, what if anything the judge needs to say to a jury, depends upon whether they believe that cautionary instructions about reliability will serve the useful purpose of taming the juror's unbridled enthusiasm for the child's testimony or whether they believe that such cautionary instructions may exaggerate the jurors' pre-existing scepticism of child's competencies to the point that it is undesirable I will leave that question for you.