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Many criminal justice professionals find it difficult to work with children, and likewise, most children find the experience of being a witness very challenging and intimidating. Under these circumstances, children are often poor witnesses, and often traumatised again. This is particularly true for child survivors of sexual abuse and exploitation. It is therefore vital to train criminal justice professionals on how to work with children in a child-sensitive manner.

This manual has been developed upon the request of dozens of magistrates, prosecutors, social workers and police officers who underwent such a training in 2016 and 2017. Post-workshop evaluations confirmed how much they had learnt during the training. However, once returned to their daily jobs, they struggled to put their newly acquired knowledge and skills into practice. What they needed was a reference document they could turn to when confronted with real-life situations.

The purpose of this manual is just that: to provide professionals with a rich resource to consult when dealing with actual cases of child sexual abuse after their training. UNICEF highly appreciates the constructive feedback from the trained professionals, as it demonstrates how seriously they take the rights and needs of children. We therefore readily supported the development of this manual in close collaboration with experts from the Prosecutor General’s Office, the judiciary, the police, the Ministry of Gender Equality and Child Welfare and the Ministry of Health and Social Services.

It starts with an introduction on children and their evidence in court. Part 2 provides a comprehensive overview of the various stages of a child’s cognitive, socio-emotional and sexual development, followed by the communication skills needed when working with children. Part 3 deals with the dynamics of child abuse, the process of disclosure as well as the dynamics of online exploitation. And in the last part (4), the reader finds detailed information on working with children in the judicial process: how to take statements from children, and how to prepare them for their court appearance.

Being in contact with the judicial system needs to be part of the helping and healing process for children after an abusive experience. It is our strong belief that instead of forcing children to fit the system, we need to adjust the criminal justice system to fit the best interests of our children.

It is my hope, that this manual will be used as a valuable resource to inform, educate and assist the reader, to apply the knowledge and skills in this manual to your work with children in contact with the law. In doing so, you will ensure the best evidence possible as well as safeguard the well-being of the child.

Rachel Odede
UNICEF Representative
Protecting, safeguarding and promoting the rights of our child survivors and witnesses in our justice system is one of the most important tasks we undertake. The Office of the Prosecutor General and its partners such as the Ministry of Gender Equality and Child Welfare, Ministry of Health and Social Services, the Office of the Judiciary and NAMPOL are devoted to modernising and improving the criminal justice system so that child survivors and witnesses find themselves within a criminal justice system which meets their needs. For vulnerable child survivors and witnesses, the whole legal process from the start of an investigation to testifying in court can make an already traumatic experience even more upsetting and stressful. We are committed to increase support and improve standards for child survivors and witnesses to help them participate in the legal process, give their best evidence and seek for the justice they deserve.

Our knowledge and understanding of child abuse has grown extensively over the last few years. However, we continue to work in an ever changing environment. Daily, justice professionals, law enforcement and social workers face challenges in dealing with child witnesses, especially in cases of sexual violence. Amongst the challenges faced by professionals in administering justice is techniques on interviewing child witnesses and leading evidence in court. This manual will increase knowledge and equip those dealing with child survivors and witnesses with the necessary skills to obtain evidence from children whilst at the same time observing their rights and complying with international standards.

The manner in which the vulnerable witnesses are treated in our court system is a mark of how civilized a society we are. I thus urge all the stakeholders to use this manual in creating a safe environment for our child survivors and child witnesses who come into contact with the criminal justice system so as to ensure that justice is served without compromising them. This manual will motivate and inspire us to continue this good fight for the wellbeing of our children. As stakeholders, I believe that we have a legal and moral responsibility towards child survivors and child witnesses to ensure that the system does not re-traumatise them.

Through the years, the work of magistrates, prosecutors, police officers and social workers in this field has yielded positive results for child survivor and witnesses, results which this manual intend to build on. This manual is proof that we can work together as stakeholders, for a better and child-friendly criminal justice system.

I hope that you will find this practical reference guide beneficial and its usage will contribute to enhancing the protective environment of child survivor and witnesses. With our strengthened concerted action and collaboration with all the stakeholders, we will achieve even greater outcomes for child survivor and witnesses in Namibia.

Adv Olyvia Martha Imalwa
Prosecutor-General: Namibia
PART 1:
INTRODUCTION
INTRODUCTION

AIMS

• To introduce a framework that will explain the need for a holistic approach to the evidence of children
• To explain how the different systems are linked in this approach

OUTCOMES

• Participants will be able to identify the different systems that are applicable to the child witness
• Participants will understand the ecological systems approach and the various systems that make up this approach
• Participants will be able to explain how the different systems are interlinked and their effects on each other and how this is applicable to child witnesses

1. Introduction
2. The Need For A Holistic Approach
3. An Ecological Systems Approach
1. INTRODUCTION

When a witness has to testify in court, the function of that witness is to provide the court with certain information which will enable the court to come to a decision on the matter before it.

A witness is a source of information.

In the courtroom the witness is viewed as a source of information. The court needs to access the information from the witness in its most accurate form to make a decision as to the conviction or acquittal of the accused.

However, it is not only the information that the witness has to provide that is important, but also the way in which the information is presented. The courts must be convinced that the witness is credible i.e that it can believe the evidence of the witness. The court needs to be convinced that the witness is telling the truth. When it comes to the evidence of children though, the courts have a number of difficulties to overcome:

- Do children have the ability to remember accurately?
- Can children relate an event accurately?
- Do children fantasise?
- Are children suggestible?
- Does court environment influence information?
- Do interviewing techniques influence the child?

As can be seen from the above questions, evaluating the evidence of children is a complex process and involves an understanding of a number of different disciplines.
2. THE NEED FOR A HOLISTIC APPROACH

In order to make sense of children within the legal system, it is necessary to develop an approach to them that will be fair to children while at the same time will protect the rights of the accused, and which will lead to a successful method of obtaining accurate information. In order to achieve all these outcomes, any approach will have to be holistic in nature. It will have to view the process of testifying from all perspectives, ranging from the child’s cognitive ability to the way court personnel behave in the courtroom. For these reasons, it is suggested that an ecological approach be adopted when evaluating the child witness as a source of information.

An ecological systems approach argues that there is a constant interaction between systems, and any change in one system will have an effect on another system.

For instance, a child’s home life will have an impact on the quality of the child’s evidence. If parents are supportive and understanding, children will be more confident, as opposed to the situation where parents threaten a child not to tell. Another example would be the effect which the initial police interview may have upon the child. If the investigating officer, who takes the initial statement from the child, is not trained or sensitive, this will have an effect on the amount and type of information obtained from the child as well as how the child perceives the criminal justice system.

Quality Of Child’s Evidence

- The child
- The context
- The personnel
- Rules of evidence

The quality of a child’s evidence depends on a number of interacting factors:

- the child (their cognitive ability, language ability and perceptions of their role);
- the context in which the evidence is given (in open court, via closed-circuit television);
- the personnel involved in the process (whether personnel are trained and competent to deal with children); and
- the rules governing the process in which the evidence is to be given (the effect of rules of evidence and any constitutional implications).

All of these factors are interrelated and, therefore, any change introduced into one system will cause an effect in another system. The aim, when dealing with a child witness, is to find a way in which the information which the child possesses can be accessed in its most accurate form while at the same time protecting both the child from any further trauma and the accused from any infringement of the right to a fair trial.
3. AN ECOLOGICAL SYSTEMS APPROACH

In order to understand children as participants in the criminal process, it is suggested that an ecological systems approach be adopted. In terms of this approach an individual’s experiences are seen as sub-systems within systems within larger systems. Since these various systems are interlinked, an ecological systems approach professes that it is not possible to do just one thing in isolation. Any single action in one system will have an effect on another system. The ecological perspective focuses on interplay between various systems. This means that any intervention in one system will have an effect on another system. For instance, if a child is removed from their home to a place of safety after disclosing abuse by the father, the child may not be willing to provide evidence to the police when interviewed because they may now think that they have done something wrong, because they were removed from the home. In this way, an intervention in the child’s home life will have a consequent effect on the criminal investigation.

In terms of the ecological perspective, systems are divided into:

- Microsystems
- Exosystems
- Macrosystems

**Microsystems**

Microsystems are smaller, isolated systems. These include, for instance, child microsystems, which would embrace the immediate relationships and social context of the child’s life.

**Child Microsystem**

- Child’s abilities
- Relationship with parents
- Friends
- School
- Family customs

Legal microsystems would, for instance, refer to the context of the trial and the courtroom.

**Legal Microsystem**

- Training of judges
- Training of prosecutors
- Preparation of child
- Reorganisation of courtroom
To increase the confidence of the child and assist them to be effective witnesses, as many connections, referred to as links, as possible must be forged between the different microsystems. These links would be used to strengthen the child’s ability to cope in the different microsystems. Possible links would, for instance, be allowing a young child to sit on a parent’s lap in the courtroom. If the child is the only one to participate in both home and court, then the linkage is weak and the child is at risk. But if the parents are allowed to participate in both home and court, then the links become stronger.

Exosystems

Exosystems are settings which exercise an influence over the child’s life without playing a direct role in it. There are exosystems that relate particularly to the child’s life and then there are legal ones that have an indirect influence. For example, a legal exosystem would include governmental bodies that make decisions affecting the child’s life, like decisions from the Prosecutor-General to prosecute and the resultant delays caused by that.

Macrosystems

Microsystems and exosystems all operate within macrosystems. They are the broad cultural, economic and political systems which provide the blueprint for day-to-day life. These would include, for instance, a constitution which could provide protection for an accused by insisting on confrontation with and cross-examination of a witness. The accusatorial system would also form a macrosystem since it is a model of procedure in terms of which other systems operate. They could also include culture and international instruments.
In order to understand children as sources of information, it is assumed that an interplay of various factors motivates the developing child’s behaviour. The child, and questions relating to their competency and credibility, cannot be viewed apart from the context in which the child operates.

The ecological systems approach for child witnesses can be summarised as follows: the individual child and their family form a microsystem. The court, the personnel, the preparation offered to a child witness and the methods adopted to enable a child to give evidence, will form a legal microsystem. In order to assist the child, as many links as possible need to be established between the various microsystems. Exosystem (legal) are found in policy making and include legislative innovations affecting the child witness. All these systems operate in a larger system (macrosystem) which includes the constitution and overriding procedures, such as the accusatorial system.


PART 2: THE CHILD

Cognitive Development
Socio-Emotional Development
Sexual Development
Memory
Communicating with Children in a Forensic Environment
Communication Skills
COGNITIVE DEVELOPMENT

AIMS

- To explain the concept of cognitive development
- To provide information about the different stages of cognitive development
- To highlight how cognitive development becomes applicable in the criminal justice process

OUTCOMES

- The participant will understand what is meant by the phrase `cognitive development’
- The participant will be able to identify the different stages of cognitive development
- The participant will appreciate the relevance of cognitive development and its applicability within the criminal justice system

1. Introduction
2. Cognitive Development
3. Stages Of Development
1. INTRODUCTION

The function of a witness is to provide the court with information so that the court can make a decision on the matter that is before it. However, there are a number of factors that interact when a child testifies.

**Interacting Factors**

- **Child**
  - Age of child
  - Cognitive development
  - Socio-emotional development
  - Family
- **Setting**
  - Courtroom
- **Personnel**
  - Training
  - Sensitivity

It, therefore, follows that it is not possible to view the child in the criminal justice system in isolation since all the systems are interlinked, and when accessing information from children, it is necessary to have an understanding of cognitive development and language development.

2. COGNITIVE DEVELOPMENT

As children develop, they change physically, emotionally and intellectually. Development occurs through stages which have been identified, and are often referred to as milestones. It is, therefore, important to be able to identify these milestones in order to have a better understanding of the general characteristics of children at that particular stage. This will improve one’s ability to communicate more effectively with children. Having an understanding of a child’s cognitive capacity enables one to recognise and explain the inconsistencies and confusions that are found in children’s communication. Children can be made to look non-credible when they are asked questions which are developmentally inappropriate.

Cognitive development refers to the development of the processes of the brain and is defined as the processes and products of the mind. Examples of cognitive processes include: paying attention, perceiving, remembering, thinking, reasoning, planning, solving problems, imagining, inferring, conceptualising, classifying, associating, symbolising, dreaming, fantasising.
A study of cognitive development involves an examination of the changes that take place in the different cognitive processes as people grow older and examines the characteristics of these different cognitive processes at the various stages in development. Cognitive development is based on the assumption that children show similar mental, emotional and social abilities, and that these changes occur at roughly comparable ages. However, it must be noted that these ages are generalised and can vary, depending on the individual child and their social background.

3. STAGES OF DEVELOPMENT

Jean Piaget is one of the most well-known cognitive development theorists and he identified four stages in cognitive development through which children progress:

- Sensorimotor stage
- Pre-operational stage
- Concrete operational stage
- Formal operational stage

Each stage develops into the next and is seen as a progression which results in a different level of thinking and understanding. According to Piaget, all children progress through the stages of cognitive development in the same order, without skipping any of the stages. However, the speed at which they progress through these stages will depend on the child’s environmental experiences. So, although Piaget did provide age norms at which children reach the different stages, these ages can vary from child to child. The ages provided are, therefore, only a general guide.

Sensorimotor stage (birth – 2 years)

The sensorimotor stage is the first stage of cognitive development and lasts from birth until approximately two years of age. There are certain achievements that have to take place during this stage:

- Movements go from being reflexive and unplanned to more goal-directed behaviour.
- The child gradually separates self from the external environment.
- The child must achieve object permanence, which refers to the realisation that objects exist even when they are not in view, which relates to the ability to represent something mentally.
- The child must be able to imitate an object that is no longer present, which involves the ability to represent the object’s overt behaviour in an internal form and then to draw on that representation later.
Pre-operational stage (2 years – 7 years)

The pre-operational stage is the second stage of development and lasts from approximately two to seven years of age. Thought is now symbolic in form. This is the ability to use a symbol, object or word to think about the past and the present and to use language. This ability forms the basis for learning a language. This ability is also a prerequisite for imagery, fantasy, play and drawing. Although the child is now moving into a more symbolic stage, this stage does have a number of distinct limitations in as far as child witnesses are concerned.

**Pre-Operational Stage**

- **Egocentric thinking**
  - View world from personal perspective
  - Cannot place themselves in position of Another
  - Cannot separate own perspective
  - Cannot answer questions about what others around them are doing or feeling
  - Assume everyone knows what they know

- **Not capable of operational thinking**
  - Unable to solve problems logically
  - Can only focus on one aspect of a problem
  - Inability to mentally reverse an action
  - Concept of cause and effect difficult

- **Cannot understand abstract concepts**
  - Do not understand concept of numbers

- **Egocentric communication**
  - Assume listener understands

- **Concrete and literal**
  - Focus on physical appearance
  - Object seen in terms of function

- **Cannot evaluate**
  - Do not question plausibility of things

- **Cannot move backward and forward in thinking**

- **No concept of time**

- **Language is personal, unstable and confused**
  - Language appears disorganised or fanciful

- **Cannot do multiple topics at once**

- **Do not have developmental ability to create elaborate fabrications**
Concrete operational stage (7 years – 11 years)

The concrete operational stage is the third stage of development and lasts from approximately the age of seven to eleven years and is the stage in which thought is logical when stimuli are physically present. As this stage proceeds, the child will begin slowly to solve the problems mentioned in stage two above. The child thus becomes less egocentric and is better able to understand the perceptions and beliefs of others, which means they are now better able to answer questions about the feelings of others.

<table>
<thead>
<tr>
<th>Concrete Operational Stage</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Less concrete</strong></td>
</tr>
<tr>
<td>• Beginning to acquire reversibility</td>
</tr>
<tr>
<td>• Better understanding of sequence of events</td>
</tr>
<tr>
<td><strong>Very concrete</strong></td>
</tr>
<tr>
<td>• Cannot do abstract or hypothetical</td>
</tr>
<tr>
<td>• Beginning to develop sense of time</td>
</tr>
<tr>
<td>• Communication more organised</td>
</tr>
<tr>
<td>• Communication less egocentric</td>
</tr>
</tbody>
</table>

Formal operational stage (11 years – 16 years)

This is the last stage of cognitive development and extends from approximately the age of eleven to sixteen years, and is the stage in which thought becomes abstract and hypothetical. This is the highest level of cognitive development. Thinking is logical and abstract, and the child is able to reason hypothetically, thus making them capable of asking questions like why they feel the way they do. It is important to remember that not all people reach this final stage of development, and many tend to operate in the concrete operational stage while performing a few operations in the final stage.
READING LIST


READING AVAILABLE ONLINE

SOcio-emotional development

Aims

- To provide information about the social behaviour of children within the context of child development
- To show how the socio-emotional development of children is applicable to abused children
- To show how the socio-emotional development of children is applicable in the courtroom

Outcomes

- The participant will have an understanding of the concept and stages of socio-emotional development
- The participant will be able to understand the behaviour of the child in cases of child sexual abuse
- The participant will be better equipped to understand the behaviour of children in the courtroom

1. Introduction
2. Erikson’s Theory Of Socio-Emotional Development
3. Adolescence
1. INTRODUCTION

Cognitive development refers to the processes of the brain, but this is only one of the aspects relevant to understanding child development. Children do not exist in a vacuum. They grow up in families, in communities, in particular cultures and societies, and these environments will exercise an influence over the child’s overall development. In order, therefore, to have a holistic understanding of child development, it is also necessary to understand the process of socialisation children have to pass through.

2. ERIKSON’S THEORY OF SOCIO-EMOTIONAL DEVELOPMENT

Since children grow up within a particular environment, it is necessary to understand the process of socialisation so that it becomes easier to interpret and make sense of their behaviour. The process of socialisation will be presented in terms of Erikson’s theory of socialisation.

According to Erikson, the socialisation process consists of 8 phases, with each stage regarded as a “psychosocial crisis” which arises and demands resolution before the next stage can be satisfactorily negotiated. These stages are conceived in an almost architectural sense: satisfactory learning and resolution of each crisis is necessary if the child is to manage the next and subsequent ones satisfactorily, just as the foundation of the house is essential to the first floor, which in turn must be structurally sound to support the second story and so on.

The following is a very brief introduction to the 8 phases of the socialisation process:

- Learning basic trust vs mistrust
- Learning autonomy vs shame
- Learning initiative vs guilt
- Industry vs inferiority
- Learning identity vs identity diffusion
- Learning intimacy vs isolation
- Learning generativity vs self-absorption
- Integrity vs despair

Learning basic trust vs basic mistrust (Hope)

This stage takes place in the first and second year of infancy and extends roughly up until about the age of two, although it can extend beyond this. The first thing that a child has to learn is the ability to trust. Children will have to learn that someone will take care of them when they are hungry, cold or sore. Since an infant is incapable of taking care of itself, it is dependent on others and will have to learn to trust that others will care for it.
Children, who have been treated well, nurtured and loved, will develop trust, security and a basic optimism. They will know that someone is there to take care of them which will give them a sense of security and confidence. On the other hand, if the child is badly handled, the child becomes insecure and mistrustful.

Consequently, when working with very young children, trust is the first important issue that has to be dealt with, since children are instinctively distrustful of strangers. This means that a lot of time will have to be spent on rapport-building when working with young children, as they will not become involved in activities until they have built some form of trust.

Learning autonomy vs shame (Will)

The second stage of socio-emotional development occurs roughly between 18 - 24 months and 3½ - 4 years, and is closely linked to the age at which children start to move around on their own. The important change that occurs here is that children are now mobile. They have started walking which gives them a greater sense of independence and a need to explore their environment. Greater independence will bring the child into conflict with the boundaries and rules laid down by parents, which will result in stormy self-will, tantrums, stubbornness and negativism. This conflict between freedom and discipline is essential for the development of a moral conscience.

These characteristics are evident in all young children of this age (“the terrible twos”), where children refuse to do what they are told and throw themselves down on the ground to prove a point. The use of “no” as a response is typical at this stage. However, once a child has been provided with clear, consistent boundaries, that child will feel safe and secure, so children emerging successfully from this stage, will be sure of themselves, confident and elated with their new found control and proud. On the other hand, a child who has been provided with no or inconsistent boundaries will feel insecure which will contribute to a lack of self-confidence.

Learning initiative vs guilt (Purpose)

This stage starts at approximately 3½ years and continues until the child enters formal schooling. The child is now coming into contact with other children and beginning to socialise. This brings the child into contact with social rules i.e. you must not hurt one another, you must share etc. In addition, the child is learning to acquire certain basic skills, like being able to tie shoelaces or eating with a fork. This is also the stage at which children are identifying their gender roles i.e. boys want to be like daddy and little girls want to be like mommy.

For the healthy developing child, this stage involves learning to use imagination to broaden skills through all kinds of active play, including fantasy. It involves co-operating with others and learning to lead as well as follow. On the other hand, where the child is immobilized by guilt, the child will be fearful; will hang on the fringes of others; will depend unduly on adults; and will be restricted both in the development of play skills and imagination.

Industry vs inferiority (Competence)

This stage tends to begin when children enter formal schooling at about 6 and lasts until approximately the age of 12, thus spanning the period of primary school. In this stage the child learns to master the more formal skills of life. At school, children are being taught to read and write and do mathematics and learn about biology and history. In terms of socialisation, children are learning to relate to their peers according to rules, progressing from free play to play that may be elaborately structured by rules and may demand formal teamwork.

The child, who has mastered the previous stages, will learn easily enough to be industrious, which will in turn contribute to a sense of confidence. The mistrusting child will doubt the future. The shame and guilt-filled child will experience defeat and inferiority.
Learning identity vs identity diffusion (Fidelity)

This stage ranges from approximately 13 until 20 years of age. This stage revolves around self-discovery. The adolescent is trying to answer questions like, "Who am I?"; “Where do I belong?” and “What will I become?” Even the best adjusted adolescents experience some role identity diffusion as they grapple with these questions. As this stage is also a stage of independence since adolescents are trying to become more independent of their families, most boys and probably most girls experiment with minor delinquency in this period as it is a time when rebellion flourishes and self-doubts flood. This is a period when adolescents experiment and try to find a role most suitable for themselves.

In their attempt to become independent and move away from parents, adolescents seek leadership, somebody who can inspire them, and they gradually develop a set of ideals, which are socially congruent and desirable.

In finding a role that is suitable for themselves, children in this stage have to answer the following questions:

- own characteristics (who am I?)
- social identity (to which group do I belong?)
- own values and ideals (what do I wish to achieve?)

The internal cause of this crisis lies in the physical and psychological changes that begin with puberty (change in physique, intensification of drives and reproductive ability).

Learning intimacy vs isolation (Love)

This stage coincides with the previous stage and stretches between 12/13 years and 20/21 years, and will culminate in the capacity to experience true intimacy, which forms the cornerstone of genuine and enduring friendship. The development task in this stage is to acquire a feeling of intimacy and overcome a feeling of isolation. Intimacy, in this context, means having a close relationship with another individual, whether in terms of friendship or partnership.

The adolescent who achieves this stage successfully will experience true intimacy, while the one who does not will experience isolation and a need to protect themselves against intimate contact and to think only of themselves. A balanced synthesis of this stage forms the basis for a good partnership or genuine and enduring friendship.

Learning generativity vs self-absorption (Care)

This stage covers most of adulthood and involves generativity in the sense of partnership and parenthood, and also in the sense of working productively and creatively. This is the period in which one forms a longterm relationship with a partner, has a family and works at one’s career. Generativity is a wide concept which includes productivity, creativity and passing on of culture. People who acquire generativity and care concern themselves with enriching their own and other people’s lives.

Integrity vs despair (Wisdom)

If the previous stages have been successfully resolved, the mature adult will reach the peak of adjustment, and have a sense of integrity. They will trust, be independent, work hard and have developed a self-concept with which they are happy. If one or more of the previous stages have not been resolved, the adult may view themselves with disgust, despair or a sense of being unfulfilled.
Adolescence is the developmental stage between childhood and adulthood. The age at which it begins varies from 11 – 13 and it ends between the ages of 17 and 21. Generally speaking, adolescence begins at puberty when sexual maturation begins.

The traditional perception used to be that adolescent years are characterised by convulsive instability and disturbing inner turmoil, which was attributed to the erratic physical changes experienced by adolescents and the resultant confusion about self-image. Although statistics on adolescent suicide supports the idea that this is a difficult period, suicides tend to involve more attempted suicides than completed suicides, which are more of a communicative gesture designed to elicit caring. The weight of evidence does not support the idea that adolescence is usually a period of turmoil and turbulence. Research suggests that most teenagers navigate through adolescence without any more turmoil than they would in other periods of life. If conflict, hostility or confusion does occur during adolescence, it is usually associated with social circumstances within the family. So, an adolescent who does not receive much love, understanding and support, will probably experience storm and stress.

Despite this, adolescence is a challenging period and adolescents have to navigate 2 of Erikson’s stages of socialisation. These are stages which focus on the establishment of identity and which go to the core of who the adolescent is. The other stage of socialisation that occurs in this period relates to intimacy. Intimacy in this context is used in a broad sense, and is not confined to sexual intimacy. It includes being close to others, caring, sharing and loving. Erikson defines intimacy as the capacity to commit oneself to concrete partnerships and affiliations, and to develop the ethical strength to abide by such commitments.

In order to grow towards adulthood, adolescents have to accomplish numerous developmental tasks in order to function optimally in adulthood. These include:

- Acceptance of changed physical appearance
- Development of a gender identity
- Development of cognitive skills and acquisition of knowledge
- Development of own identity
- Development of independence from parent and other adults
- Selection and preparation for a career
- Development of socially responsible behaviour
- Acceptance and adjustment to certain groups
- Establishment of intimate relationships
- Development of strong emotional bond with another person
- Preparation for partnership and family responsibilities
- Achievement of financial independence
- Development of moral concepts and values for own behaviour
READING LIST


READING AVAILABLE ONLINE

SEXUAL DEVELOPMENT

AIMS

• To provide information on the stages of sexual development in children.
• To distinguish between sexual behaviours that are normal and those which indicate concern.

OUTCOMES

• Participants will have a greater understanding of the manner in which children develop sexually
• Participants will be able to identify sexual behaviours that indicate areas of concern

1. Stages Of Sexual Development
2. What Is Normal Sexual Behaviour?
1. STAGES OF SEXUAL DEVELOPMENT

Child sexual development is divided into the following stages:

- Prenatal period
- Infancy (birth to 2 years)
- Early childhood (3 to 5 years)
- Late childhood (6 to 10 years)
- Early adolescence (11 to 13 years)
- Middle adolescence (15 to 17 years)
- Late adolescence (18 to 19 years)

As in most development, the stages are not clearly defined in terms of precise ages, and there are individual differences within the stages.

Prenatal stage

Prenatal sexology is mostly concerned with physical development. Although genetic sex is determined at fertilisation, the difference in genital shape only begins at about the 5th week with the first semen being produced in boys at about the 8th week and ovaries beginning to develop by the 8th week (Saleh et al 2014:47).

It is now accepted that the neurological and genital capacity for sexual arousal to orgasm exists in children from birth. Ultrasound scans show male foetuses touching their penises, erections are common, and masturbation has been observed with orgasm in a female foetus (Saleh et al 2014:47).

Infancy (Birth to 2 years)

Sexual arousal has been evidenced in both male and female infants at birth – male infants have erections and female infants display vaginal lubrication. Infants and toddlers explore their genitals whenever they get an opportunity, after which they will learn the names assigned to these body parts. There is sufficient evidence that children experience orgasms as a result of masturbation, and this has been documented as early as Freud. However, the ability to experience sexual arousal is present only at the physiological-reflexive level, because infants and young children do not have the ability to concentrate nor do they have the necessary fantasy content (Saleh et al 2014:48).

Early childhood (3 to 5 years)

Children tend to exhibit a variety of sexual behaviours at this stage, ranging from kissing and cuddling to investigating the genital organs of others or touching their own. Masturbation, sometimes to orgasm, is relatively common in this period. Sex play with siblings and peers is common at this stage, but children rarely in this stage see their genitals in terms of sexual functions. Genitals are for “weeing or pooing.” At the beginning of this stage children are able to identify their own biological sex correctly as well as that of others, basing this on clothing, hairstyles and external appearance. By the end of this stage, most children are able to detect genital differences, and have names for genital body parts (Saleh et al 2014:49).

Later childhood (6 to 9 years)

Gender is now determined by genital organs. As they progress through this period, children become more and more aware of reproduction, masturbation and the mechanics of sexual intercourse. Peers begin to play
an increasing role in the dissemination of information about sex. Although fantasy begins to be included in
the masturbation process, sexual behaviour becomes more secretive as modesty, embarrassment or even
punishment increases (Saleh et al 2014: 50).

Early adolescence (10 to 13 years)

This is the period that begins with puberty and ends in anatomical sexual maturity. Female breast
development begins on average at the age of 10 while boys begin puberty on average at 11 years. Girls begin
to menstruate by 12 or 13 and boys ejaculate by 15. Individual children vary in age and this is considered to be
perfectly normal. For instance, some girls only start to menstruate at 16 (Saleh et al 2014:51).

As far as knowledge of sex is concerned, early adolescents understand what sexual intercourse is even though
they may not yet have experienced it. Sexual fantasy begins to play a more important role with the onset
usually at the age of 11 to 13. Masturbation is the main sexual outlet in this period, although a significant
number do engage in sexual intercourse for the first time at approximately 12.

Middle adolescence (14 to 17 years)

There are a number of factors that influence the onset of some sexual behaviours in this age group, included
amongst which are pubertal milestones and the behaviour of close friends. The norm is for sexual intercourse
to begin by the end of middle adolescence, although a significant percentage of these are experiences are not
consensual. Most sexual behaviours that adults participate in are found in this age group, including anal sex,
although not at the same rate as adults. Same-sex contact is also frequent, although a significant number of
adolescents are still uncertain about their sexual orientation. Adolescents become aware of their their sexual
orientation and gender identity before puberty and this usual precedes sexual behaviour with partners (Saleh

Late adolescence (18 to 21 years)

By late adolescence, humans are involved in a large variety of sexual behaviours on a fairly regular basis
with increasing incidence. Masturbation is common as is oral sex (63% of men and 60% of females). Late
adolescence is also the age where females experience the highest frequency of anal penetration, with almost a
quarter having experienced it within the previous year of the survey (Saleh et al 2014:53).

2. WHAT IS NORMAL SEXUAL BEHAVIOUR?

Sexual behaviour has been categorised below into what is considered to be normal, less normal and red flag
behaviour. Note, however, that each and every behaviour must be seen within the context in which it occurs.

Normal sexual behaviour

Although these behaviours are characterised as normal, because they are natural and expected, it does not
necessarily mean that one would want them to continue.

However, they do provide an opportunity to talk, teach and explain what is appropriate:

- Touching and holding own genitals
- Masturbating genitals in public or private, usually with awareness of privacy as child gets older
- Looking at or touching a peer’s or new sibling’s genitals
- Showing genitals to peers
- Telling stories or asking questions using swear words or names for private parts,
• Standing or sitting too close to someone
• Trying to see peers or adults naked
• Curiosity about sexuality i.e. questions about babies, gender relationships and sexual activity
• Increased sense of privacy about their bodies
• Use of mobile phones and Internet in relationships with known peers
• Behaviours are few, transient and distractable

Less common normal behaviour

The following behaviours are less common in normal sexual development, but should again be seen within the context and situation of each child:

• Rubbing body against others
• Trying to insert tongue in mouth while kissing
• Touching peer/ adult genitals
• Crude movements associated with sexual acts
• Sexual behaviours that are occasionally disruptive to others
• Persistent questions about sexuality despite being answered
• Behaviours are transient and moderately distractable

Uncommon normal behaviours

These behaviours can be of concern and have the potential to be outside safe and healthy behaviours if they persist.

They require a response from a protective adult, extra support and close monitoring:

• Asking peer/ adult to engage in specific sex act
• Inserting objects into genitals
• Explicit imitation of sexual intercourse
• Touching the genitals of animals
• Explicit talk, art or play of sexual nature
• Persistent nudity and/or exposing private parts in the presence of others
• Pulling other children’s pants down or skirts up against their will
• Sexual behaviours that are frequently disruptive to others
• Self-masturbation in preference to other activities, whether in private or in public or with peers, and/ or causing self-injury
• Persistently watching or following others to look at or touch them
• Persistently mimicking sexual flirting behaviour too advanced for age, either with other children or adults
• Covert or secret use of mobile phone and Internet with known and unknown people which may include giving out identifying details
• Behaviours are persistent and resistant to parental distraction

Behaviours that are rarely normal

• Any sexual behaviour involving children who are 4 or more years apart
• A variety of sexual behaviours displayed on a daily basis
• Sexual behaviours that result in emotional distress or physical pain
• Sexual behaviours associated with other physically aggressive behaviour
• Sexual behaviour that involves coercion
• Behaviours are persistent and child becomes angry if distracted
Red Flag behaviours

These are behaviours which are outside healthy and safe behaviours. They signal a need for immediate protection and support from a professional.

Sexual behaviour is problematic when it includes any act that:

- Occurs frequently and cannot be redirected
- Compulsive masturbation to the point of self-harm or seeking an audience
- Causes emotional or physical pain or injury to the child or to others
- Is associated with physical aggression
- Involves coercion or force
- Disclosure of sexual abuse
- Persistent bullying involving sexual aggression
- Accessing the rooms of sleeping children to touch or engage in sexual activity
- Presence of sexually transmitted infection
- Any sexual activity with animals
- Simulates adult sexual acts or participates in sexual acts, including sexual behaviour with younger or less able children i.e. oral sex or sexual intercourse
- Use of mobile phones and Internet for sending or receiving sexual images
READING LIST

MEMORY

AIMS

- To introduce the different stages of memory
- To explain the factors that affect memory
- To highlight the difficulties that children experience with memory

OUTCOMES

- The participant will have an understanding of the different stages of memory
- The participant will be able to identify the factors that affect memory
- The participant will be aware of the difficulties that children experience with memory

1. Introduction
2. Ways of Remembering
1. INTRODUCTION

The ability to remember involves a complex set of processes which begin with a question and end with the retrieval of information. Memory involves the encoding, storage and retrieval of information.

**Stages Of Memory**

- Encoding
- Storage
- Retrieval

The first phase is called encoding and refers to the process by which a trace of an experience becomes registered in memory. Not all information is encoded in the storage system and it depends on what attention has been given to an event.

**Factors that influence encoding**

- Prior knowledge of event
- Interest value of the event
- Duration and repetition of event
- Stress level at time of encoding

The second phase is known as the storage phase where encoded events enter a short-term memory store. Not all memories survive short-term storage, but those that do then enter long-term storage. Information can be transformed, strengthened or lost while in storage.

The strength and organisation of stored information is dependent on a number of factors:

- the length of time that has passed
- the number of times the event has been re-experienced
- the number and type of intervening experiences that have been encoded and stored.

The final stage is the retrieval stage and involves the retrieval of memory from storage. Not all memories are retrieved perfectly. In fact, some are not retrievable at all. This will depend on the condition of the original memory trace, as traces that have undergone decay will be more difficult to retrieve. In other cases retrieval will be aided when the conditions for retrieval are similar to those of encoding, for instance when the interviewer makes use of cues that reinstate the encoding context (such as, where the child was), accuracy of recall improves. Therefore, what a person ‘remembers’ does not always come directly from storage.
Memory is highly constructive and memories are added to, deleted and shaped by experiences. These transformations can occur at any stage, and result in the retrieval rarely being a direct match of the original event. Storage capacity does not change greatly with age. Once information has been successfully stored in memory, a preschooler will probably remember it as well as an adult. The problems which young children encounter relate to the encoding and the retrieval processes. It is difficult for young children to encode the information i.e. to get the information into long-term storage. They also experience difficulties in retrieving information from long term memory.

The first steps are to perceive the event and to pay attention to it. Researchers argue that children can be very effective witnesses because they tend to concentrate on observing rather than interpreting their observations as adults do. Children sometimes fail to notice certain peripheral details because they lack significance but on the other hand some children may give peripheral details exaggerated importance. This depends on the circumstances of each particular case. For instance, a young child who is fascinated by cars may notice more details about the cars involved in an event than would an adult.

Once a child has perceived an event, they must be able to remember and report the information. Children may be able to perceive an event accurately but have difficulty translating this perception into words. The event may be stored in the child’s memory in some representational form but the child may not have the ability to communicate the content of the memory because they do not have the necessary vocabulary. In order to be effective witnesses, children must be able to demonstrate their retention of material in one of three ways: recognition, reconstruction or recall.

2. WAYS OF REMEMBERING

**Recognition Memory**
- Simplest form of remembering
- Requires only recognition
- Identification parades
- Children have good recognition memory for simple stimulation

**Reconstruction Memory**
- Specialised method of retrieving material from storage
- Involves reproducing form of information seen in the past
- Reconstruction of crime scene
Recall

- Most complex form of memory
- Requires previously stored memory to be retrieved from storage
- Performance strongly age-related
- Younger children recall less but more accurate
- Children of all ages as capable as adults with simple, direct questions
- From age of 6/7 children recall like adults

It is, therefore, incorrect to assume that younger children necessarily have poorer recall than older children or adults. In fact, sometimes younger children can provide more accurate information. Young children are constrained by their limited ability to use memory strategies, which means that children often know more than they can freely recall.

READING LIST


READING AVAILABLE ONLINE

COMMUNICATING WITH CHILDREN IN A FORENSIC ENVIRONMENT

AIMS

• To provide a basic introduction to language development
• To highlight the misunderstandings that occur when adults communicate with children
• To provide information on the difficulties that children have with vocabulary and syntax
• To highlight the difficulties children experience with sexual terminology

OUTCOMES

• The participant will have a basic understanding of language development
• The participant will be able to identify the errors that occur in communication between adults and children
• The participant will be able to identify the difficulties children experience with vocabulary and syntax.
• The participant will be able to understand the manner in which children communicate regarding sexual terminology

1. Communicating With Children
2. Language Development
3. Semantics
4. Errors In Communication
5. Body Parts And Sexual Terminology
6. Problems With Communicating
7. Syntax
1. COMMUNICATING WITH CHILDREN

Communication is an interaction between two or more persons. In this instance, communication has to take place between the child and the adult.

**Communicating With Children**

- Child must have necessary cognitive ability
- Child must have sufficient vocabulary
- Child must have conversational skills

Children learn to communicate through a gradual sequence of phases and it is important to assess at what stage a particular child is so that the adult can ask questions that are matched to the child's stage of comprehension and can interpret the responses in accordance with the level of development. Communicating with children is by its very nature complicated, but it becomes even more so where the communication takes place in a forensic environment and relates to sexual abuse. Communicating with children is complicated because it involves an understanding of language development. Unfortunately, communication with children tends to result most often in miscommunication.

**Problems Encountered In Adult-Child Communication**

- Developmentally inappropriate vocabulary
- Complex syntax
- Multiple questions
- Embeddings
- Passive voice
- Negative
- Introduction of new information
- Conversational competence
2. LANGUAGE DEVELOPMENT

Children learn to communicate through stages in much the same way as cognitive development occurs. Language development proceeds from the creation of sounds to the creation of words and then the arrangement of words into grammatically correct sentences. Understanding language precedes the ability to speak, so a very young child will understand what is being said to them but will have difficulty being able to communicate themselves.

Communication begins with the crying of a baby – it is the first communication that occurs – and then proceeds to the stage of cooing and babbling. This is followed by the repetition of sounds and words which the child hears. This repetition is incorrect or accidental. The child does not have a meaning or mental image attached to the word. It is simply a repetition of the sounds. From about ten months, a baby will start to repeat sounds and words in a more deliberate way, and the words will now be linked to a meaning or mental image. By twelve months a baby is able to create a word with meaning and uses it deliberately to communicate. Thereafter, the child simply has to learn more words and be able to link them to create sentences, which will become more complex as the child develops.

Because very young children have minimal vocabulary, they tend to use a holophrastic form of communication. This is where a single word is used to convey complex ideas, and is often accompanied by a gesture. So a child may say “Mama” and hold out its arms, which would translate to mean “Mama, pick me up.”

Language development will obviously have influence on recounting of events. Although children may have a detailed memory in their head, they do not necessarily have enough words to share that experience. This will influence the kind of information the child can provide. Younger children will, therefore, provide less information than older children, and will also be less specific.

3. SEMANTICS

Semantics refers to the meanings attached to words. In order to understand child language, it is important to have an understanding of how children acquire vocabulary and what words create difficulties for them. For instance, the words “frontwards”, “backwards” are very difficult for children under the age of 7 to understand because, from a developmental point of view, they are unable to work out the location of another person in terms of something else. These words are better avoided. It would be better to ask the child to show where the other person was standing.

Even when children have mastered the basics of language, there are still a number of concepts that give rise to problems in communication. For instance, studies have shown that even when children think they understand a word, they may not attribute the same meaning to a word as an adult does. Children have a tendency to interpret words idiosyncratically (peculiar to that individual) and may not necessarily assign the same meaning to a word as the adult would. A child, wearing a costume, may not regard the costume as clothing, so when asked if she was wearing clothes, she may say no. It is, therefore, important to clarify the meanings of words by asking further questions.

Where a child does not understand a word, the child may give that word the meaning of a similar sounding word. In the Saywitz study, for example, children under the age of 11 did not understand the concept of `jury’ but they frequently mistook it for `jewellery.’ Relational terms create difficulty for children, and should best be avoided. A relational term is one, the meaning of which is dependent on something else. A frequent misunderstanding is created by the use of relational terms to describe size and shape of people and things. These terms may have different meanings for children. For instance, what may be `big’ or `fat’ to a small child is not necessarily `big’ or `fat’ to an adult.
Children often use words without fully comprehending their meanings. For instance, a child may say that their father is a lawyer or an accountant, but have no idea what those words actually mean. Children tend to do this when talking about the days of the week or the months of the year. A child may be able to recite the days of the week, but this does not mean he understands the concepts symbolised by these terms. The fact that a child can recite the days of the week does not mean that the child will be able to explain what happened on any particular day, or be able to distinguish one day from another.

4. ERRORS IN COMMUNICATION

There are numerous errors that occur when communicating with children, and the more prominent ones are included here.

Over-extension

Because children are still learning a language, they do not have many words in their vocabularies. This means that they often break the rules of adult language. Where children do not have a particular word, they will use a word they do know and extend its meaning. They extend the meaning of a word in their small vocabularies to include actions/objects for which they have no words. This is known as over-extension.

This violates the rules of adult language but makes logical sense to children to apply word to objects that resemble each other. As they acquire words, children will attach a particular label to a specific object. A child then begins to extend word to similar objects e.g. all four-legged furry animals may be referred to as “doggies”. It is, therefore, important to decipher specific meanings of words used by children.

Under-extension

Another common error found in children’s communications is referred to as under-extension. This refers to the tendency to restrict the meaning of a word. Children often only attribute part of the meaning which the same word has for adults.

Other misunderstandings

Children under the age of 10 will not say that they do not understand, because cognitively they do not have the capacity to evaluate when they do not understand. Be aware that words that are apparently simple or everyday may still sometimes be difficult for children to understand e.g. ill (children use the word `sick`).

When A Child Does Not Understand A Question

- They will say “yes”
- They will say “I don’t know”
- They will keep quiet
5. BODY PARTS AND SEXUAL TERMINOLOGY

Body parts and sexual terminology is the area where it is most obvious that children have limited vocabulary. However, it is also an area that is of crucial importance in cases of child sexual abuse. Although we may think that body part terminology forms part of everyday words, research has shown that children are not as aware of their body part words as we would think. And this applies even to non-sexual body parts. Studies have found that the number of body part words both understood and named increases with age, and some words are not fully acquired until after 6, like ankles and elbows. A child will say that someone touched his leg but will not be able to be more precise. Is it the thigh, the knee, the shin, the ankle?

Adults should, therefore, not assume body part words are everyday words and seek clarification. One of the biggest difficulties in obtaining information about sexual abuse from children is the fact that children, who are not sexually active, do not understand what sex is. This is further exacerbated by the fact that children under the age of 6 do not have an understanding of their sexual anatomy. These children do not know that they have a separate anus and a vagina. Many children under this age believe that they use one orifice for both bodily functions.

In the forensic context, children will often in their disclosure use a general word to describe a body part. It may not be clear what exactly they are referring to, yet this information is vitally important for the court.

This will then have to be clarified in one of three ways:

- the use of anatomically detailed dolls
- the use of anatomically detailed drawings
- the description of bodily functions.

Children have difficulty with the comprehension of a number of words that are used when discussing sexual activities.

Examples Of Words That Create Difficulty

- Touch – only hands touch
- Move – when used in relation to penis
- In – no concept of inner anatomy
- Masturbation
- Ejaculation
- Erection
- Condoms

LITERAL USE OF LANGUAGE

Because children are concrete and are unable to evaluate, their use of language is also very literal. Young children do not have the cognitive ability to evaluate layers of meaning, and will simply accept the literal, concrete meaning. This is highlighted in the following case study. The child alleged that she had to perform oral sex on her father. In cross-examination by the defence it appears that the child is retracting what she said.
D: And then you said you put your mouth on his penis?
C: No.
D: You didn’t say that?
C: No.
D: Did you ever put your mouth on his penis?
C: No.
D: Well, why did you tell your mother your dad put his penis in your mouth?
C: My brother told me to.

The child is then re-examined by the prosecutor:

P: Jennie, you said that you didn’t put your mouth on daddy’s penis. Is that right?
C: Yes.
P: Did daddy put his penis in your mouth?
C: Yes.
P: Did you tell your mom?
C: Yes.
P: What made you decide to tell?
C: My brother and I talked about it and he said I better tell or dad would just keep on doing it.

The above example emphasises the literal manner in which children use communication. In her initial evidence-in-chief, the girl said that her father had put his penis in her mouth, so when the defence asks whether she put her mouth on her father’s penis, she denies it. In her concrete way of understanding her world, she never went and put her mouth on her father’s penis. He put his penis in her mouth. An adult would realise that the action is reversible, but children in this stage of development are not able to reverse actions.

6. PROBLEMS WITH COMMUNICATING

Temporal words

Legally it is important to specify when exactly an offence took place. This is usually included in the charge sheet itself. The accused has to be informed with reasonable clarity of the details of the charge against them and this includes details about the date and the place where the offence was committed. Children under the age of 10 have a very limited cognitive ability to understand concepts of time and will not be able to provide accurate information regarding dates and times. The information provided will usually be very vague.

Contrastive terms

Terms like more/less and some/all are contrastive in nature and young children do not understand this aspect of these words. In order to understand this concept, children need to have an understanding of parts of a whole, which is complicated for children under the age of 7. Children under the age of 7 do not realise that some is subsumed by all. They may, therefore, deny that they have some of a thing when they have all of it. For instance, if a young child were asked “did he take off some of your clothes?” the child may reply in the negative because he took off all his clothes.

Remember

Children do not use the word remember in the way that adults do. Children under the age of 9 understand it to mean that they must first have forgotten an event before they can remember it. So a child may deny that they can remember an event after they have just related that event. Another problem created by “do you remember” questions is the introduction of multiple questions.
Know

Even adults tend to find this word confusing. It is complicated because it depends on nuances and requires one to define a relationship. If one is asked how they know somebody, they will have to explain what the relationship between themselves and that person is. For instance, whether it is just an acquaintance or somebody one knows really well. Because of these complexities, children have even greater difficulty with this word. As they are unable to understand relationships and are unable to evaluate, they interpret this word in their own idiosyncratic manner which leads to confusion in child-adult communication. Young children do not have language experience to distinguish between nuances, yet this concept arises frequently in cases of sexual violence because the identity of the perpetrator and their relationship to the victim is crucial. The child is then asked to explain to the court who the alleged perpetrator is and how they know them. The concept ‘how’ involves the mental operation of reversibility and evaluation which makes it very difficult for children to understand.

Legal terminology

The medium of exchange in the courtroom is a particular form of language so steeped in legal tradition that it falls outside the normal language repertoire of adults and, even more so, of children. Law is a profession which uses vocabulary and technical terms that are specific to it. Children, who are relatively inexperienced language users, experience the specificity of legal language as very difficult to comprehend. Technical terms would include terms like cross-examination and evidence. The titles of role-players also form part of these technical terms i.e. accused, prosecutor, magistrate. Legal terminology most frequently used to witnesses in court would include phrases like ‘your worship’, ‘I put it to you’ and ‘my learned friend’.

7. SYNTAX

The complexity of grammatical structures must be reduced when talking to children. Adults tend to use very complicated grammatical structures in their everyday speech. It is recommended that interviewers learn to phrase questions as simply as possible in a way that makes the least cognitive demands on the child.

Word order

In English, the order in which words are spoken partially determines their meaning. A typical sentence follows a subject-verb-object sequence and these constructions are most easily understood by children. This has the implication, supported by research, that children have difficulty understanding passive sentences. Young children always assume that the subject of the sentence is always the actor. For instance, if a child was told “The boy was bitten by the girl”, the child would understand it to mean that the boy was doing the biting.

Embeddings

Language used in court is very compact and compressed, since a lot of information needs to be inserted into a single question. This is achieved by the use of complex syntactical structures which make comprehension very difficult. The technique used to compress information into a sentence is referred to as embedding, e.g. “Did you see the child sitting in the park with a doll on her lap, watching the other children play?” If children are confronted with questions that contain a lot of embedded information, their understanding of the content will be severely compromised.

Use of the negative

Legal language is inundated with the use of the negative. Negatives are frequently placed in unusual positions and function to break up the content of the questions. The use of the negative contributes to confusion and miscommunication. Negatives should be avoided wherever possible with questions always being framed in the positive.
**Tag questions**

A tag question is one that transforms a statement into a question by adding on a request for confirmation e.g. “You were unhappy then, weren’t you?” Although even young children appear to make use of tag questions, studies have found that many 12 and 14 year olds have difficulties understanding tag questions.

**Multiple questions**

Multiple questions involve the use of several questions at once e.g. “You don’t remember? Did anyone ever wake and see this happening?” Children will often only respond to one question, ignoring the more difficult one. For this reason, only one question should be posed at a time.

**Use of pronouns**

Pronouns have no meaning apart from the specific context in which they occur. The sentence “Did she go to the shop?” will have no meaning unless the listener knows to whom ‘she’ refers.

The ability to link pronouns with prior or subsequent nouns is not fully developed until the age of 10. It is suggested that interviewers repeat critical information instead of using pronouns e.g. “When your mom came home, did your mom make supper?”

**PRAGMATICS AND SOCIAL COMPETENCE**

Pragmatics refers to the study of language in social contexts. While children are developing linguistic competence, they are also learning to adapt their language to the demands of the social situation.

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**Conversations Of Young Children**

- Are loosely organised
- Involve unrelated topics
- Include abrupt topic shifts

Children have to learn to participate in a dialogue with others and this involves learning to take turns, which begins from as early as the age of 1. In learning this skill, children use a variety of strategies for maintaining turn-taking, one strategy being the repetition of the last statement made by the person to whom they are talking. Children use repetition to maintain a conversation when there has been a breakdown in understanding.
READING


READING AVAILABLE ONLINE


AIMS

• To increase awareness of the importance of building rapport with children
• To introduce communication skills that will assist with the interviewing of child witnesses
• To provide direction on what to do when a child witness displays inappropriate behaviour

OUTCOMES

• The participant will be able to build rapport with children
• The participant will have knowledge of the different communication skills that can be used when interviewing child witnesses
• The participant will know what to do when a child witness behaves inappropriately

COMMUNICATION SKILLS

1. Introduction
2. Rapport
3. Communication Skills
4. Inappropriate Behaviour
1. INTRODUCTION

Although it is necessary to have an understanding of a child's language ability in order to communicate with children, it is also essential to have certain communicative skills. Because children have very basic language abilities, they tend to focus a lot of their attention on tone of voice and body language.

Communicative skills include:

- Tone of voice

Because children do not understand much of the language that adults use, they pay very close attention to the tone of the speaker. The tone will indicate to the child whether the interviewer is interested in the story the child has to tell and whether the interviewer is sensitive and understanding. This will determine the child's response.

- Body language

Because children use tone of voice and body language as forms of communication, they are very sensitive to body language.

- Ability to respond

This refers to the ability of the interviewer to respond to the child, both to what the child is saying as well as the child's emotional response to relating what has happened.

- Ability to listen

This refers to the ability of the interviewer to listen to what the child is saying in a sensitive and non-judgemental manner.

- Warmth and understanding

2. RAPPORT

Rapport is defined as the positive relationship between the interviewer and the child that sets the tone for the interview and helps to increase both the amount and the accuracy of the information provided. Children, who are victims of crime, will be distrustful and unwilling to talk to strangers and rapport is the essential ingredient necessary for communicating with these children.

Communicating with children is different from communicating with adults. Adults, who are well versed in communication, will be able to respond whether rapport has been developed or not. Admittedly, more information will be gleaned if there is rapport, but communication will not be prevented by the absence of rapport. However, communicating with children is completely different. If there is no rapport, there is a very good chance that a young child will simply refuse to say a word. In order to communicate with a child, it is essential to develop rapport.
Characteristics Of Rapport

- Warmth
- Trust
- Security

In the interaction between the child and the interviewer, the child should feel safe and secure and there should be enough rapport developed for the child to trust the interviewer. In order to achieve this, the interviewer should reflect respect, sincerity and empathy. The interviewer must treat the children with respect at all times. In addition, the interviewer should always be sincere as children can identify when an adult is insincere and this will affect their response to that adult.

3. COMMUNICATION SKILLS

A number of communication skills will be introduced here. These techniques are dealt with out of context here, so they must be integrated within the individual interview structure or interaction between the child and the interviewer. It is important to remember that these skills can only be acquired through practical training and hands on experience.

Acknowledgements

An acknowledgement can be either verbal or non-verbal. It usually has very little content, but is used for a number of purposes. It shows the child that their efforts are being recognised. This is especially where a child is trying to answer a question or perform an activity. It also indicates empathy in that it acknowledges the way a child may feel about something. Acknowledgements give the child feedback that the interviewer is listening and understanding.

Acknowledgements

- "mm-hmmmm"
- looks of concern
- nodding of head
- smile
- "oh"
- "I see"

The type of acknowledgement used will depend on the age and social development of the child. Young children, for instance, will not respond to subtle cues like raised eyebrows, but will require more overt and effusive responses. Acknowledgements should always be neutral, and must not in any way reinforce any particular statement the child has made.
Descriptive statements

A descriptive statement is a non-evaluative comment that describes the situation one finds oneself in. It is a summary of the situation or behaviour of the child.

Function Of Descriptive Statements

- Promote non-threatening nature of interview
- Keep attention focused
- Encourage further elaboration
- Show interviewer’s involvement

Silence creates anxiety and increases stress, so descriptive statements can be used to reduce anxiety. Where the child is very young, a statement about what they are doing may be comforting e.g. “That’s an interesting drawing.” With older children, a statement can be used to show that silence is acceptable e.g. “I see you’re thinking quite hard about that question.” It can also be used to redirect attention to a less threatening topic e.g. “Maybe you can tell me about that later, and we can talk about..” It is obviously important to match the information contained in these statements to the child’s ability. Age-appropriate vocabulary must be used.

Descriptive Statements

- “You look like you’re a little nervous.”
- “I noticed you smiled when you spoke about your brother.”
- “I see you’re wearing a coat today.”
- “It looks like you’re thinking hard about that question.”
Reflective statements

A reflective statement is when one repeats all or part of what a child has just said. It does not change the content of the statement.

**Purpose Of Reflective Statements**

- Demonstrate acceptance of what child is saying
- Convey interest
- Convey understanding
- Offer opportunity for agreement or disagreement
- Provide opportunity for elaboration

A reflective statement can be used when an interviewer is unsure about the meaning of what the child has said. By repeating what the child has said, the child is given an opportunity to clarify what was said. This is a very effective technique to use when the interviewer is unsure what the child means. A reflective statement can also be used to direct an interview in a particular direction.

**Reflective Statements**

- Child: i got very scared when it got dark
- Interviewer: the darkness scared you.
- Child: it was really neat when she let me go out.
- Interviewer: you liked it when she let you go out.
Praise statements

Praise is a statement that indicates approval of the child. Praise statements should be used very carefully in forensic interviews, because children might perceive them to be insincere and because they can be seen to be suggestive. Praise should relate to the child’s behaviour rather than the content of the child’s statement.

**Purpose Of Praise Statements**

- Strengthen rapport
- Increase information-giving
- Provide reassurance

Praise statements are very good for rapport and they give the child positive feedback, which, in turn, increases confidence. This is particularly important in the forensic context where children are nervous and afraid that they will not be able to perform their role as a witness.

**Praise Statements**

- “That’s hard to remember, but i like the way you are trying.”
- “It’s great that you’ve been sitting so quietly while we talk.”
- “You’re doing a good job of explaining this to me.”

Questions

A question is a direct way of soliciting specific information, and makes a specific demand on the child. Questions should be simple and contain only one topic at a time. Questions should also not be leading.

**Questions**

- “When do you visit grandpa?”
- “What dress were you wearing?”
- “Where was the car?”
**Commands**

This is a statement which provides no other appropriate option to the child except to comply with the instruction. Commands should be kept to a minimum because they tend to destroy rapport. They should only be used when very concrete information is required. It is also important to be aware of the tone that is used to convey the command. Once the child has complied with a command, it is important to reward the child’s efforts. The purpose of the reward is to let the child know the interviewer is pleased with their behaviour, and to increase the likelihood that the child will respond appropriately in future.

- “Tell me what your name is.”
- “Describe what he was wearing.”
- “Look at this picture.”

**Summary statements**

Summary statements are used to review material that has already been covered. In a summary statement, the interviewer concisely describes the information given by the child. It assists in redirecting the questioning to a new area and establishing the context for the child.

- “You’ve told me about how the doctors and nurses scare you and that your mom can make you feel better. I’d like to hear more about what your mom does to help you.”
- “We’ve talked about your grades and your teacher. What is one of your favourite things to do with your friends at school?”
TECHNIQUES TO BE AVOIDED

Critical statements

These are verbalisations that communicate disapproval of the child or the child’s conduct. Critical statements are not productive and should be carefully avoided.

Critical Statements

- Directions to stop an action
- Insults to the child
- Statements that imply the child is behaving inappropriately

Critical statements foster negative reactions because they make the child feel angry, embarrassed and frustrated. This in turn decreases co-operation and destroys rapport.

Critical Statements

- “Stop moving around your chair and answer that question.”
- “That was pretty dumb of you, wasn’t it?”
- “I don’t think you are trying hard enough right now.”

4. INAPPROPRIATE BEHAVIOUR

In order to ensure that rapport is not compromised, it is vital to prevent inappropriate behaviour. Inappropriate behaviour can be prevented by setting ground rules at the beginning of the programme and repeating these at the beginning of each session. Praising good behaviour frequently also assists in reinforcing acceptable behaviour. When, however, inappropriate behaviour does occur, the interviewer has a number of options. If the behaviour is only mildly inappropriate, the interviewer can choose to ignore the behaviour. Depending on the situation, the interviewer may be able to suggest a more appropriate behaviour. Where, however, the behaviour creates danger or harm to the child themselves or another child, the interviewer will have to physically intervene, and, where appropriate, remove the child from the session.
PART 3:
THE DYNAMICS OF CHILD ABUSE

The Process of Disclosure
The Impact Of Child Sexual Abuse
Sex Offenders Who Target Children
Online Exploitation
The Effects Of Testifying In Court For Children
THE PROCESS OF DISCLOSURE

AIMS

• To introduce the concept of disclosure and map its gradual progress
• To identify the factors that impact on the disclosure process
• To introduce the child abuse accommodation syndrome

OUTCOMES

• The participant will be able to define the process of disclosure in child sexual abuse cases
• The participant will be able to identify the different types of disclosure
• The participant will be able to use the models that explain delay in disclosure
• The participant will have an understanding of the risk factors that cause recanting

1. Introduction
2. Types Of Disclosure
3. The Gradual Process Of Disclosure
4. The Child Abuse Accommodation Syndrome
5. Factors Affecting Disclosure
6. Recanting Disclosures
1. INTRODUCTION

In order for a perpetrator to accomplish a crime successfully, the perpetrator must ensure that any victims of or witnesses to the crime remain silent. Silence and secrecy are fundamental elements of most crimes, but particularly so in crimes of child sexual abuse. In order for a child molester to have continued access to the victim, the child must remain silent.

**Disclosure Has Been Defined As:**

“A clinically useful concept to describe the process by which a child who has been abused gradually comes to inform the outside world of his plight.” (Jones and McQuiston 1988: 145)

Disclosure is the process by which a child victim of abuse tells what has happened to them. Because it is a process, disclosures tend to be haphazard, often confusing and it is even common for elements of the crime to be disclosed by the child for the first time during the trial itself. This creates a dilemma between the needs of the court (which requires a clear, coherent report) and the ability of the child (who is generally not able to provide a clear, coherent report).

2. TYPES OF DISCLOSURE

There are two main types of disclosure: purposeful disclosure and accidental disclosure.

**Purposeful Disclosure**

When the child victim tells that abuse has taken place and has the intention to tell the story

**Accidental Disclosure**

When the child victim does not intentionally disclose the abuse but indicates unintentionally that abuse has taken place through some accidental behavioural indicator
However, although there are two types of disclosure, it must be remembered that disclosure is a process so the distinction is often not clear cut. For instance, a victim may make a tentative disclosure. This is where the victim gives some information about the abuse and then assesses the reaction to the disclosure. If the reaction is not negative, the victim may make a fuller disclosure.

Most disclosures are accidental and children, in general, exhibit a disclosure process that progresses from denial to tentative disclosure to a purposeful disclosure of the abuse. If there are negative consequences as a result of the purposeful disclosure, the victim may retract the disclosure. Purposeful disclosures of abuse made during an investigation are often not the first disclosures made by the child victim. For their initial disclosure, children will turn to someone they trust, such as a friend or, in some cases, a trusted adult.

3. THE GRADUAL PROCESS OF DISCLOSURE

When a child starts to disclose sexual abuse, the child often provides cues that abuse has taken place. The existence of these cues as well as the type of clues presented is dependent on a number of factors, such as the family environment and the developmental level of the child. Disclosure can also occur at any point. It may occur immediately after the abuse or it can also take place many months, or even years, after the abuse has occurred. It is important to be aware of the fact that many people never disclose their abuse. The disclosure process is, therefore, haphazard. The reason for the haphazard nature of the disclosure of abuse has been explained by a number of models. One that is used frequently in forensic reports is the child abuse accommodation syndrome.

4. THE CHILD ABUSE ACCOMMODATION SYNDROME

Child victims of abuse develop different methods of coping with the abuse. This is particularly evident in cases of sexual abuse. These methods of coping have been referred to as the child abuse accommodation syndrome. This syndrome is an attempt by the child victim to cope with the abuse by distorting their perceptions of what is happening. Although the syndrome has not been validated empirically and not all sexually abused children pass through its stages, many professionals, nevertheless, rely on the syndrome to understand sexual abuse allegations and disclosure patterns.

**Child Abuse Accommodation Syndrome**

- **Secrecy**
  Child does not tell (fear, threats)
- **Helplessness**
  Child passively accepts what is done
  Rarely resists
- **Entrapment and accommodation**
  Realises consequences
  Child adjusts life to accommodate abuse
- **Delayed, conflicting, unconvincing disclosures**
  Makes disclosure (accidental/purposeful)
- **Retraction**
  Response to disclosure may cause retraction
5. FACTORS AFFECTING DISCLOSURE

There are a number of factors that influence why a child may move from silence to a purposeful disclosure, with possible retractions. These factors include:

- Pressures for the child to remain silent
- Admission by the perpetrator or accidental disclosure
- Intervention
- Trauma symptomologies
- Child development
- Responses to disclosure

Pressures for the child to remain silent

Children often remain silent about abuse because they have been pressured to do so by the perpetrator. The child is controlled by threats from the perpetrator, fear of the consequences of the disclosure and denial by the perpetrator. In addition, the child may have strong feelings of loyalty towards the perpetrator. The grooming process used by perpetrators results in the development of a trusting relationship between the child and the perpetrator. Very seldom, therefore, will the child want the perpetrator to be punished for the abuse. Also, sometimes in cases of intrafamilial sexual abuse, it is common for the non-abusing parent to pressure the child into remaining silent.

Admission by the perpetrator or accidental disclosure

The stage in the disclosure process that the child has reached when the abuse becomes known or suspected is very important to identify as it is likely to determine whether any further disclosure will be made. If the perpetrator admits to the abuse first or the abuse was observed by another witness, it is likely that the child will still be at a non-disclosing stage and influenced by the accommodation syndrome. This is also applicable in the case of an accidental disclosure where the child’s behaviour is interpreted by someone else to mean that abuse has taken place. These factors may lead to the child denying that abuse has taken place or, if disclosure occurs, to providing a confused and incoherent account of what has occurred.

Intervention

Once disclosure has taken place, either purposefully, accidentally or in response to the perpetrator’s admission, some form of intervention occurs. This intervention can either move the child towards a purposeful disclosure or back to the state of non-disclosure by recanting. For example, if the child is removed from their home in response to allegations of intrafamilial abuse, the child may experience a greater sense of trauma due to the loss of family and friends. The child may recant in order to be returned to the family or friends. Research also shows that the intervention of the justice process can cause secondary traumatisation and can cause victims to recant their disclosure.

Trauma symptomologies

Trauma symptomologies can also influence the disclosure process. One of the most influential trauma symptomologies for the purposes of disclosure is dissociation. Dissociation is one method used by child victims to cope with the abuse. Dissociation protects the child against the trauma of the abuse by storing the abusive experiences in an unprocessed, fragmented state in the child’s memory. The child, in effect, experiences a form of amnesia with respect to episodes of the abuse. This results in episodes of the abuse being excluded from consciousness. If disclosure was to occur, the child’s report of the abuse would seem fragmented and confused due to the fact that certain parts of the abuse do not seem to exist to the child.
Child development

In order for the child to disclose, the child must have reached a level of development where the ability to understand what has happened, communicate what has happened and decide to disclose can occur. For a child who has not yet achieved these developmental milestones, the ability to disclose is minimal.

Responses to disclosure

The person to whom the child initially discloses, be it a purposeful or accidental disclosure, plays an extremely important role in the disclosure process. As has been mentioned, the child very seldom fully discloses the first time. Therefore, the reaction of the first person to whom the child discloses will often determine whether the child will make any further disclosures. If the disclosure is met with a negative response, the child is likely to retract the initial disclosure and resume the burden of abuse.

6. RECANTING DISCLOSURES

Recantation can occur at various stages during the investigation and prosecution of child abuse cases.

Reasons For Recantation

- Secrecy
- Pressure by the perpetrator
- Lack of support from caregiver/family
- Societal attitudes regarding child abuse
- Negative interactions with professionals
READING LIST


READING AVAILABLE ONLINE

THE IMPACT OF CHILD SEXUAL ABUSE

AIMS

• To introduce the concept of trauma and how it applies to victims of sexual abuse
• To provide information on different types of abuse
• To provide information on the factors that affect abuse
• To introduce the concept of traumagenics
• To explain what resilience means in the context of trauma

OUTCOMES

• The participant will understand what is meant by the concept of trauma
• The participant will be able to identify the different types of abuse
• The participant will be able to identify the factors that affect abuse
• The participant will be able to identify the different elements of traumagenics
• The participant will understand the term ‘resilience’ in the context of trauma

1. What Is Trauma?
2. Types Of Child Abuse
3. Factors Impacting On Abuse
4. Physical Abuse
5. Emotional Abuse
6. Neglect
7. Domestic Violence
8. Sexual Abuse
9. Factors Affecting Child Victims Of Sexual Abuse
10. Traumagenics
11. Resilience
1. WHAT IS TRAUMA?

Children who are victims of abuse experience significant trauma. This trauma can be overt and will be noticeable in the way in which the child behaves, as in the case where a young child victim of prolonged and repeated sexual abuse may act out sexually as a result of the abuse. Such sexualised behaviour is a symptom of the trauma the child has experienced as a result of the abuse. In most instances, however, the trauma is covert and cannot be easily identified when interacting with a victim of abuse. To understand the impact which abuse has on child victims, it is necessary to examine what is meant by a traumatic event.

The psychiatric definition of a traumatic experience is the occurrence of an event outside normal human experience. Traumatic experiences are defined by their often sudden, horrifying and unexpected nature. Such experiences can be categorised as those that occur once, such as rape, assault or an accident, or those that are prolonged, as in war or abuse over an extended period of time. Trauma is an elastic term and the level of trauma experienced by an individual depends on that individual’s personal coping methods, as well as the systems within which that individual operates, such as the family system and social system.

It is necessary, therefore, to take into account the individual characteristics of each victim of trauma when determining the impact of a violent experience on their ability to cope and level of post-traumatic stress disorder. Although responses to trauma are dependent on individuals, there are general, broad implications for children who are victims of abuse. The abuse impacts on every aspect of the child: their development, their sense of safety and ability to function effectively, to name but a few. The core of the child is damaged.

2. TYPES OF CHILD ABUSE

Child abuse includes a wide variety of behaviours and is defined as “physical or mental injury, sexual abuse, maltreatment or negligent treatment of a child under the age of 18 years by another person, in circumstances that indicate that the child’s health or welfare is harmed or threatened thereby” (Davel 2000).

Types Of Child Abuse

- Physical abuse
- Sexual abuse
- Emotional abuse
- Neglect

Child exploitation has recently also been identified as a separate category of abuse. Child exploitation refers to circumstances where children are used in work or other activities, such as, trafficking of children for sexual exploitation or child soldiers, for the benefit, usually commercial or military, of others. However, in practice, multiple forms of abuse usually occur in any one case. For example, a child who is sexually abused may be threatened with violence if they disclose the abuse to anyone. The child is, therefore, a victim of both the sexual violence as well as emotional or psychological abuse because of the threat of violence. Multiple victimisation has an impact on the child’s adjustment and behaviour and will have an effect on the trauma experienced by the child.
3. FACTORS IMPACTING ON ABUSE

There are certain factors that play a role in how severe the impact of the abuse will be on the child victim. It is essential, however, to acknowledge that, regardless of the severity of the act, some form of trauma will be experienced by all victims of abuse.

**Factors Impacting On Abuse**

- The act itself
- Frequency of abuse
- Duration of abuse
- Age of child at abuse
- Use of force
- Relationship to perpetrator
- Number of perpetrators

4. PHYSICAL ABUSE

Physical abuse is any non-accidental physical injury to a child which gives rise to temporary or permanent physical damage. Physical abuse includes any action that causes harm to the child, like beating, punching, slapping, shoving, kicking, pinching, burning and, more recently, parental/school discipline (corporal punishment).

Because physical injury can also occur accidentally, it is necessary to determine whether an injury is the result of abuse or not. This can be done by examining the location, nature and extent or severity of the injury to see whether the injury fits the explanation given. For example, if a child falls into a bath of boiling hot water the injuries should be to the front of the child's body, namely, the face, chest, head and hands. If a child is placed into a bath of boiling hot water, the injuries will probably be to the buttocks, feet and back of the child, depending on the depth of the water. In the latter instance, the child will try to pull itself into a foetal position to avoid as much of the water as possible, resulting in the injury areas described.

Other indicators of non-accidental injury may include human bite marks, fingernail scratches that leave parallel linear marks or other lacerations or abrasions that may indicate an instrument was used. Some children may have missing, loose or broken teeth, bald spots on their head or bruises/welts in various stages of healing all over the body.
5. EMOTIONAL ABUSE

Emotional abuse is any attitude, behaviour or failure to act on the part of the caregiver that interferes with a child's mental health or social development. It can include verbal abuse, mental abuse and psychological maltreatment. It can range from a simple verbal insult to an extreme form of punishment, such as, for example, locking a child in a cupboard for an extended period of time. Emotional abuse is usually part and parcel of all other forms of abuse.

Forms Of Emotional Abuse

- Ignoring, withdrawal of attention
- Rejection
- Lack of physical affection
- Lack of praise and positive reinforcement
- Yelling or screaming
- Threatening or frightening child
- Negative comparison to others
- Shaming, humiliating
- Telling children they are no good or worthless
- Habitual blaming
- Extreme/ bizarre forms of punishment
6. NEGLECT

Neglect is the failure to provide for a child’s basic needs. Neglect can take place in three specific ways, namely, physical neglect, educational neglect and emotional neglect. It is important to distinguish between neglect perpetrated as a result of circumstances, such as poverty, as opposed to intentional neglect.

Physical neglect is where the parent/caregiver of the child does not provide for the child’s physical needs, and would include not providing food or housing, clothing children inappropriately, not providing appropriate supervision, denying medical treatment or abandoning the child. Educational neglect is where the parent/caregiver fails to enrol a child of mandatory school age or to provide necessary special education while emotional (psychological) neglect refers to where the parent/caregiver does not provide the child with emotional support and love.

Emotional abuse and neglect (psychological abuse) probably have the most severe, long lasting and broadest range of negative consequences of any form of child abuse, except for child murder.

Impact Of Neglect

- Sense of powerlessness and hopelessness
- Extremely low self-esteem
- Use power and control as strategy to survive
- Feelings of being worthless, unloved, unwanted
- Angry, aggressive, delinquent

7. DOMESTIC VIOLENCE

The view used to be that domestic violence has little or no impact on the child because the child is not the direct recipient of the violence. However, research has shown that domestic violence has a significant impact on the child and often underlies the vulnerability of children to abuse, whether as the abuser or as the victim or, in many instances, both.

Impact Of Domestic Violence

- Depression
- Anxiety
- Conduct problems
- High levels of aggression
- Higher risk of being abused
8. SEXUAL ABUSE

There are various definitions of sexual abuse, but generally it is defined as including any act or acts which result in the exploitation and/or abuse of a child or young person, whether with their consent or not, for the purposes of sexual or erotic gratification. Sexual abuse can be perpetrated by either adults or children. The key elements of sexual abuse include exploitation of the child, use of coercion and/or manipulation, in whatever form, and some level of gratification gained by the perpetrator.

Sexual abuse can take the form either of non-contact or contact abuse. Non-contact abuse refers to the perpetration of certain sexual acts and/or use of images of a sexual nature, which do not require the actual physical touching of a child, whereas contact abuse involves actual physical contact.

### Non-Contact Abuse
- Exhibitionism (flashing)
- Voyeurism (peeping)
- Suggestive behaviours or comments
- Exposure to pornographic materials
- Producing sexual explicit materials of children

### Contact abuse
- Fondling of private parts
- Masturbation of child or perpetrator
- Oral sex
- Object/finger penetration
- Penile penetration

9. FACTORS AFFECTING CHILD VICTIMS OF SEXUAL ABUSE

There are a number of factors that affect the concept of sexual abuse as it relates to child victims, namely, issues around consent, exploitation, ambivalence towards the perpetrator, and force and secrecy. Children do not consent to sexual abuse. They do not fully understand what is being proposed to them and they are often not in a position to refuse sexual contact with an authority figure or a person who is stronger and more resourceful than them.

Where the abuse is of an intrafamilial nature or incest, offenders do not usually begin the incestuous relationship by having sexual intercourse. The sexual activity develops and progresses over a period of years from socially and culturally acceptable hugging, touching and kissing to inappropriate fondling, mutual masturbation, oral sex and penetrative intercourse. This is known as the grooming process and often confuses the child's boundaries of consent.
Child victims of sexual abuse are often manipulated or coerced into sexual behaviour by adults or older children who are stronger, more resourceful and more knowledgeable, especially regarding sexual acts. It is the grooming process which provides the tools for manipulation through the offering of gifts, fulfilling the child’s basic need for attention, praise, affection and closeness and reworking these needs into an inappropriate sexual relationship.

Child victims often feel ambivalent about the sexually abusive experience itself. They do not like the sexual part of the experience, but they may enjoy the special attention they receive because of the abuse. Children may also become confused about the abusive experience because some of the physical sensations they feel are pleasant. Child victims know, whether consciously or subconsciously, that the behaviour is wrong and although they want the abuse to stop, they do not want to stop receiving the gifts, privileges or attention.

Force used to coerce a child into engaging in sexual contact may not necessarily be physical. The force used may also be of a psychological nature, including threats of violence, threats of the withdrawal of attention or special favours, or the suggestion that the family will be broken up if the child tells anyone. Related to this psychological coercion is the factor of secrecy. The abuser must convince the child that they should not tell anyone else about the abuse.

Child sexual abuse is unique in its definition as a traumatic experience in that there is often a subtle process involved that does not necessarily involve violent coercion. The abuser uses tricks or bribes to lure the child into a sexual experience and the child is developmentally unsophisticated to recognise what is happening. This grooming process is used by the abuser to remove the child’s reluctance to engage in sexual contact. The grooming process confuses the child’s feelings of having experienced abuse and often results in the child feeling responsible or accountable for the sexual encounter.

This confusion sets the foundation for what research has identified as the most complex reaction to a traumatic experience, namely, Complex Post Traumatic Stress Disorder. This disorder arises from prolonged, repeated trauma where there is a relationship between the victim and the perpetrator of the abuse that results in long-term psychological disturbances.
10. TRAUMAGENICS

Traumagenics is a model that is used in assessments to understand the impact of sexual abuse. The model is often used in both research on the impact of sexual abuse as well as for the purpose of treatment. Traumagenics defines the experience of sexual abuse in terms of 4 trauma-causing factors or traumagenic dynamics. These dynamics are generalised and can occur in other kinds of trauma, such as, divorce of the child’s parents or even being a victim of physical abuse. However, sexual abuse is unique in that all four traumagenic dynamics occur at the same time.

4 Dynamics Of Traumagenics

- Traumatic sexualisation
- Betrayal
- Powerlessness
- Stigmatisation

Traumatic sexualisation

Traumatic sexualization refers to the process in which a child victim’s sexuality (including sexual feelings and sexual attitudes) is shaped in a developmentally inappropriate and interpersonally dysfunctional way.

Traumatic sexualisation occurs in a number of ways:

- when a child is repeatedly used for sexual behaviour inappropriate to their level of development
- when sexual behaviour is conducted in exchange for affection, attention, privileges and gifts
- when parts of the child’s body are given distorted importance and meaning
- when sexual behaviour and morality are confused by the offender
- when very frightening memories and events become associated in the child’s mind with sexual activity.

The extent of the traumatic sexualisation depends on a number of factors. If the offender evokes a sexual response from the child, the trauma is often more intense. Where the child is enticed to participate actively in the abuse, the trauma is usually greater than if the offender uses brute force, and the degree of the child’s understanding also impacts on the extent of the trauma experienced.

Effects Of Traumatic Sexualisation

- Sexual preoccupations
- Repetitive sexual behaviour
- Sexual aggression
- Sexual problems as an adult
- Confusion around sexual identity
- Confusion about sexual norms
- Negative connotations regarding sex
Betrayal

The second traumagenic dynamic refers to the process in which children discover that someone on whom they may have been dependant has caused them harm. The child comes to realise that a trusted person or someone they loved has manipulated them through lies or misrepresentation and have treated them with total disregard. Children can experience betrayal not only at the hands of offenders, but also by family members they believe should have protected them from the abuse.

The extent to which the child experiences betrayal in response to sexual abuse depends on a number of factors. If the abuse is perpetrated by an offender known to the child, the child is likely to feel greater betrayal than a child who is abused by a stranger. The extent of the betrayal felt by the child victim also depends on the response of a trusted person to the child’s disclosure. Children who are disbelieved, blamed or ostracised tend to experience a greater sense of betrayal than those whose disclosure is supported.

**Effects Of Betrayal**

- Grief and depression
- Deep disillusionment and disenchantment
- Extreme dependency and clinging behaviour
- Judgement impaired
- Vulnerable to similar abuse
- Hostility and anger
- Distrust
- Isolation
- Anger and aggressive behaviour
Powerlessness

The third traumagenic dynamic refers to “the process in which the child’s will, desires, and sense of efficacy are continually contravened” (Finkelhor and Browne 1985:66). This sense of powerlessness occurs in sexual abuse when the child victim’s physical and body space are repeatedly invaded without the child’s consent. This invasion is aggravated by the manipulation used by the offender to gain the child’s compliance.

The extent to which a sense of powerless is reinforced depends on a number of factors:

- the child’s attempt to stop the abuse is frustrated by fear
- a trusted person’s lack of understanding or disbelief that the abuse has happened
- any dependency the child has on the offender
- the abuser’s authority is absolute and abuse is followed by force or a threat of serious harm to the child
- Force and threat are not necessary when the child is subjected to a feeling of total entrapment - the realisation of the consequences of a disclosure is enough to render the child powerless. For example, the fact that the child may be removed from the home and placed in a place of safety.

Powerlessness, in effect, can pervade most areas of functioning and have long-term repercussions for the child.

Effects Of Powerlessness

- Fear and anxiety
  - Nightmares
  - Phobias
  - Hypervigilance
  - Clinging/regressed behaviour
  - Somatic complaints
- Impairment of coping skills
  - Avoidance
  - Despair
  - Depression
  - Suicidal behaviour
- Subsequent revictimisation
- Dysfunctional need to control
- Aggressive and delinquent behaviour
Stigmatisation

The final dynamic refers to the negative connotation associated with the sexual abuse, which may have been communicated to the child during the abusive experiences. These negative connotations become incorporated into the child’s self-image and include a sense of badness, shame, and guilt. These connotations are entrenched by the offender, often to ensure that the child does not disclose the abuse, and, in many instances, the family or community. The child may begin to feel like ‘spoiled goods’.

Effect Of Stigmatisation

- Distorted self-image
- Feelings of isolation
- Self-destructive behaviour
- Suicide attempts
- Guilt or shame
- Low self-esteem

11. RESILIENCE

Victims use coping mechanisms to manage the trauma they are going through. These coping mechanisms often make the child appear as if the child is resilient to or unaffected by the abuse. However, that outward coping often masks an inner turmoil. They try to do this by minimising the impact and/or severity of the abuse and rationalising the offender’s behaviour. At the extreme end, victims deny that the abuse occurred, try to forget it happened or dissociate from the abuse. Victims hide by creating a persona that appears perfectly functional so that no one knows that the victim was abused.
**READING LIST**


**READING AVAILABLE ONLINE**

SEX OFFENDERS WHO TARGET CHILDREN

AIMS

• To introduce a classification of sex offenders
• To explain the grooming process that is adopted by sex offenders
• To highlight the effects of the grooming process on the victim

OUTCOMES

• The participant will have knowledge of the different types of sex offenders
• The participant will understand the grooming process that is often adopted by the sex offender
• The participant will be able to understand the effects of the grooming process on the child victim

1. Introduction
2. Classification Of Sex Offenders
3. The Grooming Process
4. The Effect Of Grooming
1. INTRODUCTION

As important as it is to understand the child victim of a sexual offence, it is also important to understand the offender in order to grasp the full nature of the crime in a holistic manner. Information on sex offender behaviour is still limited. Researchers rely on the cooperation and motivation of offenders for information. To date, research has been limited to studies conducted on those offenders who have been convicted and are serving prison sentences, or those offenders in rehabilitation programmes. Although patterns of behaviour, otherwise known as grooming patterns, were established as a result of this research, it was still difficult to determine why the offenders committed these crimes against children.

Most of the information on sex offenders comes from studies conducted in the western world. There is limited research on sex offenders in Africa.

Understanding Sex Offenders Explains

- Why there is often delayed disclosure on the part of the victim
- Trauma symptomologies and other behavioural aspects
- Child's feelings to perpetrator
- Child's feelings of guilt and shame

2. CLASSIFICATION OF SEX OFFENDERS

Male offenders are typically classified by their motivation, which is assessed by reviewing the characteristics of the offence. The behaviour and motivation of female sex offenders is still a relatively new field of research, waiting to be explored, and therefore typologies for this group of offenders are not yet conclusive.

Although each sex offender is an individual with individual offender behaviour and motivations, research has identified a number of shared common characteristics that make it possible to classify sex offenders who target children into broad categories. The aim here is to provide a very brief overview of the different types of sex offenders as it provides greater clarity for understanding the way they treat their child victims.

Sex Offenders Who Target Children

- Violent child rapists
- Sadistic child rapists
- Opportunistic sex offenders
- Fixated or preferential sex offenders
- Juvenile sex offenders
Violent child rapist

Violent rape can be defined as forcing the child to submit to an act of sexual violence, which often involves pain, injuries and humiliation for the victim. Most experts agree that the primary motivation behind rape is an aggressive desire to control and dominate the victim, rather than an attempt to achieve sexual fulfillment.

Violent rapists often target strangers. However, they may target someone they know if they use rape as a form of punishment, as in instances of revenge rape. The violent rape may also be part of a crime plan and not the main intended assault, in the case of a burglar who also rapes his/her victim.

There is no specific age range for violent rapists. They tend to view the rape as a way of punishing, humiliating or controlling their victims. These offenders may also endorse attitudes supportive of male sexual entitlement, which postulates that, as a male, the offender is entitled to sexual satisfaction. In some instances, a sexual attack on a child is a way of taking revenge on the offender's spouse or other women. A basic characteristic of this group, therefore, is violence associated with domination or revenge, using sex as the weapon.

The sadistic child rapist

A minority group of sex offenders exist who get their satisfaction from sadistic sexual acts and from inflicting pain on their victims. This type of sex offender tends to kill their victim either because of the extent of the injuries inflicted or to ensure the victim cannot identify them. In some cases, the offender will continue to sexually violate the victim's corpse. The infliction of pain and the helplessness of the victim cause the offender to experience sexual arousal, which is often enhanced by the victim's pleading, screaming or crying.

These offenders tend to have a long history of anti-social behaviour and poor adaptation to their environments. They are drawn to children for both sexual and aggressive reasons and prefer victims of the same sex (homosexual paedophilia). They are responsible for most abductions and murders of children and are the most dangerous sex offender to children as well as being the most difficult to rehabilitate.

Opportunistic child sex offenders

This group of sex offenders is primarily attracted to their own peer group, and are often married or in a relationship with someone of their own age. However, in times of stress or reduced control, such as upon the consumption of alcohol, they may molest a child, usually for comfort or because of feelings of entitlement. The offence often takes place as a result of a specific situation the offenders finds themselves in or as a result of an opportunity, hence the name. Most of the literature points to issues such as the need for control, power and/or position, possibly as a result of a situation where the offender finds themselves feeling disadvantaged or threatened.

Preferential or fixated sex offender

These sex offenders are people who are specifically sexually attracted to children. They have a long-standing, exclusive preference for children, both as sexual and social companions. They feel comfortable relating to children and have usually been sexually attracted to children from adolescence. Preferential sex offenders rarely marry. Any sexual experiences with adults or peers tend to be situational in nature and never replace the primary sexual attraction to children. Their social background often lacks long-term relationships with adults.

Juvenile sex offenders

Many young people who sexually abuse others have been sexually abused themselves. In many situations their own abuse may be recent or even concurrent with their own offending. Since sexual interest begins in early adolescence, adult preferential sex offenders report that their first sexual offence occurred during adolescence. Sex offender behaviour in adolescence, therefore, may serve as a precursor to adult sex offending later in life.
The adolescent sex offender tends to come from a dysfunctional family, where there is evidence of domestic violence, substance abuse and criminal involvement. They often experience social isolation and anxiety and have a history of under-developed peer relationships. There is usually evidence of delinquent behaviour and often a history of previous convictions for non-sexual offences.

**Juvenile sex offenders: A South African study**

Most of the available sex offender classifications have been developed in the western world, and there is very little available research on sex offenders in Africa. However, non-empirical research conducted by an NGO in South Africa identified a number of classifications of young sex offenders.

- **Tweeny practice:** teenagers practise sex with younger children
- **Help seeking:** boy-child who has been sexually abused and repeats abuse
- **Monkey-see-monkey-do:** exposure to gender-based violence and re-enacting with peers or younger children
- **Revenge rape:** gang rape of girl as punishment for dumping boyfriend
- **Sport rape:** teaming up with gang to rape women

A study by the South African Police Service found that would-be juvenile gang members are expected to participate in gang rape (possibly including killing the victim) as part of an initiation. This type of rape is referred to as ‘rape homicide’. The police found that these juvenile offenders were frequently exposed to aggressive and sexual behaviour within their communities. Drugs and alcohol also play a significant role in sexual offences committed by adolescents in South Africa, according to this research.

### 3. THE GROOMING PROCESS

Sex offending behaviour has been researched extensively. The manner in which sex offenders rationalise their behaviour has been compared to that of alcoholics. The individual uses justifications to make themselves feel better about the behaviour. They know that the behaviour is wrong, but they justify it, using various reasons.

An integral part of the sex offending cycle is the grooming process. Many offenders spend a great deal of time and energy grooming their victims. Not all sexual abuse is preceded by grooming. However, grooming is a common tool used by child sex offenders to manipulate the child. The offender fulfills a basic need in the child and reworks that need into a sexual relationship. Grooming tends to follow a specific pattern, the aim of which is to manipulate the child into a sexual relationship. This pattern or cycle is known as the grooming process.

Grooming has been described in various ways. It involves an interaction between the perpetrator and the child which is aimed at relaxing the child’s defenses in order to escalate inappropriate physical contact. It is comparable to a normal courting process, and is somewhat of a seduction ritual, the ultimate goal of which is the sexual victimisation of the child.
Definition Of Grooming

“...the process by which child molesters build trust with the child to transition from a nonsexual relationship to a sexual relationship in a manner that seems natural and non-threatening.” (Kim 2004)

Grooming is a gradual process, and the tactics employed by the perpetrator will vary. The strategies employed by the offender to get the child to take part in sexual activity tend to involve gradual desensitisation of the victim. There are number of stages involved in the grooming process and the time spent on each stage depends on the child and their compliance with the expectations of the offender. Some stages can be skipped and/or returned to throughout the grooming process, again, depending on the compliance of the child.

Stages Of Grooming

- Meeting the child
- Friendship-forming stage
- Relationship-forming stage
- First sexual encounter
- Maintaining the victim

Meeting the child

For the perpetrator, the first steps towards achieving their purpose is identifying, targeting and meeting a specific child. Some sex offenders befriend adults who have children, and in this regard single parent families make particularly good targets. The sex offender will gain the trust of the parent(s) in order to have access to the child. The perpetrator will often befriend the parent first and insinuate their way into their lives. The perpetrator may also find leisure activities or have hobbies or interests which may bring them into contact with children, like becoming a soccer coach or teaching karate or playing computer games with the children. The perpetrator may also contact and befriend the victim online using social networking sites.

Offenders often target children who experience family problems, who are non-assertive, non-confident, curious, and trusting. It is not surprising that children with obvious vulnerabilities, such as children who come from unhappy homes; need attention; feel unloved and are unpopular; spend time alone and are unsupervised; lack self-confidence and self-esteem; are isolated from their peers; display behavioural problems; have few social supports; or have poor boundaries with others, are targeted, as they will soak up “loving” adult attention like a sponge.
Friendship-forming stage

Once the offender has selected and recruited the victim(s), the next stage of the grooming process begins. The friendship-forming stage involves the offender getting to know the child, their interests, likes and dislikes. This is an important precursor to the next stage, the relationship-forming stage, which is merely an extension of the friendship-forming stage.

In order to ensure that the child plays along, the offender will try to gain the child's trust. In that way, they often provide a form of counselling or emotional support to the child as well as reliability. The offender will find and fill voids in the child's life, even if it is only through providing food. The offender may spend a long time in befriending the child, and is usually very patient, devoting many days, weeks or even months to ensuring that the child trusts them. Essentially, this is a trust-building process, which may continue for some time.

Relationship-forming stage

This stage is a natural extension of the previous stage, and is closely connected to it. It is often not possible to distinguish the two stages, as they are interlinked. At this stage, the offender must introduce the child to a more intimate level of the friendship as most children are sexually naïve. During this stage the perpetrator often forges an intimate bond with the victim.

The first physical contact between the offender and the victim is often non-sexual touching designed to identify and test limits. Non-sexual touching desensitises the child, breaks down inhibitions and may lead to more overt sexual touching, which is the perpetrator's ultimate goal.

In order to maintain a relationship with the child, the offender will introduce the element of secrecy into the relationship and will usually manipulate the child to keep the secret. This may be done in a variety of ways: by using subtle tactics such as bribery, threats of harm to the child or their family, taking advantage of the child's innocence, withdrawal of affection or promises of rewards that might lead the child to believe that the relationship may be advantageous for them. A common grooming method used, at this stage, by offenders is pornography.

In Grooming Pornography Is Used

- To arouse the perpetrator
- To assist in fantasising
- To arouse the victim
- To create a collusive secret
- To sexualise the environment
- To lower victim’s sexual inhibitions

The offender often uses both adult pornography and child pornography as aids during the grooming process, albeit for different purposes. Adult pornography is most often used to arouse the victim and break down barriers to sexual behaviour, while child pornography serves the same purpose, with the additional purposes of communicating the perpetrator's sexual fantasies to the child and normalising sexual behaviour between children and adults. It further serves the purpose of diminishing the victim's inhibitions, and creating the impression that sexual acts between adults and children are normal, acceptable and enjoyable.
First sexual encounter

Once the perpetrator has desensitised the victim through the process of grooming, the first sexual contact will be initiated. The relationship progresses to the stage of actual sexual molestation, as contact which may have been seen by the child as innocent touching, now escalates to sexual touching and other sexual physical contact.

If the victim is fearful or resists, some offenders will use threats or violence to control the child as a way of overcoming the victim’s anxieties. The majority, however, will use passive methods of control such as ceasing with the abuse, and then coercing and persuading the victim again at a later stage. Once the first sexual encounter takes place, the perpetrator may progress onto more intense sexual activities.

Maintaining the victim

Once the first sexual encounter between the victim and the perpetrator has occurred, the grooming process does not necessarily end, because the offender might wish to maintain further contact with the child concerned, and will most certainly want to ensure the child’s silence about the abuse.

4. THE EFFECT OF GROOMING

There is little knowledge or understanding of the grooming process in child sexual abuse cases, both within the legal process and therapy. The grooming process distorts the relationship the child has with the offender and confuses the child’s understanding of their role in that relationship. No matter how simple the grooming of the child may be, it can have a devastating effect on the child. The child is left feeling betrayed, damaged and confused. More attention, therefore, needs to be paid to the grooming process in order to adequately assist the victim through both the criminal justice and the recovery process. An understanding of the grooming process will assist with understanding the impact of the crime on the child.


AIMS

- To explain the influence digital technology exerts on adolescents
- To explain the stages of child sexual development
- To introduce available information on the influence of the Internet on adolescent sexuality
- To provide information on sexting and its implications for adolescents
- To examine the safety risks inherent in online activity

OUTCOMES

- The participant will be aware of the influence of digital technology on adolescents
- The participant will have knowledge of child sexual development
- The participant will understand the influence which the Internet has on adolescent sexuality
- The participant will know what sexting means and how this is used by adolescents
- The participant will be aware of the safety risks that children using the Internet are exposed to

1. Introduction
2. Understanding Adolescents And The Influence Of Digital Technology
3. The Internet And Adolescent Sexuality
4. Online Sexual Exploration
5. Sexting And The Adolescent
6. Online Safety Risks
7. The Impact Of Being Involved In Child Pornography
1. INTRODUCTION

There has been an incredible increase in the use of digital technology in the last 30 years. In 2018 the world’s population stands at 7.6 billion people.

The following facts highlight the extent of the digital revolution in 2018:

Digital Technology 2018

- 4.5 Billion cell phone subscribers
- More than 4 billion internet users
- 3.7 Billion email users
- 1.9 Billion websites, increasing at one per second
- 1.34 Billion mobile phone facebook users
- 2.9 Billion facebook users active monthly
- 1.3 Billion people use youtube
- 300 Hours of video are uploaded to youtube every minute
- Almost 5 billion videos are watched on youtube every single day
- Youtube gets over 30 million visitors per day
- The total number of hours of video watched on youtube each month – 3.25 Billion
- The average number of mobile youtube video views per day is 1,000,000,000
- More than half of youtube views come from mobile devices

In Namibia too, there are more cell phones than people (110%) with approximately 2.35 million active users. More than 80,000 customers accessed the Internet through a personal computer or tablet and over 470,000 via their mobile phones, resulting in close to 550,000 users accessing mobile internet.
In 2016 research on the online activities of children was conducted in Namibia. 735 children were surveyed between the ages of 13 and 17 (UNICEF 2016).

The online activities of children are summarised below:

### Online Activities Of Children In Namibia

- Less than 1 in 10 (7%) of participants do not use internet
- Smartphones most popular for internet access
- Internet also accessed by laptops, personal PCs and school PCs
- Primary site for internet access is home
- Watching movies/videos online most popular activity
- 46% Boys and 43% girls do this more than once a day
- Other popular activities: school work, social networking sites, looking for health info

Although computers and cell phones have provided powerful avenues for sharing digital information and content, they have also provided exposure to cyber-specific risks and dangers like cyberbullying, solicitation and inappropriate content. The Namibian study (2016) found that the most prevalent forms of negative experience were seeing images of a sexual or violent nature. 68% of respondents reported having seen sexual content they did not wish to see, while 31% had been sent sexually explicit images of people they did not know, 29% had seen sexual content including children and 63% had seen disturbing or violent images.

### Risks Of Online Use

- Cyberbullying
- Sexting
- Meeting and talking to strangers
- Inappropriate content
- Breach of privacy

There are opposing viewpoints about the effects of digital technology on adolescents, with some highlighting the negative effects in terms of their ability to connect with others, engage with society and develop meaningful relationships. Others, however, believe that the Internet has created unprecedented opportunities for learning and engagement (Saleh et al 2014: 24). But, whichever school of thought is followed, it must be acknowledged that digital technology has exerted a major influence on the traditional methods of teenage social interaction.
2. UNDERSTANDING ADOLESCENTS AND THE INFLUENCE OF DIGITAL TECHNOLOGY

Technology and social media have changed the way in which people share information, learning and engagement. As digital technology has increasingly become part of daily life, it has altered the norms, attitudes and behaviours not only of adults, but has also impacted quite fundamentally on those of adolescents. Saleh et al (2014:26ff) have identified a number of trends in this regard:

- Adolescents have access to the Internet
- Adolescents communicate mostly by texting
- Adolescents love social networks
- Adolescents use a range of social media technologies
- Adolescents use social media to connect to broader culture

Communicating by texting on cell phones has become a normative mode of social interaction among teens and has emerged as the preferred manner in which most teens communicate (Saleh et al 2014:28).

Why Teenagers Like Texting

- Texts are exchanged very quickly
- Easy to use
- Gives an opportunity to think about response
- More private
- Generally free

3. THE INTERNET AND ADOLESCENT SEXUALITY

In terms of socio-emotional development, children do not develop within a vacuum, but within a particular family, community and culture. The Internet and other digital media are now becoming an important social context for adolescents in the same way as their schools and peer groups are. Since technology enables adolescents to communicate with peers as well as families and even connect with their leisure interests, Saleh et al (2014:62) proposes that online communication may provide a promising venue for adolescents to deal with the socio-emotional stages of constructing identity, forming intimate relationships as they are developing sexuality.

Saleh et al (2014:63) argues that, because the Internet is interactive, adolescents are constructing and co-constructing their online environments, as in chat rooms. They will, therefore, bring the people and their issues from their offline world into their online world. It follows that core adolescent issues (sexuality, identity, intimacy) will feature in their online activities and will involve healthy adolescent behaviour, like exploring sexuality and identity online.

But the problem is that it can also involve unsafe behaviour like meeting and interacting with strangers, in much the same way as adolescents become involved in risky behaviour offline, like substance abuse. However, the online world is very different from the offline world. It creates a realm of anonymity and provides a sense of control over interactions, because adolescents believe that the communication is over when they turn off their
Online Sexual Exploration

- Look for info about sexuality and sexual health
- Construct themselves in terms of sexual development
- Engage in sexual conversations
- Access sexually explicit content

Finding information about sexuality and sexual health

Adolescents are going through a stage of sexual maturation that involves an increase in sexual drive as well as an increased interest in sex. In terms of the previous studies mentioned, the normal age for a first sexual encounter is approximately 17, although there are statistics that indicate some children participate at a younger age.

Because of this awakening interest in sex, adolescents try to understand what is happening by searching for information about sex. To find this information, adolescents turn to their friends and peers firstly and then to media. Magazines, movies and television have for a long time been an important source of information about sex, but the introduction of the Internet has changed the media landscape.

The most frequent topics accessed are information relating to sexuality and relationships – pregnancy, contraception, dating, relationships, puberty, prevention of STDS, symptoms and testing of STDS as well as transmission and treatment, and virginity. It is clear that adolescents turn to the Internet for information about these concerns as it is easier and less embarrassing to target information in this way. In fact, in Nambia, it is culturally taboo to openly discuss sexual matters with parents or other adults.

Constructing and presenting a sexual identity online

From research conducted on how adolescents construct their sexual identity online, it was found that adolescents discussed a wide range of sexual topics, like abortion, contraceptives and premarital sex. According to Saleh et al (2014:69), adolescents are using these digital tools to exchange sexually suggestive content. This would include sexually explicit text messaging and nude or semi-nude personal pictures that have been taken with a cell phone or other camera and sent via text messaging, email or instant messaging. Sexting is a form of digital sexual messaging, which has been defined as the act of “sending nude or semi-nude photos or videos, including sexually suggestive messages through mobile phone texting or instant messaging” (Burton and Tario 2009).
Reasons For Sexting

- Boredom
- Making intimate contact with opposite sex
- Influenced by peers
- To arouse recipient
- Unplanned or accidental

Cybersex

Cybersex can be defined very widely to include anything sexual, such as viewing pornographic content, to online sexual communication between people. Saleh et al (2014:71) defines cybersex as “sexual chatting/talking between two or more individuals that may or may not include role playing and masturbatory activities for one or more of them”. Originally this involved text-based messages, but now also includes video and voice messages. This would include talking about sex and sexual experiences as well as experimenting with sex on the Internet, using video or webcams to do so.

From a developmental perspective, adolescents are experiencing identification and sexual awakening, which is manifested by increased interest in sex, conversations about sex and sexual comments and jokes. It is, therefore, natural that they will be interested in cybersex and become involved in these activities. It is unknown whether cybersex is beneficial or harmful until further research has been conducted, although there is a valid concern about the potential for compulsive or addictive behaviour.

Accessing pornography online

Pornography or sexually explicit material is readily available online with millions of pornography sites on the Internet. Defining what is meant by “sexually explicit material” can be problematic. It has been defined as images of naked people or people having sex. Saleh et al (2014:75) refers to a number of research surveys in which between 23 and 71 percent of adolescents report having been exposed to sexually explicit materials. This coincides with an adolescent’s interest in sexuality.

However, all adolescents may not necessarily feel comfortable with pornography and exhibit ambivalent feelings about it, with a large number of females and males regarding it as degrading. This reaction also depends on whether the contact was unwanted, with a quarter of respondents in a study reporting that they had had unwanted contact with online sexual images in the previous year. This usually occurred when they were surfing the Internet or opening a link or an email. A quarter of these respondents said that they were very upset about the exposure (Saleh et al 2014:75). It would seem that half of the exposure to online sexually explicit material is accidental.

Since adolescents are at a formative stage of sexual development, it is necessary to examine the possible effects of exposure to sexually explicit material. There are concerns that this could distort an adolescent’s view about sexuality, influence their attitudes about sex, shape sexual arousal patterns and create unrealistic expectations. The available research thus far suggests that exposure to sexually explicit material is linked to more permissive attitudes, greater preoccupation with sex and more casual sex exploration.

Accessing sexually violent materials

Here a distinction is made between mainstream pornography and violent and extreme pornography. The latter would include pornography that focuses on non-consensual behaviour, like rape and bestiality. Unfortunately,
violent pornography is easily accessible on the Internet, and an Australian report suggests that the use of violent pornography among adolescents is associated with sexually aggressive attitudes and behaviour, and it has identified the regular consumption of violent and extreme behaviour as a risk factor for boys and young men in the perpetration of sexual assault.

5. SEXTING AND THE ADOLESCENT

Sexting is a combination of `sex' and `texting' and is the use of cellphones, smartphones, webcams and other digital technology to take and transmit sexually suggestive and explicit images of oneself. In some definitions it also includes sexually suggestive text messages. The concept of sexting gave rise to a legal and moral panic in the USA because children, who were taking photographs or videos of their own genitals and sharing them, were in fact producing, distributing, watching and possessing child pornography (Saleh et al 2014:90). There are numerous instances of children being charged and prosecuted in the USA for various crimes relating to the act of sexting.

In view of the developmental issues discussed previously, the concept of sexting amongst teenagers has created a major dilemma i.e. normal sexual development v criminal activity. Saleh et al (2014: 91) highlights the dangers inherent in this form of communication. Previously teenagers would explore their sexuality in terms of skinny dipping, streaking or flashing, activities which were in the moment, but the use of digital technology has meant that a permanent record of the sexual behaviour is created which can be stored for years.

In addition, there is the problem that sexted images can go viral. For instance, where there has been a breakup between two partners, one may share intimate photographs with others out of revenge and these can, in turn, be passed on to others, causing immense embarrassment, shame and humiliation. In fact, there are even revenge porn sites which are dedicated to posting sexually explicit photographs of ex-lovers. This highlights the difficulty that society has with sexting, since it can be viewed as normal adolescent behaviour, problematic sexual behaviour or even criminal behaviour. There is grave concern that normal adolescent sexual exploration and legal ignorance could end with teenagers having criminal records as well as having their names appear on sex-offender registers.

Why do minors sext?

There are numerous reasons why adolescents sext, ranging from the developmental stages they are traversing to the sex-focused culture in which they find themselves.

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<tr>
<th>Why Adolescents Sext</th>
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<tr>
<td>Access to technology</td>
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<td>Increased cell phone use</td>
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<td>Developmental stages</td>
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<td>Teenage tendency towards exhibitionism and narcissism</td>
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<td>Preoccupation with sexual exploration</td>
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<td>Sex-focused culture</td>
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<td>Part of romantic relationship</td>
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<td>Peer pressure</td>
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<td>Coercion by partner</td>
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<td>Need to cause harm, shame, revenge</td>
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6. ONLINE SAFETY RISKS

Although the online environment offers adolescents potential for positive development, there are a number of safety risks in being online.

Online Safety Risks

- Online solicitation
- Adolescent prostitution
- Cyberbullying
- Exposure to problematic content

Online solicitation

There is a concern that by posting sexually suggestive images or providing sexually revealing information, adolescents are exposing themselves to the risk of unwanted solicitation. There are a number of factors that make adolescents more vulnerable to unwarranted sexual solicitations. Since adolescents spend so much time online and are preoccupied with sexual information, they are particularly vulnerable to online solicitation.

An important question is whether these online sexual solicitations result in an offline crime being committed against a child. The majority of identified cases in studies conducted involved adolescents who were aware that they were communicating with older adults who were looking for sex. In addition, most of the adolescents arranged to meet the offender with the expectation of engaging in some sexual activity. An interesting finding in the study was that there was no evidence that online predators were stalking and abducting unsuspecting victims as a result of information posted on websites. The vast majority of cases involved older adolescents who were aware that they were communicating with an adult who wanted to have sex with them.

There obviously are cases where adults pretend to be adolescents in order to victimise a child, but these cases seem to be in the minority.

Adolescent prostitution

Adolescent, or juvenile, prostitution is regarded as a form of sexual exploitation of children, and chat rooms and social networking sites provide a very favourable forum for solicitation and victimisation of children. Wells et al (2012) investigated the role of the Internet in juvenile prostitution, and found that 15% of the Internet prostitution cases involved the use of email, chat rooms and text messages.

Cyberbullying

Since the Internet has provided a new forum for adolescent communication, it follows logically that face-to-face bullying has now also found its way into the digital world, and is known as online harassment or cyberbullying. Although there is no consistent definition, cyberbullying is defined as “an overt intentional act of aggression towards another person online” (Ybarra and Mitchell 2004: 1308) or a “willful and repeated harm inflicted through the use of computers, cell phones and other electronic devices” (Hinduja and Patchin 2009: 5).

Cyberbullying can either be private, as in the use of text messages, or semi-public, as in the posting of messages on an email list, or public, as in posting information on public websites. Cyberstalking refers to an attempt to harass or control others online or simply the same as offline stalking, except that it takes place online. The purpose of cyberbullying is to threaten, embarrass or humiliate the victim.
Children At Greater Risk Of Being Bullied

- Children with mental health issues
- Children with disabilities
- LGBTIQ adolescents
- Adolescents struggling with sexuality
- Children who have moved to a new school
- Those considered outsiders
- Adolescents who spend a lot of time online

Some authorities argue that cyberbullying is simply an online form of face-to-face bullying, while others argue that they differ considerably because of the “widespread messaging capabilities of electronic media” with respect to acts of repetition (Saleh et al 2014: 141). However, the core elements of bullying can be found in cyberbullying. It is only the methods employed that are different.

The psychological impact of cyberbullying is more traumatic than traditional physical bullying because of the extreme public nature of the bullying. The humiliation is evident for all to see. In addition, the victim has no respite from the bullying because it is not limited to school and can take place at any time wherever the victim is (Badenhorst 2011:3). According to Saleh et al (2014: 143), involvement in bullying has a serious impact on emotional well-being of both the victim and the bully. Children involved in bullying as victims or as bullies tend to perform poorly at school, and are at an increased risk of developing poor physical health and psychiatric problems, such as anxiety, depression and psychotic disorders later in life. Cyberbullying may result in victims suffering from anxiety and depression, and sometimes even suicide. Bullying and cyberbullying tend to exacerbate instability and feelings of hopelessness for adolescents who are already struggling with stressful situations.

Exposure to problematic content

There are different types of internet-based content that are problematic for children to view. These include: violent media, pornographic content, hate speech and content depicting self-harm.

Problematic Content

- Pornography
  - Common
  - From spam, e-mails, mistyping addresses and keyword searches
- Violent content
  - Movies
  - Images
  - Video games
- Other problematic content
  - Hate speech
  - Recruitment for offline organisations
  - Self-harm websites promoting self-injury or suicide
7. THE IMPACT OF BEING INVOLVED IN CHILD PORNOGRAPHY

The majority of children who appear in child pornography have not been abducted or physically forced, but have rather been manipulated to cooperate, which means that in most cases they know the producer of the material (Gewirtz-Meydan et al: 2018). These victims of online child pornography can experience serious physical, social and psychological harm.

In 1989 Silbert (1989) interviewed 100 victims of child pornography about the effects of their exploitation at the time when the abuse occurred and years after the abuse.

Victims reported the following effects when the abuse occurred:

- Physical pain (around the genitals)
- Somatic complaints (headaches, loss of appetite, insomnia)
- Feelings of psychological distress (emotional isolation, anxiety, fear)
- Pressure to cooperate and non-disclosure

Victims reported in the years following the abuse, that their initial feeling of shame and anxiety intensified to feelings of deep despair, worthlessness and hopelessness.

Being photographed intensified the feelings of shame and humiliation experienced by the victims. These findings were supported by other studies of child pornography cases in Sweden, where the children also described feelings of guilt and shame.

The research shows that child pornography exacerbates the trauma experienced by the child, who has undergone the abuse in addition to being photographed or filmed. One of the most difficult aspects of this form of abuse is the lack of control over the ongoing sharing of the abusive images (Canadian Centre for Child Protection: 2017). Because of the way in which the images are continually distributed, the abuse does not end for the victim. Victims are continually being traumatised when they think about who might be viewing the images online. This makes it difficult for victims to find closure.

Information about the impact of being involved in child pornography is still very limited, but according to the Gewirtz-Mayden et al (2018) study, the victims experienced the following effects:

- shame, guilt and humiliation
- fear that people who saw the images would think that they had been willing participants
- felt it was their fault that the images were created
- worried that people who saw the images would recognise them
- worried that friends would see the images
- embarrassed about police, social workers and others seeing the images
- refusal to talk about the images
- refusal to be photographed or videoed by family or friends.

Guilt and shame

Guilt and shame were the main first emotions that most survivors dealt with. Guilt related to:

- Choosing to participate in the film making
- Engaging in different behaviours during the filming
- Their desire for glory or fame.

For many victims, using the video or the camera was introduced at first as an adventure with the promise that
the child would become a celebrity or movie star. These promises made the victims believe they were interested in the filming or enjoying it, which exacerbated the guilt and shame they experienced later in life.

Feelings of guilt were reinforced when victims saw themselves in the photos and it looked like they were cooperating or looking enthusiastic. Victims were very concerned about how they were viewed in the images and felt that they would not be believed or regarded as victims.

**Ongoing vulnerability**

The fact that the photographs are in the public domain is devastating for many victims and some describe it as “haunting them.” Some have denied their existence while others have lived in constant fear of them surfacing. They are afraid their families will see them or even their children. This makes them feel that they are being revictimised. For them, it feels as if the abuse is constant and continuing, and has no end. This makes it very difficult for them to let go of the past and move on with their lives. They were also concerned that their images could be used to entice other children into abuse or be used by the offender for masturbation.

Some participants have tried to track down their photographs so that they can destroy them while others avoid leaving the house and do shopping online so that they do not have to go out. It also has an impact on their careers and the holding of public office.

Victims in the Gewirtz-Mayden (2018) study also reported suffering from post-traumatic stress disorder symptoms related to this specific crime. Many of them were triggered by things that were directly related to cameras and photo-taking, such as the sounds of x-ray machines or just cameras.

**Empowering aspect**

Some victims began to recognise the images as empowering, because they validated their stories. The pictures helped them understand what had happened to them and used them as part of the healing with therapists. They also assisted in obtaining convictions in court as the images provided proof of what they were saying.
READING

THE EFFECTS OF TESTIFYING IN COURT FOR CHILDREN

AIMS

• To provide information about the effect which testifying has on the emotional well-being of children
• To information about the effect which testifying has on the accuracy of a child’s evidence
• To identify the advantages of testifying in court for children
• To highlight the specific difficulties which children experience when testifying in court

OUTCOMES

• The participant will understand the effect that testifying has on the emotional well-being of the child
• The participant will understand the effect that testifying has on the accuracy of the child’s evidence
• The participant will be cognizant of the advantages of testifying in court for children
• The participant will be aware of the way children experience the criminal justice system and the specific difficulties they have when testifying

1. Introduction
2. Effect On Emotional Well-Being
3. Effect Of Environment On Quality Of Evidence
4. The Advantages Of Giving Evidence
5. Difficulties Experienced By Children
1. INTRODUCTION

The experience of testifying in a courtroom is stressful for most adults. The credibility of the witness is under attack and the witness is made to feel as though they are lying. This experience is even more stressful for the child, who does not have the necessary coping skills to deal with this hostility. The child has to speak publicly in front of a group of strangers. Children are not used to public speaking and having to talk in the presence of strangers can be very intimidating. This fear of having to speak publicly can be very overwhelming for children.

The setting of the courtroom is alien with the furniture arranged in a manner that children are not familiar with. In addition, the role-players wear long robes, which can look quite overwhelming and frightening for children. The procedure that is adopted in court is unknown to children and gives rise to a lot of confusion. The language used in the courtroom is formalistic, archaic and specialised, and does not fall within the language repertoire of the child.

Where the case is one dealing with an allegation of sexual abuse, the child is required to reveal embarrassing and intimate details in front of strangers. This is very difficult for children, especially where, from a social point of view, children are not encouraged to discuss sexual matters. If the child is the complainant in the case, the child will be required to tell the story in the presence of the accused. This is very traumatic for the child. Where the accused is unknown to the child, the child will be afraid of the accused, especially where the child has experienced violence from the accused. Where the accused is known to the child, as in a parent or grandparent, it can be emotionally devastating for the child to acknowledge publicly what that person has done to them. The child is also often torn by feelings of loyalty and guilt at being forced to testify against a family member.

Finally, the child is exposed to cross-examination, which is often hostile and is used to confuse the child and suggest that he/she is lying. Children have great difficulty with being verbally attacked and manipulated in the courtroom, both from an emotional and developmental perspective.

Possible Effects Of Testifying For Children

- Increases trauma
- Decreases accuracy
2. EFFECT ON EMOTIONAL WELL-BEING

There is ample research that argues that court involvement traumatises the child victim. Psychiatrists believe that psychological damage is caused not only by the abuse but also by being forced to testify in open court in the presence of the accused. There are many recorded incidents of children breaking down in court and being unable to testify further.

Numerous studies have been conducted to investigate whether testifying in court has any effect on victims of abuse, and the overwhelming findings from these studies are that children who had testified in court showed greater disturbance than those who did not. Research, therefore, shows that testifying in court definitely does have a negative effect on children.

Sexual abuse has a severe impact on children, and symptoms include depression, low self-esteem, guilt, phobias, somatic complaints, nightmares, promiscuity, and self-destructive and suicidal behaviour. Secondary traumatisation occurs when these symptoms are aggravated by the court appearance. For example, children often believe that they are responsible for the abuse. During cross-examination, they are often asked why they did not run away or scream or whether they enjoyed the sexual interaction. These questions entrench the original symptoms of guilt.

3. EFFECT OF ENVIRONMENT ON QUALITY OF EVIDENCE

Numerous studies have been conducted to investigate what effect environment has on children’s ability to recall. Most of these studies involve showing children a videotape of some confrontation and then interviewing them afterwards in mock courtrooms and private rooms to investigate the impact of the courtroom. The overall results of these studies showed that the children who were in the private room related more central items in free recall, answered specific questions more often and said ‘I don’t know’ or gave no answer significantly less often than the children questioned in the courtroom. The findings support the argument that traditional courtroom procedures act against eliciting complete evidence from children.

Research supports the idea that children testify better when they are outside the courtroom as children provide more accurate and more detailed reports in an informal setting. The results of these studies highlight the need to develop innovative methods for preparing child witnesses and for modifying standard courtroom procedures when children give evidence.

4. THE ADVANTAGES OF GIVING EVIDENCE

There is also strong support for the argument that going through the criminal justice system can be beneficial for children. Testifying can serve as a coping strategy and can provide the child with a sense of closure to a traumatic experience. Testifying can be very therapeutic and some children report feeling very empowered by their participation in the process. Legal procedures and the outcome of the case may be vindicating for the child since it offers the child an opportunity to be heard.
Advantages Of Testifying

- Child identified as complainant
- Opportunity for skilled assistance
- Empowering
- Opportunity to hear expert validation
- Responsibility of dealing with accused taken over by adults
- Ritual where child ceases to be pseudo-adult
- Family see justice done

A study by Tedesco and Schnell revealed that the interview and litigation process was not necessarily harmful to children. However, these findings were dependent on the manner in which children testified. For instance, subjects who testified in open court rated the procedure as less helpful than those who did not testify.

Testifying can be beneficial for the child, but this will only happen where there has been a successful prosecution of the offender and the child has been treated well throughout the court process and received support.

5. DIFFICULTIES EXPERIENCED BY CHILDREN

There are certain aspects of the court system that give rise to particular difficulties for children.

Difficulties Experienced By Children

- Oral evidence
- Confronting the accused
- Court delays
- Multiple interviews
- Cross-examination
- Knowledge and perceptions of child

Oral evidence

The system of procedure used in most accusatorial countries requires that a witness must testify orally in the presence of the accused. The insistence that a witness give oral evidence at a trial has two implications for children. It means that the child has to go to court to testify, and there is usually a long delay between the child experiencing the original event and having to testify at the trial.
Confronting the accused

Research has shown that children experience stress when having to give evidence in a courtroom, and this stress increases when the child is forced to testify in the presence of the accused. Physical confrontation with the accused damages the reliability, quality and often the very existence of the child’s evidence.

Children have great difficulty testifying in the presence of the accused for a number of reasons. The stress is often exacerbated where the accused has hurt or threatened the child or where there is a familial relationship between the child and the accused. The child may genuinely be afraid that the accused will hurt them for telling what happened, or, in the case of a familial relationship, the child may not want a parent or family member to be punished.

Court delays

The insistence on oral evidence being given at a trial has the practical effect that there will be a long delay between the event and the trial, because the investigation will have to be completed, the case will have to be put on the roll and set down for trial. The existence of these delays is well documented, and cases are dealt with in court on average between six months and five years after the charge has been laid with the police, and delays of up to 10 years do occur. These delays do not allow children to find closure and the impending trial that hangs over their head causes immense stress. It also has implications for memory.

Memory

Delay has an effect on a child’s memory and suggestibility. Memory is not static and can be influenced by thinking about past events, which means that children may become more susceptible to suggestion and coaching. As time passes, memory begins to fade and it is generally accepted that children do forget significantly more than adults. Memory begins to fade after 5 months. This does not mean that children are more inaccurate, but rather that they forget detail and remember less. The study also found that suggestibility to the leading questions was very uncommon at the immediate test but was apparent to some degree after the 5-month delay.

Multiple interviews

The criminal justice system requires a complainant to undergo multiple interviews before finally testifying in court. Where the complainant is a child who has been a victim of abuse, the matter can become even more complicated. Generally, children have to tell their story as many as ten times to different people before given the opportunity to testify.

<table>
<thead>
<tr>
<th>Number Of Interviews</th>
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<tbody>
<tr>
<td>Family/friend/teacher</td>
</tr>
<tr>
<td>Police at charge office</td>
</tr>
<tr>
<td>Specialised unit</td>
</tr>
<tr>
<td>Medical examination</td>
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<tr>
<td>Prosecutor</td>
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<tr>
<td>Social worker</td>
</tr>
<tr>
<td>Psychologist</td>
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<tr>
<td>Trial</td>
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</tbody>
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Undergoing multiple interviews has the following effects:

- The child is forced to repeat very intimate and embarrassing details to strangers again and again, thereby increasing stress;
- The danger of suggestion increases with every interview, especially where the interviewers are not specifically trained to conduct forensic interviews;
- Where the child has been forced to repeat the story again and again, the evidence begins to sound rehearsed and the child acquires the terminology of the interviewers; and
- Repeated interviews can diminish the child’s motivation and co-operation.

**Cross-examination**

Cross-examination refers to that part of the trial where the witness is questioned by the defence about the evidence that have given to the court.

**Purpose Of Cross-Examination**

- To find information that is favourable to party cross-examining
- To cast doubt on accuracy on evidence of witness

Children experience a number of difficulties with cross-examination. In court communication has to take place within a set of procedures. The person examining the child often faces the bench while questioning the child and the questions are directed through the bench. Questions are often interrupted by procedural objections and discussions of what the child has been asked and how the child has replied are discussed at length while the child remains present. The scope for responding in this environment is very limited and the child has very little room to manoeuvre or negotiate.

*Measures on how to improve the court process for children has been included in the section on Judicial Management*
READING LIST


READING AVAILABLE ONLINE

PART 4:
THE CHILD IN THE JUDICIAL PROCESS

- Conducting A Forensic Interview With A Child Witness
- The Use Of Anatomically Detailed Dolls
- Taking A Statement From A Child Witness
- Preparing Children For Court
- An Introduction To The Legal Process
- Conducting A Consultation With A Child Witness
- The Competency Examination Of The Child Witness
- Leading The Evidence Of A Child Witness
- Cross-Examination Of The Child Witness
- Opening And Closing Statements
- Judicial Management
- Guidelines For Sentencing Child Rape
CONDUCTING A FORENSIC INTERVIEW WITH A CHILD WITNESS

AIMS

• To explain the difference between a therapeutic interview and a forensic interview
• To provide information on how to conduct a forensic interview
• To highlight problematic interviewing techniques

OUTCOMES

• The participant will be able to distinguish between a therapeutic interview and a forensic interview and understand the consequences of conducting a forensic interview
• The participant will have the necessary information to be able to conduct a forensic interview
• The participant will be able to identify problematic interviewing techniques and avoid these when interviewing

1. Therapeutic vs Forensic Interviews
2. Conducting The Interview
3. Problematic Interviewing Techniques
1. THERAPEUTIC vs FORENSIC INTERVIEWS

Therapeutic interviews

The purpose of a therapeutic interview is to provide treatment for the patient, who in this particular situation would be the child. In order to provide treatment, a diagnosis will have to be made to determine whether abuse has taken place. The first step in the treatment of the child would be to provide a safe environment for the child and then to obtain a disclosure. In conducting these interviews, clinical method of interviewing are used, including techniques such as leading questions, multi-choice questions, hypothetical questions and play therapy.

The primary focus of the therapeutic interview is the emotional well-being of the child

Forensic interview

The purpose of the forensic interview, also known as an investigative interview, is to establish the facts of the incident under investigation. There is a need to find out what the witness has seen, heard or experienced so that the evidence can be placed before the court and a decision made as to the guilt or otherwise of the alleged perpetrator. The interview is used as a tool to discover the material truth, to find out whether the alleged incident took place or not. The forensic interview takes place within a legal framework which sets out to afford protection to the accused and consists, therefore, of a number of rules which aim at preserving an accused’s rights.

The primary focus of the forensic interview is to obtain accurate information that will be used in the criminal process to determine guilt

Dilemma

This essential difference between the interview types creates a dilemma for the clinician, who, in conducting the interview, is confronted with the choice between what is best for the patient as opposed to what is best for the court case. An illustration of such a dilemma would be the use of play therapy. Play therapy may assist a child with resolving traumatic experiences, but, as far as the courts are concerned, it may encourage confusion between fantasy and reality and thus affect the reliability of the child’s evidence.

The distinction between the therapeutic interview and the investigative interview can give rise to problems where professionals are called upon to conduct interviews with children for legal purposes. The following case, although American, is useful in highlighting the difficulties that may arise. In State v Idaho v Laura Lee Wright, 110 S.Ct 3139 (1990) Laura Lee Wright and Robert L. Giles were charged with and convicted of lewd conduct with a minor. The crimes were committed against the two minor daughters of Wright, who were aged two-and-a-half and five-and-a-half at the time of the offence. Wright was alleged to have held down her daughters so that Giles could have sexual intercourse with each of them. Wright was sentenced to twenty years imprisonment on
each count, with the terms to run concurrently. She appealed against the conviction, arguing that her rights in terms of the Confrontation Clause of the United States Constitution had been violated by the admission of a paediatrician’s evidence.

Dr Jambura, the paediatrician in this case, conducted a physical examination of the younger child and asked her a few questions. The trial court permitted Dr Jambura to give evidence about what the younger child had told him. The child herself was three years old at the time of the trial and did not give evidence as she was found to be incapable of communicating with the jury.

Dr Jambura had asked the younger child the following questions:

- Do you play with daddy?
- Does daddy play with you?
- Does daddy touch you with his pee-pee?
- Do you touch his pee-pee?

Transcript

Dr Jambura’s evidence regarding his interview with the younger child was as follows:

Jambura: Do you play with daddy? Does daddy touch you with his pee-pee? Do you touch his pee-pee? And again we then established what was meant by pee-pee, it was a generic term for genital area.

Prosecution: Before you get into that, what was, as best you recollect, what was her response to the question ‘do you play with daddy?’

Jambura: Yes, we play - I remember her making a comment about ‘yes, we play a lot’ and expanding on that and talking about spending time with daddy.

Prosecution: And ‘does daddy play with you?’ ‘Was there any response?’

Jambura: She responded to that as well, that they played together in a variety of circumstances and, you know, seemed very unaffected by the question.

Prosecution: And then what did you say and her response?

Jambura: I asked her ‘does daddy touch you with his pee-pee’, she did admit to that. When I asked ‘do you touch his pee-pee’, she did not have any response.
The Appeal Court found that Dr Jambura’s evidence lacked particularized guarantees of trustworthiness and was therefore unreliable. The conviction was set aside:

“Instead the hearsay declarations of the younger Wright girl are not trustworthy because of Dr Jambura’s interview techniques: the questions and answers were not recorded on videotape for preservation and perusal by the defense at or before trial; and blatantly leading questions were used in the interrogation which was performed by someone with a preconceived idea of what the child should be disclosing. Because of the combined effect of her tender years and the suggestive, inadequately reviewable technique applied by Dr Jambura, we conclude that Dr Jambura’s testimony regarding the younger Wright girl’s declaration lacked the particularised guarantees of trustworthiness necessary to satisfy the requirements of the confrontation clause.”

When conducting an interview with a child witness, the purpose of the interview is to obtain a truthful account from the child in a manner which will serve the best interests of the child while at the same time being legally acceptable.

2. CONDUCTING THE INTERVIEW

The approach to interviewing the child witness endorsed here is based on the phased approach which has been accepted by numerous courts as an acceptable method of interviewing children. The phased approach treats the interview as a process in which a number of interviewing techniques are used in phases, proceeding from general and open to specific and closed form of questioning. The adoption of this method of interviewing should by no means be taken to imply that other techniques are unacceptable. It is simply that this method of interviewing provides a sound legal framework within which to work.

**Preparation**

It is important to create the right environment for the child to provide information. The more comfortable the child, the more information the child will be likely to share. Where children are to be interviewed, it is generally accepted that a police station may not be the appropriate place to do so. Some children may feel more comfortable in their own homes, others not. Account should be taken of their wishes.

In choosing a location for the interview, it is necessary to ensure that the setting is private. Children may be too embarrassed or afraid to share intimate details where they believe others can overhear what they are saying. They may, for instance, be wary of talking where there is an interleading or open doorway.

Distractions must be reduced wherever possible, since interruptions will distract the child and divert the focus of the interview. It is preferable, for instance, to choose a room that does not have a telephone. If the interview is being conducted at somebody’s home, ensure that the television and radio are switched off. Cellphones and beepers must be switched off at all times during the interview.

The child may want to be accompanied by a particular friend or relative. This should be arranged wherever possible, unless the person is also involved in the incident under investigation, in which case another option should be arranged with the child. The presence of this person may assist in making the child feel comfortable and secure enough to disclose the necessary information.
It is also a good idea, where possible, to provide some form of activity for the child, such as drawing or colouring equipment. This occupies the child’s physical needs and may allow them to speak more freely. It may also assist with developing rapport with the child in the preliminary stages of the interview.

**Phase one – Rapport**

The aim of this phase is to build rapport between the interviewer and the child so that the child can relax and feel comfortable. In addition, it can be used as an opportunity to supplement the interviewer’s knowledge about the child’s social, emotional and cognitive development as well as ability to communicate. It is important that a good impression be created on initial contact. In order for an interview to be successful, it is essential that a proper relationship be formed between the interviewer and the child.

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**What To Do**

- Introduce yourself
- Explain who you are
- Find out what child would like to be called
- Establish emotional state of child
- Be reassuring and allay fears
- Use developmentally appropriate language
- Remain neutral
- Explain purpose of interview
- Chat about inconsequentials to build rapport

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**What Not To Do**

- Do not refer to alleged offence
- Do not over-emphasise authority
- Avoid staring at child
- Do not touch the child
Phase two – Free narrative account

The child must then be encouraged to provide an account of the alleged incident in their own words and in their own time. The role of the interviewer here is simply that of a facilitator who makes it possible for the child to tell what happened. The purpose of this phase is to obtain information from the child which will be spontaneous and free from the interviewer’s influence. This is done by using general, open-ended questions.

**Open-Ended Questions**

These are questions which require the child to provide information without being specific

- “Why do you think you are here today?”
- “Can you tell me what happened?”

It may be necessary to provide prompts from time to time, but these must be appropriate and open-ended. The focus here is to encourage the child to provide a spontaneous account in their own words. It is important that prompts do not include information which the interviewer is aware of, but which the child has not mentioned. Although prompts are useful in assisting the child to tell his story, these should not be overused. Interviewers should be sensitive to any pauses or silences and resist the need to speak as soon as the child stops.

Avoid interrupting the child as this may cause information to be lost. Wait until the child has completely finished before raising any questions. It can be very difficult not to interrupt when you have a question, but it has been proved to disrupt flow, hinder the recall process and interfere with accuracy.

It is important that these interviews remain neutral. This does not only mean controlling what is said, but also facial expressions and inflections of the voice. The interviewer has to be very wary of indicating, whether consciously or unconsciously, any form of approval or disapproval of what the child has said.

Phase three – Questioning

Once the child has been given an opportunity to tell their story in their own words, the interviewer can then pose questions to clear up any issues that may have arisen. This phase consists of 3 stages of questioning and the interviewer is given the opportunity to move from open-ended questions through to closed questions.
Questioning

1. Open-ended questions
   • Non-leading questions
   • Open-ended
     Example: “Why do you think you are here today?”

2. Specific yet non-leading questions
   • Questions to clarify information
   • Does not presuppose an answer
     Example: “What was he wearing?”

3. Closed questions
   • Gives limited number of alternative responses
     Example: “Were the pants blue or brown?”

Be very careful when using closed questions as these are very similar to leading questions so must be phrased with care. It should also be borne in mind that the child’s options to reply have been severely limited and this may not be a method of eliciting truly informative replies.

Phase four – Closing the interview

The interview should always be closed on a positive note. Children should be thanked for their co-operation and for providing the information. They should be made to feel that a positive contribution has been made, whether the interview was successful or not. It is also important that the interviewer provide simple, straight-forward information about what will take place after the interview so that the child understands clearly the steps that will follow.

It is always a good idea at this stage to return to the rapport phase and chat about some of the neutral topics that were raised earlier. The child should also be given an opportunity to ask questions, and the interviewer should answer these in an appropriate manner.

Sexual terminology

Sexual terminology is an important part of a forensic interview with a child witness relating to sexual abuse. Sexual terminology creates issues with comprehension because children tend to use different terms for the various body parts and their sexual functions.
Children tend to use personal terms for sexual body parts. For this reason, it is very important to get the child to identify the parts of the body they refer to without in any way leading them or suggesting terminology. This can be done with the aid of anatomical body drawings, verbal discussions or the use of anatomically detailed dolls.

A discussion of body parts can be used to get the child to identify between the vagina and the anus. Children above the age of 7 are usually able to distinguish between the anus as being the place where the poo comes out and the vagina as being the place where the wee comes out.

3. PROBLEMATIC INTERVIEWING TECHNIQUES

The main aim of a forensic interview is to gather information which is as true a representation of the child’s experiences as possible and which is not subject to contamination. Contamination occurs when the child’s memory of the events supporting the allegation becomes influenced by external factors. This can happen as a result of poor interview techniques, inappropriate behaviour on the part of the interviewer and an unfavourable interview environment.

Interviewer bias

The information which a child offers in a forensic interview may become distorted due to the behaviour of the interviewer.

- Personal assumptions
- Reinforcement
- Repeated questioning
- Authority

The personal assumptions held by an interviewer can permeate an entire interview. If an interviewer believes that abuse has taken place, then only questions will be asked that are directed at proving that the abuse did, in fact, take place.

Attention, praise and approval are accepted parenting techniques for changing a child’s behaviour. When a young child behaves appropriately, a parent will give praise and show approval to reinforce this behaviour. Children are sensitive to approval and will behave in a manner that causes them to be rewarded. Interviewers may consciously or unconsciously display these techniques. An overly solicitous tone may inappropriately demonstrate the approval of what the child has said. A child who is unsure, may attempt to please the interviewer and respond to these demonstrations of approval. As discussed earlier in the section on communication skills, approval must be used with great care. Approval should only be given with respect to the way the child is behaving (“you are listening well;” “you have sat very quietly”) and never with respect to the content of what the child is saying.

Reinforcement can be both verbal and non-verbal. Verbal reinforcement would include praise. Praise is verbal approval of the child and needs to be used judiciously in the course of an interview, since there is a danger that the child may respond in a particular manner to gain the approval of the interviewer. It is essential for an interviewer to remain neutral when conducting an investigative interview and to be aware of any emotional reactions which may influence the child’s disclosures.
Verbal Approval

- “Very good. That’s right.”
- “Your father will be very proud that you told us.”
- “When you’ve finished talking, you can have some sweets.”

Non-verbal responses are cued by tone of voice, body movements and expressions. This could include withdrawing from the child, using a cold or neutral tone of voice, avoiding eye contact and ignoring the child’s responses.

Repeated questioning occurs when a child denies that anything has happened and the interviewer keeps repeating the question until the child finally affirms the abuse. When a question is repeated, children tend to change their replies. This could be attributed to their need to please, lack of confidence or the child may simply be too tired to argue and wishes to terminate the interview.

Children are very sensitive to the authority of adults and will succumb to power and status, thus increasing their suggestibility. This becomes even more pronounced when cultural issues are involved.
READING


READING AVAILABLE ONLINE

THE USE OF ANATOMICALLY DETAILED DOLLS

AIMS

- To introduce the concept of anatomically detailed dolls and highlight the specialisation needed when using these dolls as a forensic tool
- To introduce forensically sound methods of using the dolls in forensic interviews

OUTCOMES

- The participant will have knowledge of the use and function of anatomical dolls and be aware of the challenges that arise from the use of these dolls
- The participant will be able to use the anatomically detailed dolls in a forensic context

1. Introduction
2. What Is An Anatomically Detailed Doll?
3. The Use Of Anatomically Detailed Dolls
4. The Advantages And Disadvantages Of Using The Dolls
5. Assessing Allegations Of Child Sexual Abuse
1. INTRODUCTION

One of the difficulties that arises when communicating with young children is that they have the capacity to recall an event but do not have sufficient verbal skills to relate the memory. This is particularly problematic when gathering information in a forensic context. An attempt was made to address this communication gap through the introduction of ‘scientific tools’ to assist the information gathering process. These tools are referred to as anatomically detailed dolls and anatomical drawings.

The use of anatomically detailed dolls is often controversial due to the lack of structured, skilled and monitored procedures governing the use of this tool. Unmonitored procedures lead to higher risks of suggestibility and clinical misinterpretation of the child’s interaction with the dolls. For example, it is common knowledge that children enjoy putting their fingers into holes, therefore, it should not be surprising when the child places their fingers into the openings in the dolls, including the anal and vaginal openings. This is by no means an indicator that abuse has taken place.

It is important for practitioners to acknowledge that the dolls are not magical and their use in sexual abuse cases does not ensure disclosure nor does it provide a failsafe method of obtaining the truth. They are a valuable tool for facilitating a meaningful exchange with children about their sexual knowledge and experience but their effectiveness is dependent upon the skill of the user. Professionals using the dolls in child sexual abuse cases should obtain adequate training. It is also essential that professionals use the dolls to elaborate on the child’s narrative account and use it as a tool for children to identify body parts and explain actions they are narrating.

2. WHAT IS AN ANATOMICALLY DETAILED DOLL?

Anatomically detailed dolls are usually soft, cloth or plastic dolls that are intended to be a general replica of the human body, complete with sexual body parts. The male dolls have a penis and testicles while the female dolls have a vaginal opening. Both the male and female dolls have oral and anal openings. The adult female dolls have developed breast and both the adult male and adult female dolls have pubic hair.

Size

Adult dolls must be clearly larger than the dolls depicting children. More specifically, the child doll should be no taller than the adult doll's shoulder. The adult dolls should not be taller than 25 centimetres as children may have difficulty manipulating a doll that is too large.

Body and body materials

The material used to make the dolls should be durable, washable and well-sewn to ensure that the dolls can withstand throwing, stomping and frequent undressing. Most professionals also prefer dolls that are soft so that the bodies can be manipulated by the child. Hair and facial features must correlate to the sex of the doll. Fingers must be clearly separate in order for the child to be able to insert them in any oral or genital openings, if necessary.

An issue that has not yet been resolved is the impact of the racial features and skin colour of the dolls on the child’s response. There is, to date, no empirical evaluation of this issue, but the preferred practice is to match the dolls with the race of the child. If the race of the alleged perpetrator is different from that of the child, the person doing the assessment should consider presenting dolls of both races or a set of racially non-specific dolls with neutral skin tones.

Facial expressions
The facial features of the dolls should be reasonably attractive and appealing with a neutral expression. It is essential that the dolls do not express negative emotions, such as fear or anxiety, as this may be construed as suggestive in the information gathering process.

Clothing

The clothes should be easily removable and it is suggested that Velcro should be used for all closings. Clothing, especially slacks and underwear, should slip off easily and should be appropriate to the doll’s represented age and gender.

Sexual features

This is often the most criticised aspect of dolls currently being used in interviews and assessments. All sexual features must be in correct proportion to the size of the dolls because if the genitals are too large, the dolls may be criticised in court as being suggestive or leading. The sexual features must also be appropriate to the gender and age of the given doll.

### Sexual Features Of Dolls

- **Male adult**
  - Penis firmly attached
  - Stiff and slightly erect
  - Narrow enough to insert into doll opening
  - Genital hair
  - Anal and oral openings
- **Male child**
  - Genitalia must be proportionate to age
  - Anal and oral openings big enough to accommodate male adult penis
- **Female adult**
  - Breasts and nipples must be natural looking
  - Pubic hair
  - Vaginal and anal opening big enough to accommodate adult male penis
- **Female child**
  - Genitals proportionate to age
  - Vaginal and anal opening big enough to accommodate adult male penis
3. THE USE OF ANATOMICALLY DETAILED DOLLS

Anatomically detailed dolls were found to be the most common tool used in child sexual abuse evaluations, with 94% of sexual abuse interviewers perceiving the dolls as a valuable demonstration aid for school age children and 76% perceiving the value of the dolls in interviews with pre-schoolers (Hlavka et al: 2010).

Guidelines have been developed to reflect current knowledge and generally accepted practice regarding the use of anatomically detailed dolls in gathering information about allegations of sexual abuse from children. The guidelines aim to encourage appropriate use of the dolls and provide direction in the development of training for professionals but there are no rigid standards of practice to which professionals are expected to adhere since it is believed that flexibility is necessary for individual cases.

When to introduce the dolls

There is no predetermined amount of time that must pass during an interview or assessment before the dolls are introduced to the child, nor must a predetermined number or type of questions be asked before using the dolls. Every child is unique and the interviewers must use their judgment to determine when, and if, the dolls may be useful. In some interviews it may not be necessary to use the dolls at all. Dolls should only be used when clarification is needed after the child has made a verbal disclosure.

Previous exposure to the dolls

The interviewer must be aware, where possible, of the child’s previous exposure to the dolls. This information is important for assessing the usefulness of the dolls in the current interview and for better understanding the child’s reaction to and behaviour with the dolls. Multiple interviews with the dolls and/or therapeutic sessions where dolls are used in free play may influence the child’s interaction with the dolls in later interviews.

The number of dolls used

The number of dolls used depends on their specific use during the interview. It is recommended that in the initial introduction of the dolls to the child, only four are presented: an adult male and female, and a child male and female. If, according to the information gathered from the child, there are multiple parties involved, additional dolls can be introduced as information is presented.

The use of clothing

With regard to the use of clothing, the research is unclear as far as the impact of undressing the dolls prior to and during the interview is concerned. Preferred practice advocates that the dolls be presented fully clothed, with the direction of the interview guiding the undressing process.

The dolls as a comforter

The dolls are used as a ‘play’ object for the purpose of helping to create a more relaxed atmosphere in the interview room, and to provide the child with comfort while they talk about the abusive experience. This is achieved by allowing the child to hold, cuddle and play with the dolls freely. However, it is preferable that the dolls not be used as a comforter as they are a scientific tool and should be used for this purpose.

The dolls as an icebreaker

Researchers suggest that using the dolls as an icebreaker can assist in focusing the child’s attention on sexual issues and body parts. In addition, the presence of the dolls at the start of the interview can serve as a sign of permission for the child to talk about or demonstrate sexual knowledge and experiences and indicate that the
interviewer is comfortable with this type of discussion. Others, however, argue that the dolls should only be introduced in the interview when they are required for forensic purposes.

The dolls as an anatomical model

Here, the dolls are used as ‘props’ representing the human body. The child uses the dolls to label parts of the body, show understanding of bodily functions, and indicate possible knowledge of the sexual acts. For instance, the interviewer, pointing to the doll’s body parts (sexual and non-sexual) can ask questions like, “What do you call this part?”, “What is it used for?”, and, “Is it for anything else?”. In addition, the dolls are used as visual aids for direct questions about the child’s personal experiences with sexual body parts. Such questions may include, for instance, “Has anything ever happened to yours?”, and, “Has it ever been hurt?”. Finally, the dolls, in this instance, are used to clarify child-like terms for body parts. For example, if the child mentions her “flower” in reference to a body part, the interviewer can ask the child to show where the “flower” is on the dolls.

The dolls as a demonstration aid

This technique defines the way the child uses the dolls to show rather than talk about a sexually abusive experience, especially when the child has limited verbal skills or heightened emotional reaction to the discussion, such as fear of telling or embarrassment about discussing sexual experiences. It also includes the use of the dolls to clarify a child’s statement after disclosure of abuse has been made. Interviewers are cautioned when using the dolls as a demonstration aid with children aged approximately three and a half. At this age, the child’s cognitive stage of development may exclude their ability to use the dolls to represent themselves in behavioural construction. At best, the use of the dolls as a demonstration aid reduces any ambiguity about the meaning of the words a child uses to explain an event.

The dolls as a memory stimulus

Exposure to the dolls, especially to the private parts and the type of clothing worn by the doll, may be useful in stimulating or triggering a child’s memory of specific events of a sexual nature. In Nelson v Farrey (E.D. Wis. 1988), a four-year-old girl, while playing with the dolls explained that, unlike the doll itself, her father’s penis had been erect and had sprayed her face with “white mud” (McGough 1994:246). The child, therefore, in being able to explore and manipulate the dolls in free play during forensic or therapeutic interviews, is able to make connections spontaneously between the dolls and their own experience. The research supports this argument, suggesting that props or concrete cues may be more effective in prompting memories in young children than verbal cues or questions.
4. THE ADVANTAGES AND DISADVANTAGES OF USING THE DOLLS

The use of anatomical dolls is still controversial, with some researchers believing them to be useful while others find them suggestive. There are advantages and disadvantages to using the dolls.

**Advantages Of Using Dolls**

- Enhance communication
- Enhance recall
- Reduce motivational problems

**Disadvantages Of Using Dolls**

- Suggestive
- No standard training
- Dolls not standardised

5. ASSESSING ALLEGATIONS OF CHILD SEXUAL ABUSE

Of importance to consider when assessing child sexual abuse is the fact that sexually abused children are not always able to give coherent verbal accounts of an abusive experience. This could be attributed to the child’s developmental level, language ability and trauma related symptoms, such as, fear, embarrassment and guilt. In these instances, the use of the dolls to confirm the sexual abuse experience can be beneficial. However, it is essential for the interviewer to obtain as much verbal description of an event from the child before using the dolls.

In assessing allegations of child sexual abuse, anatomically detailed dolls are used to diagnose child sexual abuse (diagnostic tool) by observing the child’s interaction and play with them. The assumption is that abused children will interact significantly differently with the dolls from non-abused children. However, the research does not support this use of the dolls, and argues that it is not appropriate to draw definitive conclusions about the likelihood of abuse based solely upon the interpretations of the child’s behaviour with the dolls.

In fact, there is no known behaviour with the dolls that can be considered a definitive indicator of sexual abuse without the support of some verbal account by the child and/or medical evidence. The risk of interviewer error when using the doll play as a diagnostic test is unacceptably high, and this places a question mark on the credibility of the information gathered during the interview insofar as its applicability to evidence in court is concerned. Therefore, it is recommended that the dolls be used only as a demonstration tool to clarify body parts and information that they have provided in their interview already.
READING


READING AVAILABLE ONLINE

TAKing A STATEMENT FROM A CHILD WITNESS

AIMS

- To highlight the difficulties that children experience with making statements
- To find out when it would be the best time to take a statement from a child and where would be the best location
- To provide information on the different methods of taking statements and their advantages and disadvantages for children
- To examine the contents of statements

OUTCOMES

- The participant will be aware of the difficulties that children experience with making a statement
- The participant will be able to decide when it is the best time to take a statement from a child and where the best place would be
- The participant will have knowledge about the different methods of taking statements, and the methods preferred for children
- The participant will know what information must be included in a statement

1. What Is A Statement?
2. Why Is A Statement Taken?
3. Purposes Of A Written Statement
4. Sources Of Legitimacy
5. Children’s Difficulties With Statements
6. Timing Of Statement
7. Location Of Statement
8. Methods Of Taking Statements
9. What Statements Should Contain
1. WHAT IS A STATEMENT?

A statement is a written communication of facts as observed or experienced by the deponent and which can be introduced as evidence in a court of law.

2. WHY ARE STATEMENTS TAKEN?

- To elicit information from the witness and/or victim as soon as possible
- To obtain a written record which may be checked by the witness
- To determine what police action to take
- To assist in the examination of a witness in court
- To justify police action

3. PURPOSE OF A WRITTEN STATEMENT

The purpose of a written statement is to set out the evidence that a crime has been committed so that the prosecutor is able to make a decision as to whether they have sufficient evidence to prosecute the crime and to ensure that a permanent and official record exists of the facts surrounding a particular event or occurrence.

4. SOURCES OF LEGITIMACY

The right of a police officer to take a statement is based on the following authority in Namibia:

- Section 26 of the Criminal Procedure Act 51 of 1977 provides that police can interrogate and take a statement from a person they reasonably believe has information:

  "Entering of premises for purposes of obtaining evidence Where a police official in the investigation of an offence or alleged offence reasonably suspects that a person who may furnish information with reference to any such offence is on any premises, such police official may without warrant enter such premises for the purpose of interrogating such person and obtaining a statement from him: Provided that such police official shall not enter any private dwelling without the consent of the occupier thereof."
Section 27 of the Criminal Procedure Act 51 of 1977 provides that police may use violence to enter the property for the purpose of taking a statement:

“Resistance against entry or search (1) A police official who may lawfully search any person or any premises or who may enter any premises under section 26, may use such force as may be reasonably necessary to overcome any resistance against such search or against entry of the premises, including the breaking of any door or window of such premises: Provided that such police official shall first audibly demand admission to the premises and notify the purpose for which he seeks to enter such premises.”

The Police Operational Manual: Chapter 4.F.1.b emphasises the fact that a police officer may question a complainant, witness or informer and thereafter record statements from such person.

5. CHILDREN’S DIFFICULTIES WITH STATEMENTS

A statement is necessary to open a docket. For this reason, police officers insist on immediately taking a statement from the complainant. The defence is entitled to a copy of the statement as part of their rights to disclosure of the state’s evidence. This means that the defence is entitled to introduce the statement and cross-examine on the contents.

Unfortunately, children have great difficulties with the statement when it is introduced in cross-examination.

- Children not aware they have made statement
- Children do not remember making the statement
- Children forget the contents of the statement when there is a long delay
- Children do not understand implications of making statement
- Children not competent to make a sworn statement
- Children may not have been ready for full disclosure
- Information changes with cognitive development
- Children cannot read or check their statements
There are further difficulties experienced by children with respect to the taking of statements. The manner in which statements are taken is problematic. One of the techniques of taking statements is to paraphrase what the witness has said and write down that version. This technique is not appropriate for young children. Because of the problems associated with child communication, paraphrasing the child’s version can lead to misunderstandings. For instance, if the child gives an explanation of “how uncle Joe put his winkie down there”, the investigating officer cannot transcribe this as Joe put his penis in the vagina. To prevent confusion and misunderstandings, the investigating officer has to use the exact words that the child has used.

Statements are usually very brief, vague and incomplete. This becomes problematic in cases of child abuse, where details are very important to understand what happened. For instance, where there has been sexual grooming of a child, the relationship between the child and the accused becomes very important in order to understand the dynamics of the abuse. This is very rarely included in a statement.

6. TIMING OF STATEMENT

The timing of taking the statement is very important. In practice, the statement is usually taken immediately. This is because the statement is needed to open the docket and begin the investigation. Taking the statement immediately is often difficult for children, because disclosure is a process and they may not yet be ready to disclose everything. If the statement is taken immediately, there may not be sufficient time to build rapport. Some children may need to be met on a number of occasions before they feel comfortable and secure enough to tell everything that has happened to them.

If children have not developed enough rapport and do not feel comfortable, they may minimise what happened to them or later recant. This often leads to a number of differing statements, which can be very problematic for young children, especially when they are cross-examined about the contents of the different statements.

So, from the above, it becomes clear that timing is very important and can affect the outcome of a case. Where the child has made different statements, it is often alleged that the child is lying and prosecutors decide as a result that the cases should be withdrawn.

Certain police forces have introduced procedures or even included provisions in their Instructions so that statements can be taken at a later stage of the investigation. An example of this can be found in South Africa where the police have introduced SAPS Instruction No22/1998: Sexual Offences: Support to Victims and Crucial Aspects of Investigation, which provides that investigating officers do not have to take statements immediately from complainants in cases of sexual violence but can open a skeleton docket.

These instructions recommend that the investigating officer obtain a description in private from the victim rather than taking a detailed statement at this point. The purpose of taking a description in private is to provide the investigating officer with a basis for preliminary police intervention so that he can open a skeleton docket, make an arrest where this may be applicable and facilitate medical examination of the victim. In terms of the above-mentioned Instructions, the investigating officer can delay the taking of the statement. According to section 10 of the Instructions, the investigating officer is given the responsibility to take victim’s in-depth statement when the victim is ready.

Other parties involved in the case should first be interviewed as this will give the investigating officer a better understanding of the dynamics of the case and an opportunity to gather more information about the child so that they will be able to deal with the child more appropriately when they decide to take the statement.
A Statement Should Be Taken When
The Investigating Officer:

- Has had sufficient time to interview other relevant parties
- Has a good understanding of the dynamics of the case
- Has developed some trust and rapport with the child

7. LOCATION OF STATEMENT

When deciding where the statement should be taken, it is important to remember the following factors:

- **Confidence:** as children may be submissive and afraid, it is important that they be interviewed in a place where they feel confident. Strange, unknown environments may make the child feel insecure and uneasy.
- **Privacy:** children must be interviewed in a place that is private. Children will have great difficulty disclosing intimate details if the interview is not conducted in a private place. This is particularly relevant in cases of child abuse, where children are often embarrassed about discussing sexual matters.
- **Safety:** children may have been threatened not to disclose so may be afraid. It is, therefore, important to ensure that the child feels safe enough to tell you what happened.

8. METHODS OF TAKING STATEMENTS

There are a number of ways in which a statement can be taken. The more traditional method of taking down a statement is for the investigating officer to write down the statement, but there are different methods of doing this:

Methods Of Taking Statements

- Writing
- Audio recording
- Videotaping

Writing statements

One of the biggest problems with writing as a method of taking down a statement is that it interferes with the building of rapport. The investigating officer tends to focus on the statement rather than the child. The investigating officer is concerned with completing the statement properly, making sure that all the information has been included, so all their attention is focused primarily on the statement.
This will obviously have an effect on the disclosure process, and will make it more difficult for the investigating officer to focus on the child and the latter's behaviour. There is less time for eye contact and less time to observe the child's body language, because the investigating officer's eyes will be on the statement.

The child is also forced to talk slowly, because the investigating officer has to write down everything the child has to say. This also interferes with rapport because it makes it more difficult for the child to tell their story.

Another disadvantage of writing down a statement is that it cannot convey gestures and emotions. Young children have very limited language capabilities and often make use of gestures. It is very difficult to transcribe these gestures into words and can give rise to miscommunication.

Audiotaping statements

The second method of taking a statement is to audiotape the interview between the child and the investigating officer. There are a number of advantages to using audiotaped statements and this method is preferred over writing statements. This method makes it possible to hear the child’s story in their own words, which makes it much more emotional rather than the bland account found in a written statement. This becomes particularly useful when the audiotape has to be introduced into court and the court can hear what the child originally said.

The tape also offers the prosecutor an opportunity to assess the child’s ability and hear how the child responded to the investigating officer’s questions. The audiotape enables the investigating officer to focus on the child. The officer does not have to write down what the child is saying so can focus instead on making eye contact with the child, and can concentrate on what the child is saying and build rapport. There is also no need to interrupt the child to talk slower to take notes as everything the child says will be recorded on the audiotape.

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<thead>
<tr>
<th>Disadvantages Of Using Audiotapes</th>
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<tbody>
<tr>
<td>Audiotape equipment required</td>
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<tr>
<td>Interviewing techniques can be attacked</td>
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<tr>
<td>Specialised training required</td>
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Videotaping statements

The third method of taking a statement is to videotape the interview between the child and the investigating officer.

There are a number of advantages of using this method of recording a statement:

- If the statement is introduced into court, it is possible for the role-players in the courtroom to see the child while the child is making the statement.
- It also has the advantage of giving the court an opportunity to hear what the child is saying in the language that the child uses.
- The videotaped interview also has much more impact in the courtroom, because it is possible to hear and see the child rather than view a bland statement.
- This is also important where a long time has elapsed since the incident occurred, because the court is able to see the child at the age when the child was abused.
- The investigating officer will be able to focus on the child in the interview, which will increase the opportunity for building rapport with the child and for listening carefully to what the child is saying so that appropriate questions can be posed.
Disadvantages Of Using Videotapes

- Equipment required
- Interviewing techniques can be attacked
- Specialised training required

In Namibia, s216A of the Criminal Procedure Act 51 of 1977 provides that evidence of a statement can be given in the form of the playing in court of a video or audiotape of the making of the statement if the person to whom the statement concerned has been made, gives evidence in such criminal proceedings. This section provides authority for the admission of audiotaped and videotaped statements.

9. WHAT STATEMENTS SHOULD CONTAIN

Because a statement is the basis of a criminal investigation, it is the tendency for investigating officers to focus only on the elements of the crime. However, as cases of child sexual abuse are more complicated, it is often necessary to include information about the context and the relationship between the child and the perpetrator in order to better understand the crime. As a child’s consent may have been influenced by grooming, it is necessary to provide information about the manner in which the alleged perpetrator befriended the child.

Statements Should Include

- Information about the offence
- Information about the child
- Information about the perpetrator

POINTS TO NOTE

- If a statement of a parent of the child is taken, the following information must be included:
  - Whether the child is a biological/ foster or adopted child
  - Date of birth of child
  - If child is not biological child, particulars of the biological parents.

- Where the child does not use proper terminology for body parts, these words must be used in the statement. An additional statement must then be taken from a parent/ guardian to provide corroborative evidence with respect to the meaning of these words.

- Where a child is too young to make a statement or the investigating officer is unable to get a statement from the child, the investigating officer can make their own statement. In this statement the investigating officer will explain how an attempt was made to take a statement from the child and that the child was too upset or scared to talk, or the investigating officer can state what the child said to them.
READING AVAILABLE ONLINE


PREPARING CHILDREN FOR COURT

AIMS

• To provide information on the need for and objectives of court preparation for child witnesses
• To provide information on what court preparation for child witnesses involves

OUTCOMES

• The participant will understand the need for and objectives of court preparation
• The participant will know what court preparation involves

1. What Is Court Preparation?
2. The Need For Court Preparation
3. Objectives Of A Court Preparation Programme
4. The Scope Of Court Preparation
5. Location
6. Contents Of Court Preparation Programmes
7. Issues Relating To Implementation
1. WHAT IS COURT PREPARATION?

Court preparation is a life-skills approach used to empower child witnesses by providing them with the necessary skills and knowledge to perform their task as witness effectively.

Court Preparation

- Encourages children to reveal their fears about court
- Helps children to understand the legal process
- Helps children understand their role

2. THE NEED FOR COURT PREPARATION

The judicial system demands a prompt, clear and consistent report of a recognisable crime, from an effective witness. Children, however, do not have the skills and knowledge to fulfil these expectations. This is further exacerbated by the fact that children have gross misconceptions about the legal system and its role-players. These misconceptions give rise to fears and fear can interfere with memory processes due to heightened levels of stress and anxiety. Child witnesses, therefore, require preparation to empower them to cope with their participation in the legal system and to be more effective witnesses.

3. OBJECTIVES OF A COURT PREPARATION PROGRAMME

On examining some of the existing child witness preparation programmes, the objectives of court preparation are primarily to:

- demystify the courtroom through education
- reduce the fear and anxiety related to testifying through stress reduction

Some opponents of court preparation have argued that court preparation has the possibility to contaminate the child’s testimony because of non-neutral programme content, and would thus give rise to cross-examination around the child’s participation in a court preparation programme, and issues relating to the possibility of disclosures taking place during the programme, which may result in harsher cross-examination and lower perceptions of the child’s credibility. It is believed that only through the standardised training of programme facilitators, as well as the use of researched and monitored programmes, will these disadvantages be eliminated.
4. THE SCOPE OF COURT PREPARATION

Researchers argue that there is a need to prepare children for the entire spectrum of the legal process.

**Scope Of Court Preparation**

- Assessing child’s needs for court
- Helping children understand court process
- Helping children understand roles of participants
- Helping children understand their own role
- Organising a court visit
- Provision of stress reduction and anxiety management techniques
- Involving the child’s parent/caregiver
- Keeping child and parent informed
- Assisting with practical arrangements
- Accompanying child on the day

Preparation of the child for involvement throughout the legal process ensures that the quality and quantity of the information that the child gives during investigation as well as testimony are optimal. It will also ensure that the ambiguity of the events to come, and the related anxiety associated with them, are reduced.

5. LOCATION

A wide range of locations can be used for child witness preparation programmes. On examining existing international programmes, the location of the programme is very dependent on the availability of facilities. Therefore, programmes can take place in just about any location including, a courtroom, police station or office of an organisation.

6. CONTENTS OF COURT PREPARATION PROGRAMMES

Simply providing children with some legal knowledge and giving them a tour of the courtroom is not considered sufficient to reduce their stress and improve the quality of their testimony. The preparation process aims to provide the child witness with basic information about the judicial process and its role-players. More specifically, it provides information about legal terminology, personnel and procedure, stress reduction techniques and skills to empower the child.
7. **ISSUES RELATING TO IMPLEMENTATION**

**Does preparation amount to coaching?**

Research shows that there is a real concern among practitioners that ‘preparing’ may be tantamount to ‘coaching’. For this reason it is extremely important that the specifics of the child’s case are not discussed during the programme.

**Who does the preparation?**

It is recommended that the preparation be done by individuals who are familiar with current research relating to child witnesses and child abuse case law, the demands of the criminal justice system, and the needs of child witnesses. Others argue that the person who prepares the child for court should be more than an instructor. In fact, they argue that this preparation facilitator should become the child’s support person.

**Individual versus group preparation**

There is some debate as to whether preparation should take place in a group or on an individual basis. The argument for the group-approach points to the support children gain from being with other witnesses. The group process reinforces the child’s realisation that their experience is not unique or rare, thereby minimising the child’s feelings of stigmatisation. On the other hand, those who support an individual approach believe that the programme must be shaped to the educational and emotional needs of the individual child. Individual help, therefore, allows the practitioner to evaluate the child’s abilities and limitations and the information can be passed on to the prosecutor. A combination of both approaches may be the most effective.

**Training**

Child witness preparation needs to be seen as a specialised area of practice by those involved, and training should be conducted to ensure that facilitators are aware of the legal issues related to court preparation as well as the knowledge required to work with children in developmentally-appropriate ways.
READING LIST


READING AVAILABLE ONLINE

AN INTRODUCTION TO THE LEGAL PROCESS

AIMS

• To provide a general introduction to the criminal justice system
• To identify and explain the components of the criminal justice system
• To provide a basic introduction to the procedure followed in a trial

OUTCOMES

• The participant will have a basic understanding of the criminal justice process
• The participant will be able to identify and explain the components of the criminal justice system
• The participant will have a basic understanding of the procedure followed in a criminal trial

1. Introduction
2. Criminal Justice System
3. The Police
4. The Court
5. Correctional Service
6. Accusatorial System
7. Trial Procedure
8. Plea Of Not Guilty
9. Plea Of Guilty
10. Accommodations for Children
1. INTRODUCTION

A basic knowledge of the criminal justice system is essential for any person working within this system so that they are able to understand the processes and navigate their way through the system.

This knowledge is important for the following reasons:

- To assist the officer to perform their own tasks effectively by understanding the system in which they work
- To enable the officer to guide young witnesses through the system
- To enable the officer to answer questions that the children or their parents may have about the legal process.

The purpose of this section is to provide a brief introduction to the legal process with special emphasis on those areas which are relevant to the child.

2. THE CRIMINAL JUSTICE SYSTEM

The criminal justice system is comprised of 3 main components, with each component performing tasks specific to its particular mandate.

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<th>Criminal Justice System</th>
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<tr>
<td>Police (investigation)</td>
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<tr>
<td>Courts (trial &amp; decision)</td>
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<tr>
<td>Prisons (enforce punishment)</td>
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While the police will be responsible for the investigation of a case, the courts will focus on the trial and determination of guilt or innocence and the prisons will be responsible for carrying out the punishment imposed by the courts.

3. THE POLICE

The police are involved in the initial stages of a case. When a crime has been committed or is suspected, the police are informed. This initial complaint can be made by anybody. In child abuse cases, this is usually done by a parent or by somebody to whom the child has disclosed. The police will then open a docket and begin an investigation. The manner in which the complaint is laid will affect the way the investigation is conducted. For instance, if there has been a violent rape, depending on the time and area, the ordinary police stationed at a police charge office will open a docket and then refer this to a specialised unit. Many police departments have specialised units that deal with specific issues, such as commercial crime, domestic violence and sexual crimes. In Namibia, matters relating to sexual crimes against children are dealt with by the Gender Based Violence Protection Unit (GBVPU).

If a complaint is made and it is not an emergency situation, the matter will be referred straight to the specialised unit, who will undertake the matter from the beginning. These procedures vary from town to town, depending on whether there are specialised care centres or one-stop centres available. Once a case has been opened, an investigating officer will be appointed to the case, and this person will then interview the child victim. The
manner in which this interview is conducted will vary, depending on the training of the officer concerned and the facilities available.

Some police stations, especially those in urban areas, are equipped with better facilities and may even have specially allocated interview rooms. In some areas, the investigating officers use social workers to interview the children, but generally it is the investigating officers themselves who will conduct the interview.

The purpose of the police interview is to take a statement from the child, which will then form part of the docket. This statement will at a later stage be made available to the defence, and is often introduced at the trial. It is the introduction of this statement at the trial that creates so many problems for the child:

Statements Cause Difficulties For Children In Court

- Don’t understand term ‘statement’
- Memory fades
- Incomplete disclosure
- Child’s story paraphrased
- Child’s terminology changed
- Lack of detail and vagueness

Once the statement has been taken, the police will then investigate the allegation. The investigation will include taking statements from other possible witnesses in the case, and organising that the child undergoes the medical examination, if this is deemed necessary. The majority of children do not have medical examinations. This is because disclosure often happens many months after the alleged assault, and a medical examination would not contribute any further evidence. Medical examinations are only conducted where there is a possibility that medico-legal evidence will be found.

It is, however, important to be aware that some of the children may have undergone a medical examination and that this experience can be very traumatic for any victim of sexual abuse. Parents will be particularly interested in the medical examination i.e. why their child did not have one; what it was for, etc. Officers should be able to respond to these questions accurately.

The arrest of the accused can take place at any stage of the investigation. If there is sufficient evidence at the time the initial complaint is made, then the police will arrest the accused immediately. This is usually the case where there has been a violent rape or where the incident is reported immediately after it has happened and the police are aware of the identity of the perpetrator. Where the disclosure comes many months down the line, the police may first investigate the case before they make the arrest.

Where the accused has been arrested, the accused must appear in court within 48 hours of being arrested. It is at this stage that the question of bail will be decided. The Constitution of Namibia guarantees that all persons charged with a criminal offence shall be presumed innocent until proven guilty (Article 12) and that no person shall be subject to arbitrary detention (Article 11). In practical terms, this means that accused persons should normally be free to live in the community and continue their lives until the trial is finished. Keeping accused persons in jail before the trial is a harsh measure that should only be used in situations where they may run away, interfere with witnesses, or be a danger to other people. In cases of rape, the accused must convince the court that they should be released. In the most serious cases of rape, such as gang rape or the rape of a child, the accused must show there are exceptional circumstances why they should be released.
At the first court appearance, the case will be postponed, usually for further investigation. A case can be postponed a number of times, depending on the investigation that needs to be done before a trial date is set. When the investigation has been completed, the prosecutor will set a date for trial. It is the investigating officer’s job then to subpoena all the witnesses so that they are at court on the day of the trial.

**Role Of The Police**

- Listen to complaint
- Open docket
- Take statement from complainant
- Organise medical examination
- Arrest of accused
- Statements from other witnesses
- Investigation
- Subpoena witnesses

## 4. THE COURT

The prosecutor’s first introduction to the case will be via the docket. The prosecutor will receive the docket and monitor the investigation. For instance, if there are certain aspects that have not been investigated, they will then instruct the investigating officer to do so.

When preparing for the case, some prosecutors may organise to consult with the child before the trial, while others will only meet the child on the morning of the trial. This will depend on the time and infrastructure available to the prosecutor, as well as the details of the particular case and the distance the child is required to travel to be at court. For instance, if the victim in the case is only three years old and very withdrawn, the prosecutor may decide to meet the child on a number of occasions before the trial.

A typical consultation will take place in the prosecutor’s office. In some areas, prosecutors do not have their own offices and then they consult wherever they can find a place.

**Purpose Of Consultation**

- To find out what the child says happened
- To understand the dynamics of the particular case
The prosecutor will have to lead the child’s evidence in court, and for that reason they need to know exactly what the child has to say. They will also, at this stage, check to see whether the child’s story corresponds with the statement made by the child. Also, the prosecutor has to draw up the charge sheet, and therefore has to check the details of what happened to make sure the charge is correct. The charge is a formal declaration of what the accused is alleged to have done.

When the consultation is complete, the child will have to wait until called to testify. A witness, who has to testify, may not wait in the courtroom, so the child will have to wait elsewhere. This could be in a special waiting room, if there is one, or in the passage outside the courtroom, or sometimes even in the prosecutor’s office. The child is a witness so is not allowed to be in the courtroom when other witnesses are testifying. If the accused is not in custody, they will in all likelihood also be waiting in the passage outside the courtroom.

The trial will then take place, with all the witnesses testifying, one after the other. This can take anything from one day, to a couple of days, to weeks, to months. Postponements can occur in the middle of a trial, if witnesses aren’t available or if the court role is already booked up.

If the accused is acquitted, then the process ends there. If, however, the accused is convicted, then they will have to be sentenced. The sentencing of the accused is like another mini trial. The prosecution gets an opportunity to call witnesses in aggravation of sentence and then the defence gets an opportunity to call witnesses in extenuation. In some instances, the witnesses may be recalled in the sentencing phase to testify about the effect that the crime has had on their lives, which means that they then testify twice. The presiding officer will then decide on the sentence that is to be imposed, once they have taken all the factors into consideration.

5. CORRECTIONAL SERVICE

If any sentence of imprisonment has been imposed, then it is obviously necessary that this punishment is enforced. This is where correctional service comes into play. Where an accused has been sentenced to a term of imprisonment, they will be transferred to a prison and fall under the responsibility of correctional services. Sentences of community service will be monitored by correctional service, and issues of parole and the parole board all fall under their control.

6. THE ACCUSATORIAL SYSTEM

Modern systems of criminal procedure are divided into 2 models, namely the accusatorial model and the inquisitorial model. The accusatorial system originated from the earliest form of litigation where confrontation between two parties before an impartial arbiter replaced vengeance. The inquisitorial model originated from the Middle Ages where the judges themselves investigated the case. Namibia follows an accusatorial system of procedure which is based on the presiding officer making a comprehensive and complete analysis of the offence by integrating all the available evidence.

Features Of Accusatorial System

- Passive presiding officer
- Two opposing parties
- Cross-examination
- Rules of evidence
Passive presiding officer: The role of the judge or magistrate is mainly passive. They have to listen to the evidence that is presented by the two parties, and must then make a decision, based on that evidence. The presiding officer is very much like an umpire, who must remain neutral and not favour any side.

Two opposing parties: The trial itself is party-centred. There are two parties and each party must present its case. The parties play an aggressive role in presenting and examining evidence. The prosecution must present all relevant evidence to the court to prove the accused's guilt. The defence, on the other hand, is entitled to "fight for acquittal with all legitimate means". This means there are 2 parties "fighting" each other, which makes the proceedings very combative in nature. The concept of two opposing parties fighting a battle pervades the trial, with each side calling their own witnesses and attacking the witnesses of the other party by means of cross-examination.

Cross-examination: In the accusatorial trial, there is a distinction between evidence-in-chief and cross-examination. Once a witness has testified, the opposing party has the right to cross-examine the witness. Cross-examination is so crucial that evidence will be excluded if it cannot be cross-examined.

Rules of evidence: The accusatorial model has a very formalistic and rigid adherence to the rules of evidence. The emphasis is on the admissibility of evidence. There are strict rules which exclude certain types of evidence e.g. competency rule, hearsay evidence, and cautionary rule. So this system provides the framework within which all court procedures have to operate.

7. TRIAL PROCEDURE

There is a set procedure that has to be followed in every criminal case. In very simplistic terms the procedure could be described as follows:

### Trial Procedure

- Charge read to accused
- Accused pleads
- State addresses court
- State calls witnesses
- Defence cross-examines witnesses
- State closes case
- Defence addresses court
- Defence calls witnesses
- State cross-examines witnesses
- Defence closes case
- Parties address court
- Court gives verdict
- Sentencing if conviction

For ease of understanding, the procedure has been set out in a series of steps, examining first the situation where the accused pleads not guilty and then where the accused pleads guilty.
8. PLEA OF NOT GUILTY

Reading of Charge

A criminal trial begins when the prosecutor reads the charge that is being made against the accused to the court. The purpose of this is to inform the accused of the allegations against them as well as to provide the magistrate with details of the charge. The charge will set out what the accused is alleged to have done.

Accused pleads

Once the charge has been read, the accused is given an opportunity to plead. They have two options: guilty or not guilty. If the choice is guilty, the accused will be asked if they wish to make a statement, outlining the basis of the defence. The accused does not have to make such a statement and can choose to be silent. A statement could perhaps be that the accused pleads not guilty to the charge of rape but admits that sexual intercourse took place, although it is alleged that it was with the full consent of the complainant.

State addresses the court

Once the accused has pleaded not guilty, it is the turn of the prosecution to present their evidence. The prosecutor will begin by addressing the court. This basically means that they will tell the court what they plan to do i.e. that they intend to prove that the accused committed the rape and that they will call the following witnesses to prove this.

State calls witnesses

The prosecutor then calls the first witness. The witness must take the oath before being allowed to testify. The prosecutor will then lead the witness’s evidence. This is done by asking the witness questions so that the presiding officer can hear everything that happened. In cases of sexual assault, the questions are very intimate and very personal. The reason for this relates to the elements of the crime. For instance, in cases of sexual violence, the prosecution will have to prove certain intimate details and will require detailed information about the sexual assault. So, the prosecutor will have to get the witness to tell the court this information. When the prosecutor has placed all the evidence of the witness before the court, they will stop asking questions and sit down.

Defence cross-examines witnesses

It is now the turn of the accused or their legal representative to ask the witness questions. This is known as cross-examination, the purpose of which is to test the truth of the witness’s version.

Re-examination by State

When the defence is finished asking questions, the prosecutor has a turn again to clear up any problems that may have arisen in cross-examination. No new evidence is introduced at this stage. Thereafter the witness is finished and can leave. The prosecutor will then call the next witness and repeat the process. When the prosecution have called all their witnesses, they will inform the court and close their case.

Defence case

The defence then have a turn to present their case to the court. They have an opportunity to address the court and lay the basis of their defence.
Defence calls witnesses

The accused has a right to call witnesses, and also has the right to testify if they wish. The accused cannot be forced to testify, but if they do choose to do so, then they must be cross-examined by the prosecution. The same procedure is followed as with the prosecution above, except the parties are now reversed. So the defence will call their witnesses and lead their evidence.

State cross-examines witnesses

The prosecution will then cross-examine the witnesses to raise doubt in the defence's case.

Re-examination by the defence

The defence now has an opportunity to clear up any confusion that may have arisen during re-examination. Thereafter the defence will close their case.

Closing arguments

The prosecutor and the defence lawyer each get an opportunity to address the court on whether the accused should be convicted or acquitted. The prosecutor will usually address the court, arguing that the accused should be found guilty whereas the defence will set out the reasons why the accused should be acquitted.

Verdict

The presiding officer must then make a decision as to whether the accused is going to be convicted or acquitted, and must give reasons for so doing. This is known as a judgement. If the accused is acquitted, he/she will be released immediately and the trial is over. Where the accused has been found guilty, he/she will have to be sentenced.

Sentencing

The sentencing procedure can be likened to a mini trial. Each party has an opportunity to call witnesses and lead evidence about an appropriate sentence. The prosecution will usually argue that the accused be given a heavier sentence, and will call witnesses to justify this. The defence, on the other hand, will argue that the accused should be given a more lenient sentence, and will call witnesses to justify this. The presiding officer, having heard both sides of the story, will then have to impose an appropriate sentence, which can vary from a fine to direct imprisonment.

9. PLEA OF GUILTY

When the accused pleads guilty, there is no need for a trial. The prosecutor will read the charge to the court, and the accused will be given an opportunity to plead. If the accused pleads guilty, the prosecutor no longer has anything to prove. The presiding officer will take over the proceedings and ask the accused questions to make sure that they are in fact guilty. If the presiding officer is satisfied that the accused is guilty in terms of the elements of the crime, the latter will be found guilty. Thereafter the proceedings will go straight to the sentencing phase, and the presiding officer will have to impose an appropriate sentence.
10. ACCOMMODATIONS FOR CHILDREN

Section 158A of the Criminal Procedure Act 51 of 1977 provides for certain accommodations for children and other vulnerable witnesses. The court has the discretion to make an order that special arrangements be made for the child to testify. These include:

- the relocation of the trial to another location while the child’s evidence is being heard
- the rearrangement of the furniture in the courtroom
- the removal from or addition of certain furniture to or from the courtroom
- a support person to accompany the child while the latter testifies
- allowing the child to testify behind a screen or in another room which is connected to the courtroom by means of closed-circuit television or one-way mirror
- any other steps that in the opinion of the court are expedient and desirable in order to facilitate the giving of evidence by the child

The support person is allowed to stand or sit near the witness and to give such physical comfort to the witness as may be desirable and is allowed to inform the presiding officer that the witness is experiencing undue distress. The support person, however, is not allowed to assist the child with the answering of a question.

READING LIST

AIMS

• To highlight the problems that are inherent in conducting a consultation with a child witness
• To examine the preparation that is necessary in order to conduct a consultation with a child witness
• To explain how to conduct a consultation with a child witness
• To highlight problematic interviewing techniques

OUTCOMES

• The participant will be aware of the problems that are encountered when consulting with a child witness
• The participant will know how to prepare for a consultation with a child witness
• The participant will be able to conduct a consultation with a child witness
• The participant will be aware of problematic interviewing techniques

1. Introduction
2. Problems With Interviewing Children
3. Pre-Interview Preparation
4. The Setting For The Interview
5. Establishing Rapport
6. Conducting The Interview
7. Sexual Slang Words
8. Problematic Interviewing Techniques
1. INTRODUCTION

It is the role of the prosecutor to interview a witness before the witness testifies in court. This is when the prosecutor makes a decision as to whether the witness will be called at the trial or not. This decision of the prosecutor, based on such a pre-trial interview, will obviously have far-reaching effects, and can in certain circumstances lead to a case being withdrawn if the child is unable to give evidence and there are no other witnesses available.

Since the statements made by the child in the course of such an interview will often, especially in abuse cases, be the only evidence available to the prosecution, the interview is of critical importance. The quality and reliability of a child’s evidence will be influenced to a great extent by the skills of the interviewer. The interviewer will have to conduct the interview with expertise and sensitivity.

**Purpose Of Consultation:**

To enable the child to give a coherent and unbiased account of the events experienced

It would be impractical to set out guidelines for the so-called ‘correct interview’, since the interview deals with children and no two children will react the same way in a given situation. Much depends on the personality and age of the child. If, for instance, the child is shy, certain skills will have to be employed to elicit the necessary information from them. Although the perfect interview method does not exist, abundant research has been conducted on interview techniques and general guidelines have been compiled on how to conduct legally acceptable interviews.

Generally, in criminal cases, it is the role of the prosecutor to interview the child since the prosecutor has the right to call witnesses as the dominus litis. This means that the prosecutor is the “master of the trial” and is the person who is in charge of the case. It is, therefore, the prosecutor who decides who to call as a witness in the case, so an interview with the witnesses will have to be conducted before the trial in order to make this decision. The child witness has information which the interviewer needs in order to go to trial. For instance, in a sexual abuse case, the prosecutor will have to find out what actually happened to the child and establish whether the child will be competent to testify. The purpose of the pre-trial interview then is to obtain such information without in any way influencing the child’s testimony, and then to prepare the child for what will follow at the trial.
2. PROBLEMS WITH INTERVIEWING CHILDREN

There are a number of problems encountered when trying to obtain information from a child, especially where the information relates to allegations of sexual abuse. These include language issues, which often makes communication difficult, and issues relating to trust and security. Children also experience embarrassment and may have difficulty communicating because of this. Children are exposed to stress and are even traumatised by a court appearance.

Why Are Children Reluctant To Talk About Sexual Abuse

- Fear
- Limited vocabulary
- Embarrassment
- Child’s developmental level

Fear

In cases of sexual abuse, fear is often one of the biggest stumbling blocks to communication. Often children have been threatened that if they ever tell anyone, they will be hurt or go to jail or may even be threatened with death. Where the abuse is of an intra-familial nature, the child may be afraid to lose the affection of the perpetrator. The child may not want to be responsible for sending the perpetrator to prison, or may be afraid to break a promise of secrecy. Disclosure may create a dilemma for the child, who may feel that it is better to have the affection of the perpetrator, despite what this may entail, than to have no affection at all.

Ignorance also leads to fear. Children may think that they themselves will be prosecuted or may even go to jail. They may fear being removed from their family. Misconceptions about the court process and the role-players may create difficulties for children, and could contribute to the fears which they already have. These negative emotions seem to be related to their perception that courts are bad places for bad people and that they would go to jail if they were not believed.

Fear can be all-encompassing to a child. It is important for the person interviewing the child to acknowledge these fears and address them in some way. For instance, an introduction by the prosecutor and an explanation of their role may assist in correcting the perceptions which children have.

Communication

It is essential for a prosecutor to be able to communicate with the child witness since it is necessary to establish the specific details of the offence. An understanding of language development and the problems children experience with regard to communication are vital for conducting successful interviews with children.

Most children do not have a vocabulary which is sophisticated enough to discuss the details of sexual abuse. They may not know the correct terms for the body parts or the actions. For instance, a young child may say: “He put his willy in my bum”. This could mean that the perpetrator inserted his penis into the child’s anus, or that he inserted his penis between the child’s legs from behind. Young children would not be able to distinguish between these actions as they do not know what anal penetration feels like, unless, of course, they have experienced it previously. It is, therefore, important for the prosecutor to establish a common language base with the child and pursue those statements that appear to be unclear.
Embarrassment

Open discussions of sexual matters are regarded as inappropriate in our society. From a young age, children learn not to touch themselves in public, not to talk about private parts and not to appear before others naked. It is, therefore, difficult for children suddenly to make a paradigm shift and talk to strangers about intimate sexual matters.

Children who have been abused are also embarrassed by the fact that others may come to know the details of what happened to them. Friends and siblings can be very cruel, and abused children may be concerned that they will be teased by them. Children who have been sexually abused by a person of the same sex may fear the embarrassment of being labeled homosexual.

Children may also find it too embarrassing to point to the sexual parts on their own bodies when describing what happened. The use of anatomically detailed dolls or anatomically detailed drawings may assist in overcoming these barriers to some degree.

Child development

Children progress through a series of stages in their development with each stage being seen as a progression and being defined by the emergence of a different level of thinking. An understanding of these different stages is important in order to recognise and explain the inconsistencies and confusions that arise in children’s reports.

For instance, a 4-year-old would normally be in the pre-operational stage of development. One of the characteristics of this stage is that the child does not have the ability to reverse actions. This makes it impossible for them to understand kinship relationship, and they would, therefore, not be able to answer questions relating to this.

In order to combat these problems, it would be important for a prosecutor to have a good understanding of child development. A prosecutor needs to know what children understand, how they view their world, and how they may interpret questions. This information is contained in the section on child development above.

3. PRE-INTERVIEW PREPARATION

In order to conduct a successful interview, the interviewer has to be well-prepared. This begins with the gathering of background information. Knowing something about a child and their family can provide valuable information that can assist the prosecutor in communicating with the child.

In order to communicate as effectively as possible with a child, it is necessary to put the child at ease. The child is being forced to share very intimate details with a stranger, and may be afraid and embarrassed. If the prosecutor has background information about the child and their family, it can make the interview a lot easier for both of them. It may be more difficult to develop rapport when the interviewers know little or nothing about the child’s family and social life.
Background Information

- Gather information about:
  - The allegation
  - Child’s family background
  - Friends/ pets

- Obtain information from
  - Police docket
  - Investigating officer
  - Parents/ caregivers
  - Social worker’s report

The amount and type of pre-interview preparation varies, depending on the circumstances and the available resources. Collecting background information can take time, but the effort is well worth it. The prosecutor may only have one opportunity to create an environment which will be conducive to free and comfortable information, and the more information available, the easier the task will be.

The background information obtained about the child’s hobbies and friends can be used to develop rapport with the child. It provides very valuable information for predicting what will be needed to prepare for the interview. For instance, a child who has made a spontaneous disclosure will be approached differently to a child who has made an accidental disclosure.

Gathering necessary background information will also assist the prosecutor in preparing for trial. The prosecutor will be able to evaluate any possible motives for false allegations and gather evidence to disprove these before the defence has an opportunity to attack the child in that regard.

Interviewing tools

It is helpful to have certain toys available that may assist in rapport building and communicating with the child. Young children have different attention spans and may lose concentration quite easily. In this situation, it is very helpful to have certain toys available that can be used to redirect the child’s attention back to the interview.

Interviewing Tools

- Paper (to write or draw)
- Colouring books
- Pencils and crayons
- Modelling clay or play dough
- Anatomical dolls
- Anatomical drawings
Colouring and drawing are very good activities for rapport-building. The prosecutor can chat about the picture the child has drawn or coloured in (not abuse-related). This will give the child an opportunity to relax and enable the conversation to flow a little easier. It also provides the child with some release for nervous energy. Drawings can also be used later in the interview if the child needs to explain or demonstrate certain details relating to the abuse. The anatomical dolls can also be used later in the interview if the child needs to clarify body parts, or if the child is too embarrassed to point out areas on their own body.

Too many toys can become distracting and may entice the child away from the actual interview. Having the necessary toys available makes it easier to respond to the child’s particular communication style and provides flexibility where this may become necessary in the course of the interview.

4. THE SETTING FOR THE INTERVIEW

Once the necessary background information has been gathered, the interviewer is now in a position to determine the setting for the interview. The location of the interview will obviously play a role in the interviewing procedure, since it should be conducted at a place where the child is able to feel relaxed and communicate with ease.

Privacy is a key factor in choosing a place for the interview to be conducted. Children will be reluctant to share intimate details if they think anybody else may be able to hear them. Also, if there is a lot of activity going on around, the child may be easily distracted and not concentrate on the questions being asked.

There are a number of locations that can be used for consulting with a child witness and there are different advantages and disadvantages to each of these. In practice, consultations take place at the child’s home, the child’s school or the prosecutor’s office. Where a very young child is concerned and the abuse is not of an intra-familial nature, the home may be a better setting for the interview, especially where the child has a strong attachment to a parent. The home is usually viewed as the least desirable location for an interview, because there is very little control over the environment. Even parents who are supportive may be hesitant about their child being interviewed or may disrupt the interview by constantly interrupting. The close proximity of parents may inhibit children from making full disclosures. Children do not like to discuss sexual matters in the presence of their parents. Older children may be embarrassed to admit that they are sexually active and thus lie about certain details.

A school is also not considered to be a conducive setting for an interview. Children are afraid that others may come to know what has happened to them. Locating an interview at a school adds to the child’s fear and embarrassment that teachers and friends will discover what happened.

In practice, pre-trial interviews are generally conducted in the prosecutor’s office or, if one is not available, in a vacant office or room in the court building. The child is usually brought to the prosecutor’s office by the investigating officer, often together with a parent or caregiver.

The optimal environment for interviewing would be a location specifically set up for that purpose. It is also important to have a place where the child can wait until the consultation begins. Prosecutors have heavy caseloads and are not always immediately available. It is, therefore, necessary for children to wait in a place where they feel safe and secure.
5. ESTABLISHING RAPPORT

The purpose of the consultation is to obtain as much information as possible. The interview should also be conducted in a manner that is sensitive to the needs of the child. The first phase of any interview is the development of rapport between the child and the interviewer.

Rapport

The positive relationship between the interviewer and the child that sets the tone for the interview and helps increase both accuracy and amount of information

When an interviewer meets a child, their attitude towards the child will be of the utmost importance and will affect the way the child reacts to the interviewer. It is extremely important that the prosecutor establishes a level of trust and communication. This is achieved by being aware of and being able to respond to the welfare of the child and their particular needs, fears and expectations.

What To Do During Introductions

- Build rapport
- Chat to child about inconsequentials
- Be patient
- Be aware of physical presence/authority
- Do not sit too close to the child
- Be aware of own body language
- Be sensitive to child body language

Ground rules

In order to ensure that the child knows what to do and how to behave, it is essential that the ground rules of the interview be explained to the child. This provides security for the child and enables the child to provide greater co-operation. Children should be informed that if they do not understand a question, they must inform the prosecutor. If they do not know the answer to a question, they must say 'I don’t know'.

There are no standardised instructions for interviews of this nature. When explaining the ground rules to the child, the prosecutor needs to be sensitive to the child’s age and development, and should use appropriate language.
“If I ask you about something you don’t remember, I want you to say ‘I don’t know.’ If I ask a question that you don’t understand, I want you to tell me that you don’t understand, OK? For example, suppose I asked you to tell me my dog’s name. Can you tell me my dog’s name? That’s right, you don’t know my dog’s name, so ‘I don’t know’ is the right answer. Sometimes you might have to think about a question for a bit. You don’t have to answer right away.”

Truth and lies

Children who testify in court will have to demonstrate an understanding of truth and lies before they are allowed to testify. Prosecutors may want to determine whether the child can distinguish between these concepts, and also emphasise the importance of telling the truth. Instructions must be modified to accommodate the particular child’s level of cognitive development.

“I meet with lots of children and during our discussions they tell me the truth about things that have happened to them. I want to make sure that you understand the difference between the truth and a lie: If I said that I’m wearing shoes, is that the truth or a lie?”

Time

The interviewer requires time to develop a relationship. It is not possible for a prosecutor to step quickly into a room where a child is waiting, and then to ask a few questions to get a general idea whether the child will be able to testify or not. Children who have been abused have difficulty sharing their experiences with strangers, and the quality and quantity of information provided will depend on the time taken to develop rapport and trust with the child. Many prosecutors believe that if they cannot get a clear account from the child within the first hour, then the child will not be able to testify. Some children may require more than one interview to build rapport and confide in the prosecutor.

6. CONDUCTING THE INTERVIEW

The interview structure suggested here is based upon the phased approach of interviewing, which has been accepted by various courts as a legally acceptable method of interviewing children. The phased approach treats the interview as a process in which a number of interviewing techniques are used in phases, proceeding from general and open to specific and closed forms of questioning. The adoption of this method of interviewing should by no means be taken to imply that other techniques are unacceptable. It is simply that this method of interviewing provides a sound legal framework within which to work. However, it is important that the interviewer proceeds from the first phase through to the last, and that this sequence is maintained.
Free narrative account

Once sufficient rapport has been developed between the child and the prosecutor, the child must then be encouraged to provide an account of the alleged incident in their own words and in their own time. This can be accomplished by the use of transition statements or questions such as asking, for instance, the child if they know why they are there. The purpose of this phase is to obtain information from the child that will be spontaneous and free from the interviewer’s influence.

The role of the prosecutor here is very like that of a facilitator who helps the child to tell what happened. This is done by using general, open-ended questions.

Open-Ended Questions

These are questions which require the child to provide information without being specific

- “Why do you think you are here today?”
- “Can you tell me what happened?”

It will be necessary to provide prompts from time to time, but these should be appropriate and open-ended. The focus here is to encourage the child to provide a spontaneous account in their own words. It is important that prompts do not include information which the interviewer is aware of, but which the child has not mentioned.

Non-Leading Prompts

- “And what happened then?”
- “Tell me more about that”
- “What did you do then?”

Interviewers should be sensitive to any pauses or silences and resist the need to speak as soon as the child stops. They should avoid interrupting the child as this may cause information to be lost. As this consultation is a forensic interview, it is important it remain neutral. This relates not only to what is being said but also to facial expressions and inflections of the voice. The prosecutor has to be very wary of indicating, whether consciously or unconsciously, any form of approval or disapproval of what the child has said.

Questioning

Once the child has been given an opportunity to tell their story in their own words, the prosecutor can then ask questions to clear up any issues that may have arisen. This phase consists of three stages of questioning and the interviewer is given the opportunity to move from open-ended questions through to closed questions.
Questioning

4. Open-ended questions
   - Non-leading questions
   - Open-ended
     - "Can you tell me what happened."

5. Specific yet non-leading questions
   - Questions to clarify information
   - Does not presuppose an answer
   - "What was he wearing?"

6. Closed questions
   - Gives limited number of alternative responses
     - "Were the pants blue or brown?"

Closed questions should be used with great care as these are very similar to leading questions. These questions severely limit the child’s options to reply and may, therefore, not be a method of eliciting truly informative replies.

Closing the interview

The consultation should always end on a positive note, with the child being thanked for the co-operation and for providing the information. The child should be made to feel that a positive contribution has been made, whether the interview was successful or not.

The prosecutor should also provide simple, straight-forward information about what will take place after the interview so that the child understands clearly the steps that will follow. This would include information about the date of the trial and what will happen next.

The prosecutor should return to the rapport phase and chat about some neutral topics that were raised earlier. The child should also be given an opportunity to ask questions and the prosecutor should answer these in an appropriate manner.

7. SEXUAL SLANG WORDS

Children use different terms for different body parts and their sexual functions. For instance, ‘bumps’ could be used to describe breasts and ‘fanny’ could refer to either the vagina or the buttocks. This can give rise to issues of comprehension, as in the word ‘fanny,’ which can be used to refer to either the vagina or the buttocks. It is important to use the child’s term as much as possible and not to correct it, otherwise the child will sound rehearsed by the time they testify and will use terminology that does not appear appropriate to a child of that age.

Children are not very precise in their choice of words and may use a term for sexual intercourse to describe genital fondling or any kind of penetration. Therefore, a young child who says, “he had sex with me”, may not be referring to sexual intercourse – they may simply be referring to an incident of digital penetration. It is, therefore,
very important to clarify exactly what the child means when using sexual slang words. The child has to identify the parts of the body they are referring to and must be assisted in this task without any leading or suggestive terminology being used.

### Naming Of Body Parts

- Anatomically detailed drawings
- Anatomically detailed dolls
- Discussion

## 8. PROBLEMATIC INTERVIEWING TECHNIQUES

The main aim of an investigatory interview is to gather information which is as true a representation of the child’s experiences as possible and which is not subject to contamination.

Contamination occurs when the child’s memory of the events is interfered with in any way. This can happen as a result of poor interview techniques, inappropriate behaviour on the part of the interviewer and an unfavourable interview environment.

### Interviewer bias

The information which a child offers in an investigative interview may become distorted due to the behaviour of the interviewer.

### Interviewer Bias

- Personal assumptions
- Reinforcement
- Repeated questioning
- Authority

The personal assumptions held by an interviewer can permeate an entire interview. If an interviewer believes that abuse has taken place, then only questions will be asked that are directed at proving that the abuse did, in fact, take place.

Children are sensitive to approval and will behave in a manner that causes them to be rewarded. Interviewers may consciously or unconsciously display these techniques. A tone may inappropriately demonstrate the approval of what the child has said. A child who is unsure, may attempt to please the interviewer and respond to these demonstrations of approval. Reinforcement can be both verbal and non-verbal. Verbal reinforcement would include praise. Praise is verbal approval of the child and needs to be used judiciously in the course of an interview, since there is a danger that the child may respond in a particular manner to gain the approval of the interviewer. Non-verbal responses are cued by tone of voice, body movements and expressions. This could include withdrawing from the child, using a cold or neutral tone of voice, avoiding eye contact and ignoring the child’s responses. It is essential for an interviewer to remain neutral when conducting an investigative interview and to be aware of any emotional reactions which may influence the child’s disclosures.
Repeated questioning occurs when a child denies that anything has happened and the interviewer keeps repeating the question until the child finally affirms the abuse. When a question is repeated, children tend to change their replies. This could be attributed to their need to please, lack of confidence or the child may simply be too tired to argue and wishes to terminate the interview.

Children are very sensitive to the authority of adults and will succumb to power and status, thus increasing their suggestibility. This becomes even more pronounced when cultural issues are involved.

Leading questions

Leading and/or suggestive questions should be avoided since they cast suspicion on any information the child may provide. Leading questions are those which give an indication of what response the questioner wants to hear. Interviewees are often vulnerable, especially when they are complainants in a sexual matter. They may respond with the expected answer in order to be helpful because they are confused or frightened. The witness may be too unsure to contradict the interviewer. This is especially true of children. A further danger of using leading questions is that it can incorporate into the child’s mind information and ideas that the child did not previously have. It has been argued that children may assimilate the suggestive information and may subsequently incorporate it into a statement concerning the allegation.
READING


READING AVAILABLE ONLINE

AIMS

• To examine the information available on the competency examination of a child witness
• To introduce a developmentally appropriate test for assessing the competency of young children

OUTCOMES

• The participant will understand what a competency examination is and what the legal consequences thereof are
• The participant will be able to assess the competency of a child using a developmentally appropriate test

1. Introduction
2. The Oath
3. Unsworn Evidence
4. Cognitive Development And The Competency Examination
5. Improving The Competency Examination
1. INTRODUCTION

Determining the competency of a child is a very difficult task, and it has serious ramifications. In cases of abuse, the child is very often the only witness to the incident, and a finding of non-competency will, in effect, amount to an acquittal. This results in a further lack of trust on the part of society, who is campaigning for an increase in the conviction rate of crimes which are perpetrated against children.

In addition, the competency examination itself has given rise to many difficulties. There is no standard examination provided, which means that judicial officers are required to determine competency on a set of questions they have come to accept through practice rather than scientific enquiry. This matter is further exacerbated by the fact that a competency evaluation falls within the parameters of psychology, and judicial officers have no experience in this regard.

This has given rise to the argument that the competency requirement in the case of child witnesses acts as an exclusionary mechanism, since the witnesses who are most often affected by the exclusion are the ones targeted as victims of sexual offences. Children, who are excluded by the competency examination because of their youth or mental disability, are usually targeted by perpetrators of sexual offences, because they are aware that these children will not meet the threshold of being found competent.

The general rule in most jurisdictions is that all witnesses are considered to be competent unless there is evidence to the contrary. This would include children. However, witnesses are required to testify under oath, which means they must understand the meaning of the oath and its legal implications. This becomes problematic in the case of children as presiding officers must then determine whether the child understands the concept of an oath. Where the child does not understand the concept of the oath, the child may testify under warning. The court must warn the child to tell the truth. In order to do this, the court will have to enquire whether the child understands the distinction between truth and lies.

**Test For Competency**

- Understanding oath
- Understanding distinction between truth and lies

The competency of the child witness relates to the child’s ability to differentiate the truth from a lie and the ability to understand the duty to tell the truth and the consequences of not doing so. A child will be considered to be a competent witness, if, in the opinion of the court, the child understands what it means to tell the truth. The child may then give their evidence either sworn or unsworn, depending upon whether in the opinion of the court they can understand the nature and religious sanction of the oath. There is no fixed age at which children become competent witnesses. Rather, the courts deal with each case on its own merits.
2. THE OATH

The first step in the competency examination is for the presiding officer to determine whether the child witness understands the nature of the oath. This is governed by section 162 of the Criminal Procedure Act 51 of 1977 which provides that all witnesses who testify in court proceedings have to do so under oath.

162. Witness to be examined under oath

(1) Subject to the provisions of sections 163 and 164, no person shall be examined as a witness in criminal proceedings unless he is under oath, which shall be administered by the presiding judicial officer or, in the case of a superior court, by the presiding judge or the registrar of the court, and which shall be in the following form - “I swear that the evidence that I shall give, shall be the truth, the whole truth and nothing but the truth, so help me God.”

(2) If any person to whom the oath is administered wishes to take the oath with uplifted hand, he shall be permitted to do so.

The oath is a solemn promise to tell the truth with a reference to God, although in terms of section 163 an oath can be taken under affirmation which is binding on one’s conscience without a reference to God. For the child, there needs to be an understanding that the oath is a very serious promise and that negative consequences will emanate from lying. It is irrelevant from where the punishment will come. It could emanate from God, the judge, the police or a parent. It is sufficient that the child believes in punishment, it does not matter what the punishment is. It would, therefore, seem that an understanding of the nature of the oath involves an appreciation of the seriousness of the occasion and of the duty to speak the truth.

The inquiry

Before a child can be allowed to take the oath, the presiding officer must conduct an inquiry to determine whether the child understands the nature of the oath. An understanding of the nature of the oath entails not only an understanding of the religious obligation of the oath, but also an understanding of the meaning of the truth, which is the subject of the oath, and the difference between speaking the truth and falsehood. The presiding officer must then conduct some form of an inquiry that will elicit the above information. The purpose of the inquiry is to determine the witness’s understanding of the oath. There is no prescribed format for such an inquiry, and questions are simply based on tradition and experience. After the inquiry has been conducted, the court must make a finding before a child can be allowed to give unsworn evidence.

3. UNSWORN EVIDENCE

It used to be the position that children, who did not understand the nature of the oath, were incompetent witnesses. However, in many jurisdictions, statutory amendments have been introduced which enable children to give unsworn evidence. In terms of these amendments a witness may, nevertheless, be competent even if he or she does not understand the nature of the oath, provided that he or she has been admonished to speak the truth. This is contained in section 164 of the Criminal Procedure Act 51 of 1977.
164. When unsworn or unaffirmed evidence admissible
(1) Any person— (a) who, from ignorance arising from defective education or other cause, is found not to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation; and (b) who is younger than 14 years shall be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation: Provided that such person shall in lieu of the oath or affirmation be admonished by the presiding judge or judicial officer to speak the truth, the whole truth and nothing but the truth.
(2) If such person wilfully and falsely states anything which, if sworn, would have amounted to the offence of perjury or any statutory offence punishable as perjury, he shall be deemed to have committed that offence, and shall, upon conviction, be liable to such punishment as is by law provided as a punishment for that offence.
(3) Notwithstanding anything to the contrary in this Act or any other law contained, the evidence of any witness required to be admonished in terms of the proviso to subsection (1) shall be received unless it appears to the presiding judge or judicial officer that such witness is incapable of giving intelligible testimony.

The section provides specifically that children under the age of 14 are able to give evidence without taking the oath, on condition that the child shall, in lieu of the oath, be admonished to speak the truth, the whole truth and nothing but the truth. The basis of giving unsworn evidence is the ability to understand what it means to speak the truth. The child must, therefore, have the ability to distinguish between truth and lies and must be able “to recognise the danger and wickedness of lying” in order to be competent to give unsworn evidence.

In each case the presiding officer must determine whether a child has the capacity to distinguish between what is true and what is false. In order to do so, the presiding officer will have to hold an inquiry. This can be done by simply questioning the child or by holding a trial-within-a-trial at which witnesses can give evidence regarding the child’s mental capacity.

There are no clear rules or questions that must be asked to determine, whether the child understands what it means to tell the truth. There are no official rules, practice directions or practitioners’ guidelines on the subject. Children are usually asked questions concerning the difference between the truth and a lie, i.e. why is it wrong to tell lies, what age are you, where do you live? In fact, it seems to be a matter of common sense and experience. Since it is the presiding officer who must determine whether the child witness is able to distinguish between truth and lies, the content of the inquiry will remain in their discretion.
4. COGNITIVE DEVELOPMENT AND THE COMPETENCY EXAMINATION

In terms of section 164 children are required to be able to distinguish between truth and lies. However, the concepts of truth and lies are abstract and, therefore, cognitively inappropriate, which means that children will have difficulty performing the task. If the competency examination is to be effective, children must be questioned in an age-appropriate manner so that they are able to understand the content of the questions. Questions should be as simple as possible.

Testing Truth And Lies

- Defining truth and lies
- Distinguishing between truth and lies
- Identifying truth and lies

One of the crucial elements of competency is the understanding of the difference between truth and lies. The most obvious way of doing this is to ask the child to explain the difference between the two concepts. An alternative method would be to ask the child to define the terms `truth' and `lies'. Another method of showing such an understanding is to ask a child to identify between truthful statements and lies. Research examining children's comprehension of truth and lies has shown that identification of truth and lies is easier than defining the concepts. By the age of 4, children are able to identify correctly whether a statement is the truth or a lie, whereas children are only able to define the concepts from the age of 7. This is consistent with the experience in court where children are able to identify truthful statements and lies, but are unable to explain the difference between the concepts.

Asking children to explain the difference between truth and lies is an unnecessarily difficult task on a cognitive level. It is much simpler to ask the child to define individually `truth' and then `lies'. This makes this task much more manageable, and is related to the difference between recall and recognition memory. Recall requires one to generate what one remembers – this skill improves with age. Recognition, on the other hand, requires affirmation of what one remembers.

For the competency examination, it is also important for children to understand the importance of telling the truth. It is sufficient if the child realises that lying will lead to punishment. And, this is, in fact, the reality. Section 164 provides for lying under admonition and makes it an offence which can result in punishment.
5. IMPROVING THE COMPETENCY EXAMINATION

Although much criticism has been levelled at the competency examination and the manner in which it is conducted, it is not suggested that the examination be completely rejected. The competency examination can serve a number of purposes if conducted appropriately.

Function Of Competency Examination

- Evidentiary function (record of competency)
- Cautionary function (reminder of seriousness)
- Ritual function (establish solemnity)

The following points should be noted when conducting a competency examination with children:

- It is important to determine whether the child can discriminate between truth and lies and whether the child appreciates the duty to speak only the truth. The court is entitled to assurance that the child who is about to testify has acquired the necessary ability to discriminate.
- All questions posed in this inquiry must be concrete, since children under 10 have great difficulty with abstract concepts.
- Presiding officers need to be aware of developmental problems that may arise. For instance, the concept of colour is often used to test whether the child can discriminate truth from lies. This may be appropriate where the child is older, but can give rise to difficulties where the child is young and does not yet have a clear concept of colour. Many children confuse blue and green, for instance.
- Questions must be phrased in a developmentally appropriate manner. Questions like “Why would that be a lie?” are abstract and evaluative and would pose serious challenges for children under 10.
- When the child has shown an understanding of the distinction between truth and lies, it is necessary to determine whether the child is also aware that lying is “wrong.”
- The competency examination should also be an opportunity to instruct the child about the importance of telling the truth. The presiding officer must inform the child that they are expected to answer all questions truthfully.
- It is also an opportunity for the presiding officer to explain to young children the importance of their role as a witness. For instance, the presiding officer could explain to the child that they was not present when the offence occurred and does not have any knowledge of what happened. The presiding officer is, therefore, dependent on what the child has to tell, hence the seriousness of telling the truth.
- The child should also be informed that if the child does not know the answer to any question, they must tell the court and not guess about what may have happened. And the child can be reminded that he/she can say “I don’t know,” “I can’t remember” or “I don’t understand.”
- Obviously, children must be warned that they can be punished if they lie. But this is not meant to be done in a terrifying or heavy-handed manner that would increase the trauma of the court appearance. Rather, the court should in a gentle way instruct the child that telling a lie on purpose is a serious matter which can result in punishment. This can be coupled with an assurance that the child will be protected by the court and does not have to be afraid that harm will come to them if they tell the truth.
- Although the competency examination has come under fire for a number of reasons, it can act as an important opportunity to educate children about their role as a witness.
NAMIBIAN EXAMPLE OF COMPETENCY EXAMINATION OF CHILD WITNESS

S v Bertus Koch Criminal Case 12/2017

WITNESS 1:

COURT:   How are you?
CHILD:  Fine.
COURT:  You are fine. Do you speak English or do you want to speak Damara language?
CHILD:  I want to speak the Damara language, my Lord.
COURT:  Yes, okay. So you listen to the aunty there who is with you and you speak back to her in Damara and she will tell us what you have said.
CHILD:  Yes.
COURT:  How old are you?
CHILD:  I am eleven years old, my Lord.
COURT:  What do you have in your hands?
CHILD:  It is a paper, my Lord.
COURT:  What is a paper?
INTERPRETER:  I think it is a statement, my Lord.
COURT:  Yah, can you put it aside for now.
INTERPRETER:  I thank you, my Lord.
COURT:  Where do you go to school?
WITNESS:  X Primary School.
COURT:  I see. Who is your teacher?
WITNESS:  Ms X, my Lord.
COURT:  Your principal, do you know the name?
WITNESS:  Ms Y.
COURT:  Ms Y, I see. Which church do you go to?
CHILD:  The Lutheran Church, my Lord.
COURT:  Lutheran Church. I see.
CHILD:  That is correct, my Lord.
COURT:  Now in church do you tell about telling the truth??
CHILD:  Yes, my Lord.
COURT:  And what happens to people who do not tell the truth?
CHILD:  You will be punished.
COURT:  Punished by who?
CHILD:  The people.
COURT:  By who? People will punish you?
CHILD:  Yes.
COURT:  Okay, which kind of people is that?
CHILD:  The police.
COURT:  Police. I see. Okay. Now do you know where you are today?
CHILD:  Yes, my Lord.
COURT:  Where are you?
CHILD:  I am in Windhoek.
COURT:  Windhoek, in which building are you now? Do you know what is a court?
CHILD:  Yes.
COURT:  What is a court?
CHILD:  It is a place where the people tell the truth.
COURT:  I see. And if you do not tell the truth, do you know what will happen to you?
CHILD:  Yes, I do.
COURT: Now you are here to tell us what you know about what happened some time ago.
CHILD: Yes.
COURT: Do you still remember those events?
CHILD: Yes, I do.
COURT: And do you promise me that you will tell me only those things that are true?
CHILD: Yes, my Lord.
COURT: And only those things that you know personally and things you did not hear from other people.
CHILD: Yes.
COURT: Now those things you are going to talk about today are the things that you know?
CHILD: Yes, my Lord, it is things that I know.
COURT: And if you tell me things that are not true today, you know what will happen to you?
CHILD: Yes, my Lord.
COURT: What is your favourite subject in school?
CHILD: Math.
COURT: Now who is your Math teacher?
CHILD: Ms Z
COURT: Which grade are you?
CHILD: Grade 4A.
COURT: Yes, okay. Mr D, I think she is sufficiently intelligent to testify in this court and I do not need to administer an oath. I am satisfied that she can tell the difference between the truth and what is not the truth. And I am prepared to take her testimony on that basis.

WITNESS 2:

PROSECUTOR: The next witness is R.
COURT: R.
CHILD: 14 years, my Lord.
COURT: When did you turn 14?
CHILD: Last year December.
COURT: I see. Where do you go to school?
COURT: Yes, which church do you belong to, R?
CHILD: IME, my Lord.
COURT: Where is that church?
CHILD: It is in Swakopmund, my Lord.
COURT: How often do you go to church?
CHILD: A lot, my Lord.
COURT: Oh, very good. Every e for that Sunday?
CHILD: Yes, my Lord.
COURT: So you receive holy communion every Sunday?
CHILD: No, my Lord. Only at sometimes.
COURT: Only sometimes. I see. Have you been confirmed?
CHILD: Not yet, my Lord.
COURT: When are you going to do that?
CHILD: Next year, my Lord.
COURT: But your mother did she tell you you are baptized?
CHILD: No, my Lord.
COURT: I see. Now which grade are you?
CHILD: Grade 8.
COURT: Who is your teacher?
CHILD: Mr M.
COURT: Your principal?
CHILD: Ms I.
COURT: Now, you live with your mother, do you?
CHILD: Yes.
COURT: Your mother, does she tell you what is right and what is wrong?
CHILD: Yes.
COURT: When you do the wrong things, what does she do?
CHILD: She will scold me for that.
COURT: Does she tell you about telling the truth and not telling lies?
CHILD: Yes.
COURT: And when you tell lies, what does she do or say?
CHILD: She will beat me or she will scold me for that.
COURT: So what is wrong with not telling the truth? Talk to me, talk to me. I’m listening. What happens to people who do not tell the truth?
CHILD: You will be punished.
COURT: Who punishes people who do not tell the truth?
CHILD: The Lord.
COURT: I see. So if you do not tell the truth, the Lord will punish you?
CHILD: Yes.
COURT: What type of punishment do you think you will get?
CHILD: That I do not know, my Lord.
COURT: You do not know. What does the Bible tell you? Do you read the Bible?
CHILD: Yes, I do read the Bible, but not that much, my Lord.
COURT: Do you do Religious Education at school?
CHILD: No, not that much, my Lord.
COURT: I see. But you know that if you do not tell the truth, the Lord will punish you.
CHILD: Yes.
COURT: Now if you tell me something that is not true about somebody, do you think that is a good thing.
CHILD: No, it is not good, my Lord.
COURT: Do you know where you are?
CHILD: Yes.
COURT: Where are you?
CHILD: In the court.
COURT: Do you know what happens in court?
CHILD: No My Lord.
COURT: You know, In Court if people are accused of doing certain things in that if somebody comes to Court here and say they did something that did not do, they can be in trouble. Do you understand that?
CHILD: Yes.
COURT: Like for example if somebody says your mother did something which she did not do and she goes to jail for a long time. Do you understand? That is a very serious problem.
CHILD: Yes.
COURT: We also do not want to do the same about other people. Do you understand?
CHILD: Yes.
COURT: Do you promise to do that for me?
CHILD: Yes, my Lord.
COURT: Okay. Yes, I am satisfied that she can testify, taking the oath.

**READING AVAILABLE ONLINE**

LEADING THE EVIDENCE OF A CHILD WITNESS

AIMS

- To examine methods of leading the evidence of a child in court
- To highlight the difficulties encountered when leading the evidence of children in court

OUTCOMES

- The participant will have the knowledge of how to lead the evidence of a child in court
- The participant will be aware of the difficulties experienced when leading the evidence of children in court

1. Leading Evidence
2. Preparing For Trial
3. Leading The Evidence Of The Child Witness
1. LEADING EVIDENCE

Leading evidence, or examination-in-chief as it is also known, is the process of calling witnesses so that their evidence can be placed before the court. The method used for placing evidence before court takes the format of questions and answers. This method enables the party calling the witness, in this instance, the prosecutor, to control what the witness says, thus ensuring order and relevance. It places the burden of presenting complete evidence upon the prosecutor, who has to ensure that all the evidence relevant to the elements of the offence is placed before the court. However, the method in which evidence is led is alien to the layman and witnesses have difficulty expressing themselves in this format. This is particularly so where the witness is a child, who has to contend with developmental and language issues.

The primary purpose of leading a witness is to place the evidence of the witness before the court. There is, however, a further, subsidiary purpose which is rarely acknowledged, and which relates to the emotional impact of the witness's evidence. Not only must the witness's evidence be led, but it must also be led in such a way that the manner of testifying is also persuasive. According to Palmer and McQuoid-Mason, it is a futile exercise to lead the witness “through as dry, stark rendition of his version”. It is necessary to get the witness to paint a vivid, dramatic picture in the mind of the presiding officer.

2. PREPARING FOR TRIAL

In preparation for the trial, the prosecutor will have made a list of the witnesses that are going to be called. They will have analysed the statements of the witnesses and will, hopefully, have consulted with the witnesses. The prosecutor should have a clear idea of what each witness's contribution to the trial will be, and this should also have been highlighted in the opening address to the court.

For each witness called, the prosecutor should have a list of the elements that need to be covered so that they ensure the evidence is placed before the court. This preparation should merely include a list of the points that the witness needs to cover when testifying. It is not suggested that the prosecutor write out all the proposed questions, as this is not only time-consuming, but also tends to blinker the prosecutor to alternative directions of questioning should the witness's answers create new possibilities. If a prosecutor does not have a list of proposed questions, they will focus primarily on the witness and the responses to the questions. This is especially relevant where the witness is a child, because the child may reply in an ambiguous manner to a question posed. It is then necessary for the prosecutor to sort out the ambiguity, rather than focus on a list of proposed questions.

In child abuse cases, it is sometimes not possible to gather all the information necessary to prove the charge from the child and this will have to be led from other witnesses. These points can easily be forgotten in the course of the different witnesses and this can have a devastating outcome.
3. LEADING THE EVIDENCE OF THE CHILD WITNESS

The emphasis here is on the child witness, so the focus here will be primarily on leading the evidence of children. It is suggested that the same interview structure that was used in the consultation be incorporated into the leading of evidence in court.

The essence of examination-in-chief is to lead a witness through a sequence of events from a given point to the culmination of the event.

The witness must be given an opportunity to place their version before the court in a chronological sequence in their own words. Once this has been done, the prosecutor can return to specific events to clarify or highlight particular points.

The first phase of any interview involves the building of rapport. Where a child is a witness, rapport-building is vital. The child is not only intimidated by the court and all that it encompasses, but is also afraid of what is about to happen and whether they will be able to answer the questions.

It is essential that the prosecutor spend a few minutes putting the child at ease. Since one of the primary fears which children have, is that they may not be able to answer questions, the prosecutor should allay these fears by asking the child simple, rapport-building questions that will be easy for them to answer. In this way, some measure of confidence is instilled. Ironically, this form of rapport-building is very often used by the defence at the beginning of cross-examination whereas it is completely ignored by most prosecutors. The prosecutors, after a cursory comment or two, usually go straight into the facts of the case by asking the child to tell what happened.

This is well illustrated in the case *S v Lombardt and Others 17 November 2000, RC5/21/00, Port Elizabeth*. The prosecutor began the examination-in-chief of the ten-year-old witness as follows:

```
P: W, you said that you are ten years old.
W: (no answer)
C: Mr Prosecutor, I think that is established. He has already said that he is ten years old.
P: Yes, that is so (unclear). Is it right that you are ten years old?
W: Yes.
P: And when was your birthday?
W: 16 September.
P: Now, tell me, W, are you at school?
W: Yes.
P: In what standard are you now?
W: Standard one.
P: Now where do you live now?
W: New Jacaranda.
P: I see. New Jacaranda. Is it a block of flats or a house?
W: It is a block of flats.
P: Now, W, have you ever heard of dagga? Do you know what it is?
```
In this excerpt there are a number of problems:

- The prosecutor does very little rapport-building with the child. A few minutes should have been taken to chat to the child about topics that would have made them feel comfortable and in control.
- In addition, there were questions that were developmentally quite difficult, since they focused on concepts of time (“when was your birthday?”) and vague questions relating to place (“where do you live now?”).
- In this instance, the question “where do you live now?” was particularly vague since the child in question had been moved from one foster home to another. Did the prosecutor mean: “with whom do you live?” or “what is the name of the place where you live?”
- The first question put to child was framed in the form of a statement (“you said that you are ten years old”) to which he did not reply. Children do not understand the purpose of statements put to them, and will not reply since they do not perceive it to be a question.

However, in the same case, the defence spent a long time on building rapport with the child:

```
D: W, you must relax completely. You do not have to be scared when I ask you questions. I see you are holding your hand so tightly. Are you scared?
W: (unclear)
D: Alright, fine, then. In which school are you, W?
W: Dr Viljoen.
D: Have you got a Miss or a Sir who teaches you?
W: A Miss.
D: What is her name?
W: Liezel.
D: And her surname?
W: Hayward.
D: Do you like her a lot?
W: Yes.
D: What all do you learn about at school?
W: We learn (unclear) and we read the Bible every morning and we pray.
D: Yes. Do you also do sums at school?
W: Yes.
D: Do you learn about history, also?
W: Yes.
D: Do you play rugby?
W: No, my brother does.
D: In what do you take part? Do you take part in sport? What sport do you do?
W: Cricket.
D: So, are you a bowler or are you a batsman?
W: I bat.
D: You bat. Fine. Are there any other games that you also play at school?
```
Once the prosecutor has developed some form of rapport with the child, he/she can then move to the actual facts of the case. It is important that the prosecutor informs the child at every stage what is happening. This can be done in the form of a simple statement or two, often known as a transition statement: “Are you feeling okay, X? Do you mind if we start talking about what happened to you? I have to ask you some questions now.” Any transition statement that informs the child of what is going to take place would be suitable here.

As in the format for conducting an interview with a child, the prosecutor should then move into the free-narrative stage of interviewing. The need for control of a witness is so great that prosecutors very rarely allow the witness to tell their story. They simply go straight into the questioning phase and determine the line the evidence will take. It is important to allow the witness an opportunity to tell their story in their own words. This is important for two reasons. Firstly, the child may offer more details than the prosecutor actually knows about and, secondly, the child will explain in their own way what happened, thus contributing to their credibility in the eyes of the court.

It is accepted that children are not skilled at providing detail and will, in all likelihood, simply offer an over-summarised version of events. When the child has provided their version of the story, the prosecutor can then go back and start questioning the child in detail. Again, it is essential to inform the child what is happening:

“Now, X, you must remember that we were not there when this happened, so it is a bit difficult for us to understand everything. Okay? I’m going to go back to the beginning and ask you some questions so I can understand better. Okay? If I ask something you don’t understand, please tell me. Then I’ll ask it in another way. Okay?”

This phase takes the same format as the questioning phase in the interview structure. Questions must progress from open to closed. Use should be made of prompts to assist the child where this is necessary e.g. “Can you tell me a bit more about what happened in the room?”

The prosecutor can then proceed to ask the child more detailed questions. It is essential at this stage to focus on communicating with the child. The prosecutor must be vigilant about the manner in which questions are phrased, and must constantly be evaluating the child’s replies to see whether the child has not misunderstood the question. This is an incredibly difficult, but vital, role that must be performed.

All court rules must be obeyed so prosecutors must avoid leading questions. These are particularly dangerous where children are concerned.

**Dangers Of Leading Questions**

- Child may believe he/she is wrong
- Child may be afraid to disagree
- Child may want to please prosecutor
When the prosecutor is satisfied that all the necessary elements of the offence have been covered, the prosecutor can bring the examination to an end. This, again, can loosely be based on the closing phase of interviewing. Explain to the child what is going to happen next and thank the child for their participation.

“X, I have finished all my questions now. Thank you for answering them. The accused/lawyer for the accused is now going to ask you some questions just to make sure he understands everything. Okay?

Credibility is a crucial element in the case of children. Since the courts tend to view children with suspicion, it is the role of the prosecutor to build the credibility of a witness, which in this case will be the child witness. The courts have accused children of lying and not being able to distinguish between fact and fantasy, amongst others. A prosecutor should, therefore, use every opportunity that avails itself to show the court that the witness is capable of distinguishing between truth and lies and is being truthful.

As children are hampered by their cognitive and language abilities, a prosecutor must clarify issues where vagueness and confusion arise and, where necessary, make the court aware where children misunderstand or are confused.
READING


READING AVAILABLE ONLINE

CROSS-EXAMINATION OF THE CHILD WITNESS

AIMS

• To introduce the concept of cross-examination, its purpose and the techniques employed
• To highlight the difficulties that children have with cross-examination

OUTCOMES

• The participant will have knowledge of the purpose and techniques employed in cross-examination
• The participant will be able to identify the techniques that create particular difficulties for children

1. Introduction
2. The Purpose Of Cross-Examination
3. Techniques Used In Cross-Examination
4. The Effect Of Cross-Examination On Children
5. Communicating In An Adversarial Environment
6. The Use Of Language
7. Features Of Lawyer Language That Create Difficulties For Children
8. Conclusion
An accused has the right to a fair trial and this is provided for either in Constitutions, common law or legislation. The right to a fair trial includes the right to confront the person who accuses you as well as the right to cross-examine that person. The right to cross-examine a witness is also contained in specific legislative provisions. As a result, failure to allow cross-examination to take place is a serious irregularity at common law since it will almost always involve prejudice to a party.

The right to cross-examination is a constitutional right and is also contained in section 166 of the Criminal Procedure Act 51 of 1977, which provides that the accused may cross-examine any witness called by the prosecution.

166. Cross-examination and re-examination of witnesses
(1) An accused may cross-examine any witness called on behalf of the prosecution at criminal proceedings or any co-accused who testifies at criminal proceedings or any witness called on behalf of such co-accused at criminal proceedings, and the prosecutor may cross-examine any witness, including an accused, called on behalf of the defence at criminal proceedings, and a witness called at such proceedings on behalf of the prosecution may be re-examined by the prosecutor on any matter raised during the cross-examination of that witness, and a witness called on behalf of the defence at such proceedings may likewise be re-examined by the accused.

(2) The prosecutor and the accused may, with leave of the court, examine or cross-examine any witness called by the court at criminal proceedings.

Although the accused has a right to cross-examine witnesses who give evidence against them, this right is not absolute. In the South African case Klink v Regional Court Magistrate NO and Others 1996(3) BCLR 402 (SE) at 410A, Melunsky J said that the court retained a discretion to disallow questioning which was irrelevant, unduly repetitive, oppressive or otherwise improper. There is ample international authority to indicate that cross-examination should always be conducted with restraint and dignity. In Namibia, a similar provision is contained in section 166(3) of the Criminal procedure Act 51 of 1977.
S166((3)(a). If it appears to the court that any cross-examination contemplated in this section is being protracted unreasonably and thereby causing the proceedings to be delayed unreasonably, the court may request the cross-examiner to disclose the relevance of any line of examination and may impose reasonable limits on that cross-examination regarding the length thereof or regarding any particular line of examination. (b) The court may order that any submission regarding the relevancy of the cross-examination be heard in the absence of the witness. [Subsec (3) added by sec 3 of Act 24 of 2003.]

There are further inroads into the accused’s right to cross-examine witnesses contained in section 166(4) of the Criminal Procedure Act 51 of 1977, which provides that the cross-examination of a child under the age of 13 can only take place through the presiding officer.

S166 (4). Notwithstanding the provisions of subsections (1) and (2) or anything to the contrary in any other law contained but subject to subsection (5), the cross-examination of any witness under the age of thirteen years shall take place only through the presiding judge or judicial officer, who shall either restate the questions put to such witness or, in his or her discretion, simplify or rephrase such questions. [Subsec (4) added by sec 3 of Act 24 of 2003.]

The courts have always had the discretion in terms of the common law to interfere in cross-examination which is being protracted unreasonably. However, the courts have always been wary of intervening lest it be thought that they are descending into the arena and losing their objectivity.
2. THE PURPOSE OF CROSS-EXAMINATION

Cross-examination is the strategy of words and actions which the advocate employs during the presentation of evidence by the opposition that serves to cast doubt upon the opposing party’s case. Cross-examination is geared tactically to upset the credibility of a witness.

**Purpose Of Cross-Examination**

- To find information favourable to party cross-examining
- To cast doubt on the accuracy of the witness being cross-examined

In the accusatorial system of law, there is a fundamental belief that cross-examination is an effective tool for discovering the truth and assessing credibility. It is believed that accuracy is ensured by subjecting the evidence to cross-examination which “has long been regarded as the most efficient method of discerning truth from falsehood”. According to Wigmore (1974) it is “the greatest legal engine ever invented for the discovery of the truth.”

Unfortunately, this belief in the effectiveness of cross-examination goes unchallenged and is based upon “anecdote and supposition rather than upon evidence”. For instance, a witness can easily be confused into making many mistakes in cross-examination, which will have the effect that the witness’s credibility is compromised and the evidence is viewed with suspicion by the courts. This does not prove that the witness was lying – the person may simply be very poor at being a witness. The standard of proof in legal matters is based on persuasion rather than scientific proof.

It is important to understand that an accusatorial system has often been described as a ‘battle’. There are two opposing sides who attack each other which highlights the combative nature of the relationship between the two parties. The proceedings are described as combative or aggressive. It, therefore, follows that adversarial examination will be aggressive – it is the weapon used in the battle between the two parties. Words are weapons and the outcome of a case depends on confrontation between one side’s witnesses and the other’s lawyer (“battle”).

3. TECHNIQUES USED IN CROSS-EXAMINATION

An understanding of the effect of cross-examination on children is only possible where there is some knowledge of the techniques employed in this type of examination. There are various techniques that are used in cross-examination, many of which are taught to advocacy students. A few of these techniques are mentioned here to highlight the dangers they hold for child witnesses.

Davies (1993) wrote a handbook for law students on cross-examination. He instructs potential cross-examiners to begin their cross-examination by just looking at the witness for a longer period than seems appropriate as this device “often makes witnesses uncomfortable and they begin to fidget. It serves in some small measures to begin to break down their confidence”.

It would seem from the literature on cross-examination that a primary technique of cross-examination is to destroy the confidence of a witness and to make the latter as vulnerable as possible – in fact even reduce them to
Davies (1993) suggests that prospective cross-examiners should begin their observation of the witness from the moment the witness enters the courtroom, because “witnesses are particularly vulnerable” at this stage, and these observations can disclose a great deal about the witness.

“Often a witness will bring a friend or family member to court for support. ...if you recognize the setup, you can use it to your advantage by blocking the witness’s view of the person he’s relying on for help. It can have a devastating effect. ... This behaviour by a witness can be turned to your advantage even though you have been unable to shake the substance of the testimony.”

Davies (1993) also refers to a technique, known as silent cross-examination, that is to be used in the ‘breaking down’ of a witness. Silent cross-examination is described as the ability to dismiss a witness in such a way that it conveys to the court the impression that nothing the witness could possibly say is worth listening to.

It would seem from these extracts that cross-examination has much to do with a battle between two parties and very little to do with the need to establish the truth. Humiliating and scaring a witness seem to be the products of a successful cross-examination. In this process the witness is perceived as being the prey and treated likewise.

4. THE EFFECT OF CROSS-EXAMINATION ON CHILDREN

Cross-examination is generally stressful for most witnesses, but it is even more so for children. The stress is induced not only by having to give evidence in court but also by the fact that the child will be called upon to reveal very intimate details in a public forum. The adversarial nature of the trial places the child in a position where they find themselves under attack. The defence is obliged to attack the child’s credibility in an attempt to highlight inconsistencies and discredit the child’s evidence.

Cross-examination is not only traumatic for children, but also results in inaccurate evidence. The child is questioned in a hostile environment, often about very intimate and emotionally-laden events. The questioning of a child witness is a very specialised task, and prosecutors and defence counsel are not trained in these methods. In addition, a number of techniques employed in cross-examination give rise to serious difficulties with comprehension for the child witness.
5. COMMUNICATING IN AN ADVERSARIAL ENVIRONMENT

In court, communication takes place within certain formal procedures that have been established over generations. These conventions are not only foreign to the lay person, but also intimidating and confusing, and interfere with communication. The person addressing the child often faces the presiding officer while putting the questions to the child and questions are directed through the bench. Questions are interrupted by procedural objections and discussions about the questions posed and the child’s replies take place in the child’s presence.

The court provides a prescriptive environment in which the communication must take place, and there is very little room for the child to negotiate the scope for responding. This situation is completely foreign to a child’s experience of language, where words have been used to learn about, explore, test and generally establish relationships. This change in the use of language prevents children from expressing themselves in a meaningful and truthful way.

In cross-examination, the order of speakers is fixed in advance and all communications must be fitted within the question-answer sequence. Questions are posed and the child must respond. The child cannot tell the story in their own words, or negotiate the direction of a line of questioning. This is highlighted in the following extract from the case S v Nozakuzaku 1995, case no. RC 6/68/95 (E) (unreported):

“Attorney: The question is did they then suggest that you accompany them around the shebeen, they pointed out a certain spot and you had to confirm where you were raped?
Prosecutor: Your worship, if I could just object. The line of questioning is a bit dangerous. Because it is put in such a way that the child must say yes or no. Can’t he rather ask it in a way that the child can explain.
Court Well, it is cross-examination, but I agree to some extent.”

Asking Questions In Court

- Communication takes place in form of questions and answers
- Cross-examiner is skilled language user
- Questions used to test credibility and manipulate replies

In the courtroom, the child will be met with two types of questions, namely elaborative questions and restrictive questions. Elaborative questions are usually found in examination-in-chief and require the child to explain, expand, describe and qualify events. Restrictive questions, also known as closed questions, limit the responses available to the child. These questions are phrased in such a way that they force a particular reply. Often they restrict the child to a yes/no reply and effectively remove the child’s right to offer any more information. Forcing a yes/no reply can create a distortion of the truth.

In cross-examination, the defence is obliged to place their version of events before the witness. This is usually done in the form of statements. The purpose of these statements confuses children since they do not know what response is required from them, especially as no question has been asked.
6. THE USE OF LANGUAGE

Comprehension becomes a critical problem in the courtroom, especially where the witnesses are children. The language used is based on adult perceptions of language and does not take cognizance of the developmental stages of the particular child concerned. In addition, a highly specialised language, peculiar to the courtroom, is used by the participants.

Courtroom language has been described as a dialect with its own conventions and vocabulary which sets it apart from everyday communication. This is exacerbated by the fact that lawyers are masterful users of language. The distance between a child’s language ability and the language used in the courtroom gives rise to communication that is confused and disjointed, thereby increasing the stress experienced by the child. This language mismatch implies a form of secondary victimisation, which is used to exclude and intimidate the child victim.

7. FEATURES OF LAWYER LANGUAGE THAT CREATE DIFFICULTIES FOR CHILDREN

There are a number of features of lawyer language which create difficulties for children. Some of these will be highlighted here.

Difficulties With Cross-Examination

- Use of the negative
- Multifaceted questions
- Technical terms and legal vocabulary
- Embeddings
- Repeating previous responses
- Leading questions
- Peripheral questions
- Use of police statements

Use of the negative

Legal language is riddled with the use of the negative, which is often placed in unusual positions and serves to fragment the content of questions. Children have great difficulty in comprehending questions which contain negative constructions. The negative is frequently used as a rhetorical device in the courtroom. It is usually placed at the end of a question, and creates the possibility of multiple interpretations, thereby contributing to the child’s confusion. Multiple negatives is also a feature of lawyer language that creates difficulty in comprehension for children. Certain negative terms are also particular to court dialogue. Negative words like `deny' and `dispute' pose problems for children.

Multifaceted questions

Multifaceted questions are long and complicated questions which “consist of convoluted preambles, confused centres and rhetorical endings which invite no response” (Brennan and Brennan 1988). These questions have been found to produce the highest degree of misunderstanding. They often begin with words like `now', `so', or
‘well’ and seem to indicate that the question has been arrived at as a result of a process of logical deduction. They usually contain a number of facts which are presented as though they have already been established (and are thus true!), and are finalised by rhetorical markers which require no response because of the tone used.

**Multifaceted Questions**

- “Now do you say that whatever it was that happened, or whatever it was that happened to Dianne, you were in the toilet at the time and you obviously heard something, did you?” (11 years)
- “Well I know, I understand, what you say you have been talking to her today but you see what I am asking you is this, that statement suggests that you said those things that you now say are wrong to the police. Now did you say it to the police or did you not?” (9 years)

**Technical terms and difficult vocabulary**

Every profession uses terminology which is specific to it. Science, medicine and law are examples of professions that use specialised terminology which is particular to that discipline. Not only does law as a profession have highly specialised terminology, the emphasis on words and language is so much greater too, with determinations of guilt and innocence being based on the manner in which they are manipulated.

Difficulties in this regard can be divided into two categories: those relating to specialised language and those relating to difficult vocabulary. Questions frequently contain sophisticated vocabulary that falls outside the repertoire of children. Children have very limited vocabularies and experience difficulties with words they have not come into contact with yet. This can create misunderstandings which can be crucial to the child’s credibility in court.

The language of the court is extremely specialised. This does not only refer to the use of technical terms (i.e. evidence; defence; statement) but also includes grammatical structures which have developed as a result of generations of usage. Courtroom procedures and traditions all exercise an influence over the meanings of words in this context, creating a language so specialised that only those trained in its intricacies are able to understand it.

- Can you tell his Worship what is the blanket used for?
- I’m going to put it to you that you are fabricating this now, Tuliswa.
- You see, why I’m asking you this question, Tuliswa, is my Learned Friend, when she led you in evidence-in-chief, she put two questions to you.
Embeddings

Legal language is very compact and compressed and examiners will squeeze a lot of information into a single question. This is highlighted in the following examples (Brennan and Brennan 1988):

- “Taking you back to the time when you were living in Sydney, when you first met Fred, at the time and throughout the period that Fred was living with your family, he used to work as a baker, didn’t he?”
- “All right, so between his patting you and his attempt or his trying to put his penis in your vagina, there was nothing else, is that right?” (11 years)

Repeating previous responses

This is a technique whereby the cross-examiner repeats the witness’s response. The purpose of this technique is not to check the response, because it is usually quite clear and understandable, but “to hold the child’s answer up to more public security and possible disbelief” (Brennan and Brennan 1988). The following is an example of this:

Q: December last year, and was that a weekend or a weekday?
A: I can’t remember.
Q: Cannot remember. Were the circumstances much the same then as they were on this last occasion, can you remember? (Transcript 8 years)

In the example, the cross-examiner repeats the child’s response ‘Cannot remember’. The reply is obviously clear and understandable, yet the cross-examiner deliberately repeats it. There is a subtle implication being created that the child is either lying or their memory should not be trusted.

Leading questions

A leading question is one which suggests a particular reply. The major objection to the use of leading questions is that they bend and distort the evidence. The anomaly created here is that leading questions are not allowed when a witness is giving evidence-in-chief because they suggest replies and are, therefore, unreliable. Yet leading questions are allowed when a child is being cross-examined.

Research on the suggestibility of children has shown that children are more likely than adults to produce unreliable information when questioned in a suggestive or leading way. A further problem with leading questions is that they are particularly effective with people who are unassertive. This is especially relevant where children are being questioned in an adversarial environment by authoritarian figures.

Peripheral matters

Peripheral questions are those questions which do not deal with the direct issues in a case, but rather with questions relating to surrounding matters that are aimed at testing the witness’s credibility. Research has shown that it is easier to get children to give false answers by asking them leading questions when dealing with peripheral matters than when dealing with matters that are of central importance.
Use of police statements

In the course of cross-examination, a great deal of time is spent on questioning the child about the statement that was made to the police after the disclosure of the alleged assault. These questions create particular difficulties for children. A considerable length of time usually elapses between the taking of a statement from a child and the eventual court appearance. There will consequently be an effect on the child’s memory, with very little accurate recall of the making of the initial statement. It will, therefore, be easy to confuse the child about the details of the statement.

Children develop cognitively through various stages. It is thus not cognitively possible for a child to understand or explain why they made a statement two years ago or what they meant at that time. Children also do not appreciate the legal weight which is attached to a police statement. They do not understand the implication that, if they did not include information in a statement, it will be viewed with caution.

One of the techniques employed in the course of cross-examination is to question the child about the contents of the initial statement to the police and then compare and contrast it with the child’s evidence in court. Developmentally, children are unable to perform this task, which invariably leads to confusion and distress.

8. CONCLUSION

The above features of lawyer language contribute to the mismatch between a child’s language ability and the language demands of the courtroom, and succeed in reducing the child’s credibility in the eyes of all the participants. If a child cannot hear language, then the quality of the response given cannot adequately reflect the child’s knowledge and experience surrounding the incident of alleged assault. In this way, the credibility of the child witness is systematically destroyed by a combination of language devices and questioning techniques.

How To Improve Cross-Examination For Children

- Remove all hostility and aggression
- Simple sentences only
- Single question at a time
- Avoid all legalese and technical terms
- Avoid developmentally inappropriate vocabulary
- Reduce complexity of sentences
- Do not repeat the child’s responses
- Avoid leading questions
- Avoid the negative and passive sentences
READING


READING AVAILABLE ONLINE


OPENING AND CLOSING STATEMENTS

AIMS

- To explain the scope and purpose of an opening statement
- To explain the scope and purpose of a closing statement

OUTCOMES

- The participant will know what an opening statement is and how it is to be used in court
- The participant will know what a closing statement is and how it is to be used in court

1. Opening Statements
2. Closing Statements
1. OPENING STATEMENTS

The prosecutor has the right to make an opening statement after the arraignment procedure has been completed. This provides the prosecutor with an opportunity to talk directly to the magistrate (and assessor) or judge (and assessor).

It is the job of presiding officer to decide the case on the evidence before them, and it is the role of the prosecutor in the opening statement to make the presiding officer's task easier by providing a structure that frames the evidence.

Before the trial begins the presiding officer in the lower courts will have no previous knowledge about the case, apart from the charges put to the accused and the plea of not guilty which has been entered. The opening statement is the first real opportunity for the presiding officer to become acquainted with the issues, witnesses and the evidence.

In the higher courts the judge will receive the indictment, summary of facts and a list with the names of state witnesses. The judge is in a better position than his or her counterpart in the lower courts, although the stage has by no means been fully set for the trial, especially in complicated cases. It is important that the court understands fully every aspect of the prosecutor's case.

**Purpose Of Opening Statement**

- Serves as an introduction
- Provides an outline and guide to state's case

Opening statements have often been likened to a road map that will enable the court to be in a better position to follow the path of evidence, with some idea of what the final destination will be. The evidence becomes more meaningful, and, therefore, more persuasive because it is provided within a context. The court is thus offered an opportunity to glimpse the `bigger picture', enabling the subsequent evidence to appear connected.

The opening statement should provide a clear picture of the starting point, the destination, the manner of getting there and what is likely to be experienced along the way. The opening statement has also been compared to the prologue of a book which introduces the reader to the plot and characters.

A further important function of the opening statement is that it forces a prosecutor to prepare a case in more detail. In order to prepare an opening statement, the prosecutor will have to have studied the docket and consulted with the witnesses.

In addition, the structure of the opening statement should form the backbone of a case, and will serve to put prosecutors in control since they will have a clear route of the path they has to travel. Generally, the prosecutor's opening statement should include a brief outline of the complainant's version, the essential elements of the case and the names and number of witnesses. Sometimes the essential focus of each witness's testimony will also be mentioned.
Opening Address Can Include

- Statement of nature of case
- Clear summary of essential facts
- Basis of liability
- Description of harm or trauma suffered
- Statement of disputed issues between parties
- Brief outline of evidence of witnesses
- Address to court on law

The summary of the facts should provide a chronological account of what happened and care should be taken that it does not overstate or go beyond what witnesses will actually say. Only potential evidence should be summarised and only facts that can actually be produced may be included. A promise made during an opening statement, which is subsequently not fulfilled, may make a case appear far weaker than it actually is. If there is any suspicion that a witness may not perform adequately or even may not appear, the witness’s testimony should not be introduced. Inferences, conclusions or judgments of credibility should be kept for the closing statement, since they are matters of argument.

Once the essential facts of the prosecution’s case are set out, the prosecutor will go on to review the allegations in more detail. If the analogy of the roadmap is borne in mind, the next step is to establish the context in which the facts of the crime itself must be placed. No offence occurs in a vacuum.

Establishing Context Of Crime

- Scene where offence committed
- Who was present
- Relationship to commission of offence

References to particular witnesses, who will testify for the prosecution, could be inserted here. If only a single witness is going to be called, then the prosecutor may indicate in a little more detail what the witness will later say under oath. Where more than one witness will be called, it is better to avoid too much detail and leave some flexibility, since it is always uncertain how the evidence will develop during the course of the trial.

The opening statement should not be too specific or detailed, since the contents thereof are evidentiary material that may be used to cross-examine the state witness. If the testimony of the witness should differ from the opening statement, for example, a failure to say what was averred in the opening statement, defence counsel will certainly draw the court’s attention to that failure. It is for the court then to decide how significant that omission is. The credibility inferences to be drawn from such a comparison, is a matter to be decided in the light of the circumstances of each case.

Statements made by the prosecutor may be disregarded if found to be erroneous, but not where it is a deliberate statement defining the ambit of the case. Certain types of evidence will most definitely be challenged, for example, police evidence of an alleged confession. Before referring to evidence of this nature, the evidence should always be verified with the defence to determine whether the admissibility of such evidence will be
challenged. If there is any potential objection, reference to the evidence must be omitted from the opening statement. Admissibility will normally be determined at a later stage.

When the identity of the accused is in dispute, the prosecutor should not say that the accused was seen at a particular time and place. It may only be stated that a man or woman was seen at that time and place and that the state witness will say that the man or the woman was the accused.

It may sometimes be possible with some degree of confidence to anticipate the defence case, and to attempt to rebut it. However, in the event of a pure guess at the defence, it is safer to remain silent on that point.

In simple cases, where the issues are straightforward, the prosecutor will often choose to forego the opening statement. The prosecutor might think that an experienced presiding officer really has heard it all or that an opening statement would waste time. It is recommended that an opening statement should still be made, but should be kept brief. A prosecutor should always try to engage the court’s interest.

The opening statement should be made by speaking clearly and using appropriate language. A story should be told as one would to a group of friends, using plain language. Eye contact should be made to build rapport. The opening statement should not be read from a prepared script, although notes could be used. The better the prosecutor is prepared, the less will be the need to look at notes.

The complainant should be referred to by name in order to be personalised, while the accused should be referred to as simply the `accused’. The aim is to get the court to empathise with the complainant.

2. CLOSING STATEMENTS

The closing statement provides an opportunity for the prosecutor to address the court after the defence has completed its case.

**Purpose Of Closing Statement**

To convince the presiding officer that the accused has been proved guilty beyond a reasonable doubt

The closing statement has been described as the chronological and psychological culmination of the trial. In order to persuade the court to decide the case in the State's favour, the prosecutor must present an argument which is limited to the evidence led at the trial. In simple cases, the presiding officer may agree with the prosecutor’s submissions on the evaluation of the evidence and will, therefore, not challenge them. The closing statement will then simply amount to a short speech.

However, in more complicated cases the prosecutor has to debate or argue with the presiding officer in order to persuade the court to accept the State’s submissions. When required to answer oral questions or challenges from the bench, the prosecutor must be ready to answer promptly and persuasively, even though there is no time to prepare. It is best to state one’s submission on the question, then give reasons for that submission and, lastly, support the reasons with evidence. The evidence may include case law, textbooks, research findings or examples to illustrate the reasons submitted. If the prosecutor is unable to make a submission on a legal point arising because it was not anticipated, a short adjournment may be requested to do some research on that point.
Each case will have a different argument, but many will have a similar structure which should be clear, logical and easy to follow. The approach of prosecutors may vary on how closing arguments should be structured. One approach may be to provide a structured overview, which organises the evidence around issues and summarises the evidence that applies to each issue. This approach does not review the evidence witness by witness or exhibit by exhibit as this may be regarded as tedious, and involve repeating aspects of evidence.

### Jones’ Structure Of A Closing Statement

- Introduction
- Issues
- Narrative
- Argument
- Confirmation and refutation
- Result – verdict of guilty suggested

On the other hand, in the light of the fact that the prosecutor will try to persuade the court to adopt their submissions in its judgments on the merits, Palmer and McQuoid-Mason suggest and illustrate the use of the structure of the judgment as a method of preparing the closing statement.

### Palmer And Mcquoid – Mason

- Issues
- Agreed facts
- Summary of relevant evidence
- Evaluation of summarised evidence
- Conclusions of fact
- Applying legal test to
- Conclusions of fact

### The issues

Depending on the charge and the particular case, the court will have to decide specific issues in order to reach a verdict. The first step should then be to list:

- the issue
- the onus of the issue
- the legal test applicable to the issue.

### The agreed facts

Facts that are not in dispute or are common cause should be listed, based on one of the following:

- prior arrangement between the parties
- formal admissions made before or during the trial
- identical evidence led by the State and defence on a particular aspect.
Summary of relevant evidence

No prosecutor should ever try to mislead the court as to what any of the witnesses said. The relevant evidence must be briefly summarised in the following categories:

- Witnesses called for the State (if witnesses handed in any objects or documents, these should be referred to here)
- Witnesses called for the defence
- Witnesses called by the court
- Evidence handed in by consent between the state and defence
- Circumstantial evidence
- Other categories of evidence.

Evaluation of the summarised evidence

At this stage, both the positive as well as the negative aspects of the summarised evidence must be pointed out. As far as positive aspects, which would contribute to a credibility finding, are concerned, the following may be taken into account:

- lack of motive on the complainant’s part to implicate the accused
- consistency; coherence
- corroboration of other witnesses.

Unfavourable evidence should never be ignored. Since the defence and/or the presiding officer is almost certain to refer to this evidence, the prosecutor might appear at best careless and at worst dishonest in the eyes of the court. Problems should be explained and clarified and may include the following:

- non-disclosure
- inconsistencies
- contradictions with other witnesses
- mistakes
- indications of untruthfulness or exaggeration.

When assessing the witnesses as truthful, untruthful or mistaken, the inherent probabilities of their versions as well as their demeanour must also be taken into account. The prosecutor must also make submissions as to how much weight should be attached to each individual item of evidence, including objects and documents. The evidence can then be assessed as reliable or unreliable. Finally, an evaluation of the circumstantial evidence should take place.

Conclusions of fact

The prosecutor must focus on persuading the court to accept the version of the state witnesses. In other words, he must submit to the court that the probabilities favour the State to such an extent that there can be no reasonable doubt of the accused’s guilt – thus the probabilities must overwhelmingly favour the State.

The argument should also refer to the defence’s version which should be rejected as so improbable to the extent that it is totally false or so improbable that it cannot reasonably possibly be true.

Applying the legal test to the conclusions of fact, and the overall onus of proof

The prosecutor’s argument must now show that the proved facts are sufficient to justify a verdict of guilty. Probabilities favouring the State’s case must be highlighted. The legal test applicable to each issue must now be applied to facts found to have been proved, and an assessment of the overall probabilities be made to decide whether the required onus has been discharged.
Discussion of legal tests should be brief as the court certainly does not want a lecture on the law. Making a habit of preparing main points of argument in writing will force prosecutors to order their thoughts and will thus have a marked effect on successful prosecutions. A closing statement should be presented in a calm and rational manner, even though cases involving children can be very emotional.

Finally, where children are witnesses, it is important to place extra emphasis on the child’s credibility. Children have for centuries been regarded as highly suspect witnesses and have been accused of lying, fantasising and being unable to distinguish between truth and lies. In the closing arguments the prosecutor should highlight instances in the trial where, for instance, the child showed a clear grasp of reality, or was able to show clearly an understanding of the truth. It is vital to show to the court that the child is a reliable witness and should be believed.

READING LIST


READING AVAILABLE ONLINE


JUDICIAL MANAGEMENT

AIMS

• To examine the need for enhanced judicial management in cases involving children
• To investigate judicial discretion in cases involving children
• To introduce special techniques that can be used to assist children in court

OUTCOMES

• The participant will understand the need for enhanced judicial management in cases involving children
• The participant will understand the concept of judicial discretion in cases involving children
• The participant will be aware of special techniques that can be introduced to assist children in court

1. The Need For Judicial Management
2. Judicial Discretion
3. Possible Accommodations
4. Special Techniques
5. Conclusion
1. THE NEED FOR JUDICIAL MANAGEMENT

It is the normal procedure for a judicial officer to allow attorneys or advocates fairly wide latitude in shaping their cases. When child witnesses are involved, however, there is a greater need for judicial involvement. Researchers argue that ‘enhanced judicial involvement is a necessity’ because children lack knowledge of the legal system, are embarrassed and afraid to speak in public, and the resultant stress and anxiety affects their performance on the stand.

Adults are to a certain extent able to manage their stress through their general understanding of what happens in court, whereas children, because of their lack of knowledge, believe that they will go to jail if they give the wrong answer. A stressful courtroom situation may cause a young child to be unable or unwilling to testify.

The Alaskan Supreme Court accepted that rules of evidence were not developed to handle problems presented by child witnesses. Courts must, therefore, be free to adapt these rules to accommodate these circumstances.

2. JUDICIAL DISCRETION

The judicial officer has inherent judicial authority, unless otherwise specifically excluded, to control the conduct of the proceedings and interrogations before it, in an attempt to accommodate children (Rural Hicks-Bey v. United States, 649 A.2nd 569 at 575).

In addition, there are several specific accommodations authorised by legislation and case law. In Namibia, section 158 of the Criminal Procedure Act 51 of 1977 provides for a number of accommodations for vulnerable witnesses. The court can make orders that ensure special arrangements for vulnerable witnesses. These special arrangements include the relocation of the trial to another location while the child is testifying, the rearrangement of the furniture in a courtroom and even directions that certain persons sit or stand at certain locations in the courtroom. The court can order a support person to accompany the child while testifying or grant permission for the witness to give evidence behind a screen or in another room which is connected to the courtroom by closed-circuit television. The court is also given a wide discretion to take any steps that would in their opinion be expedient and desirable in order to facilitate the giving of the child’s evidence.

“Despite the adoption of procedures making the process of testifying less intimidating for a young child, the fact remains that many children are not able to discuss incidents of abuse even in a modified courtroom setting...... Generally speaking the rules of evidence were not developed to handle the problems presented by the child witness. Therefore our courts must be free to adapt these rules, where appropriate, to accommodate these unique (circumstances). However, this increased flexibility places a proportionately greater burden on the trial judge” (In re T. P., 838 P. 2nd 1236, 1240-41 Alaska 1992).
158A. SPECIAL ARRANGEMENTS FOR VULNERABLE WITNESSES

(1) A court before whom a vulnerable witness gives evidence in criminal proceedings, may on the application of any party to such proceedings or the witness concerned, or on its own motion make an order that special arrangements be made for the giving of the evidence of that witness.

(2) "special arrangements" means one or more of the following steps:
   (a) the relocation of the trial to another location while the evidence of the vulnerable witness is being heard;  
   (b) the rearrangement of the furniture in a court room, or the removal from or addition of certain furniture or objects to or from the court room, or a direction that certain persons sit or stand at certain locations in the court room;  
   (c) notwithstanding the provisions of section 153 the granting of permission to any person (hereinafter referred to as a "support person") who is a fit person for that purpose to accompany the witness while he or she is giving evidence;  
   (d) the granting of permission to the witness to give evidence behind a screen or in another room which is connected to the court room by means of closed circuit television or a one way mirror or by any other device or method that complies with subsection (6);  
   (e) the taking of any other steps that in the opinion of the court are expedient and desirable in order to facilitate the giving of evidence by the vulnerable witness concerned.

(3) For the purposes of this section a vulnerable witness is a person-  
   (a) who is under the age of eighteen;  
   (b) against whom an offence of a sexual or indecent nature has been committed;  
   (c) against whom any offence involving violence has been committed by a close family member or a spouse or a partner in any permanent relationship;  
   (d) who as a result of some mental or physical disability, the possibility of intimidation by the accused or any other person, or for any other reason will suffer undue stress while giving evidence, or who as a result of such disability, background, possibility or other reason will be unable to give full and proper evidence.

(4) The support person is entitled to-  
   (a) stand or sit near the witness and to give such physical comfort to the witness as may be desirable;  
   (b) interrupt the proceedings to alert the presiding officer to the fact that the witness is experiencing undue distress: provided that subject to subsection (5), the support person shall not be entitled to assist the witness with the answering of a question or instruct the witness in the giving of evidence.

(5) The court may give instructions to a support person prohibiting him or her from communicating with the witness or from taking certain actions, or may instruct the support person to take such actions as the court may consider necessary.

(6) When a witness gives evidence behind a screen or in another room, the accused, his or her legal representative, the prosecutor in the case and the presiding officer shall be able to hear the witness and shall also be able to observe the witness while such witness gives evidence.

(7) When a court is considering whether an order under this section should be made, it shall also consider the following matters-  
   (a) the interest of the state in adducing the complete and undistorted evidence of a vulnerable witness concerned;  
   (b) the interests and well-being of the witness concerned;  
   (c) the availability of necessary equipment and locations;  
   (d) the interests of justice in general.
Research has shown, however, that judicial officers in some jurisdictions seldom implement accommodations that are available to them under existing law. The reason for this would appear to lie firstly in the presumption of innocence, which requires judicial officers to protect the rights of the accused. It is the fear of compromising judicial neutrality and undermining the rights of the accused that may withhold judicial officers from playing an active role in managing the testimony of the child witness. However, internationally there has been a strong move towards urging judicial officers to play a greater role in managing their courts. A further reason that judicial officer do not implement accommodations is that they do not have knowledge of all the possible methods of reducing trauma nor the confidence to take control of the courtroom proceedings.

3. POSSIBLE ACCOMMODATIONS

The following are some of the accommodations that can be introduced:

Ground rules for attorneys

At the outset of the trial, ground rules for attorneys regarding the questioning of the child witness can be set down by the presiding officer to facilitate the child's testimony. The result of pre-determined ground rules is that the court's control is underscored and counsel is educated.

Ground Rules

- Questions must be developmentally appropriate
  - Short sentences
  - Simple words
  - Simple grammar
  - Be concrete
- Postponements and delays minimised
- Questioning at age-appropriate times
- No raised voices
- Regular scheduled breaks
  - Every 20 minutes

It is cautioned that assumptions should not be made based on the child's age or physical appearance. Information should rather be obtained about the child's needs, developmental stage, learning or other difficulties and home circumstances, as well as the child's updated emotional status and adjustment. Awareness by all parties of the child's concentration span is also very important.

Introduction and welcome

It has already been mentioned that testifying in court is a stressful experience for a witness. The witness is required to give evidence in the presence of strangers, often about embarrassing and intimate details. The setting of the courtroom is alien to anything they have previously encountered. A procedure is followed that is not understood by the ordinary lay person. In addition, the language employed is formalistic, at times archaic and of a very specialised nature.

Where the witness is a child, these factors are even further exacerbated by ignorance. Ignorance of the procedures followed in court and the inability to understand the language employed prevent the child from
being an effective witness and from taking part effectively in the judicial process. It is, therefore, vital that the judicial officer assists the child by dispelling some of the myths and misconceptions that may clutter the child’s understanding of the procedures.

When the child gets into the witness box, it goes without saying that the child will be scared, anxious, and uncertain about what is going to happen. It is the role of the judicial officer to welcome the child and make the child feel a little less anxious. Children see the judicial officer as the boss of the court, and should this person develop some rapport with them at the initial stages of the trial, this will contribute greatly to the child’s subsequent performance in the witness box.

The presiding officer should welcome the child and spend a minute or two making the child feel a little more relaxed. Language usage and tone are very important. The presiding officer should speak to the child in a manner that the child will understand, and use a tone that is respectful of and sensitive to the child. There are many ways in which to develop rapport with a child, and this will depend very much on the individual child concerned. The aim is simply to get the child to relax and feel a little more confident about testifying. It is, therefore, suggested that the judicial officer chat to the child about inconsequentials unrelated to the case. Although rapport-building may take a few minutes, this is not time wasted. It will contribute greatly to the effectiveness of the child as a witness subsequently in the trial.

Introduction

“Hello, Ben. I’m the magistrate in this case. I hear that you’ve got something to tell us today, but before we begin, I just want to make sure that you’re okay. How are you feeling? Are you comfortable? I see you have a toy in your hand. Is that a bunny?”

The judicial officer should provide the child with a brief introduction to the role-players involved in the trial. A simple description of who is present and what their functions involve will suffice.

Explanations For Roleplayers

MAGISTRATE: they are in charge in court and must listen to what everybody has to say and then make a decision
WITNESS: the child is a witness in the case and their job is to tell the court what happened
PROSECUTOR: they are the person who will help the child tell their story by asking the child questions
DEFENCE LAWYER: they work for the accused and must help the accused tell their story
COURT ORDERLY: they keep order in court and take care of everybody
STENOGRAPHER: the person who tapes everything that has been said in case anybody forgets
INTERPRETER: a person who explains what is being said to you in your own language
Finally, it is important for the presiding officer to provide the child with a few ground rules that will assist the child to testify as effectively as possible. These would include, for instance, the fact that the child must say when they do not understand or cannot remember. These must be explained in a manner that the child will understand, and, where possible, the child should be given an opportunity to practise what has been said.

**Example Of Ground Rules**

"If you are asked something you don’t remember, I want you to say ‘I don’t know’. If you are asked a question that you don’t understand, I want you to tell me that you don’t understand, OK? For example, suppose I asked you to tell me my dog’s name. Can you tell me my dog’s name? That’s right, you don’t know my dog’s name, so ‘I don’t know’ is the right answer. Sometimes you might have to think about a question for a little bit. You don’t have to answer right away."

It is important to be sensitive to the child’s age and development and to use appropriate language. Asking the child to demonstrate their understanding of a concept by role-playing it, is a useful technique to ensure that the child does, in fact, understand what has been said.

**Examination, cross-examination and re-examination**

Children are ignorant of court procedures, so do not have an understanding of who will ask them questions, nor do they understand the order in which the questioning takes place. Once the judicial officer has sworn the child in or warned the child to tell the truth, the judicial officer can take a minute to explain to the child that the prosecutor will now ask some questions so that the court can find out what happened.

The judicial officer should reinforce the need to tell the truth as well as remind the child that they do not know anything about the case and were not present, so the child must tell them everything. There are no standard instructions, so judicial officers should simply talk to the child in an appropriate manner.

**Example**

"Ben, the prosecutor is now going to ask you a few questions to help you tell us your story. Remember that we weren’t there, so you must tell us everything, otherwise we won’t understand. All you must do, is tell us what really happened".
At each stage of proceedings, the judicial officer should explain to the child what will happen next. For instance, when the prosecutor has finished questioning the child and the defence is about to begin cross-examination, the presiding officer should intervene to explain to the child what is happening. The presiding officer must explain that the prosecutor has finished asking questions and that the defence now has a turn to ask questions. Children are often confused by the fact that the prosecutor asks them questions and immediately thereafter somebody else asks them the same questions.

Example

"Ben, the prosecutor is finished asking you questions. Thank you for answering all the questions. The defence lawyer is now going to have a turn to ask you questions. They want to make sure they understand."

Interventions from the bench

The magistrate is the ‘boss of the court’ and should, therefore, manage the court to the best of their ability in the interests of justice. One aspect of managing a court involves the protection of witnesses. Presiding officer should ensure that witnesses are not bullied or harassed in court, and there is a duty to intervene when it is obvious that a witness does not understand a question and is being confused.

There are a number of instances when it is incumbent upon the judicial officer to intervene, and the purpose here is not to address fully all the possibilities. Rather, the idea is to highlight a few instances where the interventions are particularly applicable to child witnesses.

When To Intervene

- Introducing child’s statement in court
  - Delay since making statement
  - Inability to remember making statement
  - Do not understand legal weight
  - Effect of disclosure
  - Inability to read and confirm contents
- Language development
  - Simple questions
  - One topic at a time
  - Active voice
  - No negatives
  - No legalese
- Cross-examination
  - Protect child against hostility and Harrassment
4. SPECIAL TECHNIQUES

The following are some of the special techniques that can be introduced to assist children in court:

Recesses

The judicial officer has the discretion and responsibility to decide upon recesses in the course of court proceedings during a child’s testimony, and should do so when the child shows signs of fatigue, loss of attention or unmanageable stress. Breaks can be allowed either as a matter of routine or when the child witness is emotionally upset. In the latter instance, it is in the discretion of the judicial officer to allow it or not. When the need arises during cross-examination, special care should be taken to ensure that no coaching takes place. The purpose must be to allow the witness to calm down. To avoid the complaint that recesses interfere with cross-examination, the court may inform counsel ahead of time that recesses will occur at regular intervals.

Rearranging the courtroom

Innovations in rearranging the courtroom are included in section 158 of the Criminal Procedure act 51 of 1977, as discussed above. A child witness may testify from a location other than the witness chair, allowing the accused and judicial officer to have frontal or profile view of the child. A child may not be required to look at the accused, except for official in-court identification. A pre-school witness may be allowed to sit at a child-sized table and a child-sized chair. Judicial officers may also remove their robes. It is suggested that the child is given the option to choose and that the consent of everyone is obtained.

Support person

This is also provided for in section 158 of the Criminal Procedure Act 51 of 1977, where the court has the discretion to allow a child to be accompanied by a support person. Researchers highlight the obvious need for the assistance of a parent when a child goes to hospital, but note how this assistance is not available when the child has to go to court. A trusted adult may, therefore, accompany the child. If the adult is also a witness, the court may require the adult to testify prior to the child. The court will normally instruct the individual not to coach or prompt the child.

Comfort item

The court has the discretion to allow a child witness to keep a comfort item during their testimony. It may vary and can include a blanket, doll or teddy bear. A child witness should be permitted to bring their particular favourite toy or stuffed animal.

Speedy disposition of cases

Delays in the processing of sexual offence cases may delay the healing process of the victim, prolong the trauma and anxiety associated with court appearances and may erode the memory of the victim and other significant witnesses. Language development may also occur in this space of time, and child victims may mature physically, emotionally and psychologically. This may contribute to the development of inconsistencies in the child’s evidence as compared to the initial statement, and this can have a detrimental effect on the case. Time delays are inherent in the present criminal justice system. However the judicial officer should take a firm stance against unjustified or flimsy reasons for postponement.

Thanks

It would be fair to the child witness to thank them after giving evidence. Recognition is given of the time spent in court as well as the effort. The child’s dignity is also enhanced in this way.
5. CONCLUSION

Judicial officers have a responsibility to protect vulnerable witnesses, including children, from unnecessary stress and trauma. They can accommodate child witnesses in the courtroom without compromising judicial neutrality and without undermining the rights of the accused. Judicial officers should take an active management role in accommodating child witnesses to reduce trauma and increase the accuracy and completeness of their testimony.

READING LIST


READING AVAILABLE ONLINE

AIMS

- To provide an overview of the sentencing principles relating to child rape
- To provide a brief overview of the principles applicable to minimum sentencing
- To identify mitigating and aggravating factors in cases of child rape

OUTCOMES

- The participant will have an understanding of the sentencing principles applicable to cases of child rape
- The participant will have an understanding of the principles applicable to minimum sentencing
- The participant will have an understanding of mitigating and aggravating factors in cases of child rape

1. Introduction
2. Judicial Discretion
3. Judicial Approach In The Sentencing Process
4. Conclusion
1. INTRODUCTION

Sentencing in child rape cases is an emotional and complex process. Unlike the trial phase, the judicial officer may take on a central and more active role. In addition, behavioural science – a discipline of which the judicial officer has little understanding – acquires greater importance during this phase. During the sentencing phase, the focus falls not only on issues regarding the accused’s dangerousness and degree of culpability, but also on issues relating to the impact of the crime on the victim.

During the last two decades there have been considerable developments in the legislative approach to the sentencing of perpetrators of child rape in both Namibia and South Africa. Since May 1998, section 51(1) of the Criminal Law Amendment Act 105 of 1997 in South Africa prescribes life imprisonment as a discretionary minimum sentence for, inter alia, the rape of children younger than 16 years of age or gang rape, and ten years imprisonment for all other incidents of rape. In Namibia the prescribed minimum sentences for child rape, depending on the aggravating circumstances present and the previous record of the perpetrator, may vary between five and forty-five years (section 3 of the Combating of Rape Act 8 of 2000).

During sentencing the court is required to consider whether a finding of substantial and compelling circumstances (in terms of section 51(3)(a) of the Criminal Law Amendment Act 105 of 1997 and section 3(2) of the Combating of Rape Act 8 of 2000), could be made in order to deviate from the prescribed term of imprisonment and thereby avoid a grossly disproportionate sentence. This process gives rise to a further grading of these offences, already singled out by the legislature as falling in the most serious categories.

The aim in this contribution is to consolidate local judgments (scattered over many years in different law reports), minimum sentence legislation and selected foreign practices in order to offer readily accessible guidelines that will contribute to greater uniformity in the judicial approach during the sentencing process. These guidelines embrace general and specific principles, as well as relevant aggravating and mitigating factors, and are intended to guide the judicial officer in the exercise of his or her discretion. The sexual abuse of children includes the offences of rape and sexual assault and, though guidelines may overlap, this contribution focuses on an overview of materials regarding child rape.

2. JUDICIAL DISCRETION

Notwithstanding the legislative developments explained above, judicial discretion during sentencing (albeit within the legal framework) has always been hailed as something to be guarded jealously and has been described as a crucial aspect of the law of sentencing (Du Toit (1981: 127). However, though it is accepted that this will have the effect that sentencing outcomes differ to a certain degree, judicial discretion has also given rise to unacceptable and unjustified disparity in the sentencing process, as well as in the actual sentences imposed in child rape cases. This disparity has been caused by diverse judicial approaches to various important aspects, namely, the seriousness of these offences, the recognition and interpretation of mitigating and aggravating factors, the relevant circumstances of the offender and the victim, and the relative weight given to each of these factors (SA Law Commission (2001: 732)). (See also Namibian cases Munyama 2011 SC and Auala 2008 as mentioned in Terblanche (2013: 21) in relation to the importance of sentencing discretion).

3. JUDICIAL APPROACH IN THE SENTENCING PROCESS

General guidelines

Sentences in respect of the rape of children, as listed in section 3 of the Combating of Rape Act 8 of 2000 are consistently more severe than they were prior to the passing of the amending Act. Thus, even where a departure
from the prescribed sentence is justified in terms of a finding of substantial and compelling circumstances, sentences should reflect the legislature's intention to introduce a more severe sentencing regime.

In the case of LK (P1-2014) [2015] NASC (13 Nov 2015) it was stated that a higher legislative benchmark had been created and in S v Shapumba 1999 NR 342 (SC) page 344, the Supreme Court emphasised the seriousness of rape of children:

‘Whereas there is very little that can mitigate the commission of the crime of rape there are certain specific factors which would further aggravate and contribute towards the seriousness of the crime and the consequent punishment thereof. Examples of these are the rape of young children …’

In S v Libongani 2015 (2) NR 555 (SC) it was re-iterated that rape is a very serious offence and should be punished severely. Presiding officers should thus bear in mind that the legislature has set its face firmly against crime of this nature, and be mindful of the Act’s purpose, which is to combat and eradicate rape where possible:

“The Courts are under a duty to send a clear message to the accused, to other potential rapists and to the community: We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights … Our society is undoubtedly embarrassed by the killing and raping of women and children on a daily basis. The promulgation of the Combating of Rape Act is a serious effort the legislature undertook in an attempt to arrest the scourge. The courts should join that fight, in some cases where possible, should show no mercy’ (page 564).

The court in Libongani (page 562) also made a specific comment on the fact that if the victim was a child it had an aggravating effect on the seriousness of the crime: ‘Rape is a very ugly offence, when a child is the victim, as is the case here, even worse.’ In the case of S v LK (page 112) the Supreme Court again commented on the fact that the victim was a child: ‘The victim in this case was particularly vulnerable, being a young girl of 7 years.’ Yet it was pointed out that on the scale of seriousness, LK’s actions ranked on the low side (para [66]).

Where the offence is serious, this should therefore tip the scale in favour of a harsher sentence. In the case of S v JB (page 119) 2016 (1) NR 114 (SC) the Supreme Court stated as follows: ‘The trial court was correct in its characterisation of the crime of rape as heinous, particularly because it was committed by a father against his own daughter.’

The Judge President in S v Kaanjuka 2005 NR 201 HC (page 206) held that sentences imposed by courts for the rape of vulnerable victims should ensure that the public do not lose faith in the criminal justice system. Despite
earlier precedents not being applicable as precedent for sentence severity, it should, however, still be applicable regarding the recognition of aggravating and mitigating factors in child rape cases (S v Abrahams 1 SACR 116 (SCA) 126b, also discussed in more detail below).

Further, the Zinn-triad (the crime, criminal and interests of the community), as well as the interest of the victim (impact of the crime), are basic considerations during all sentencing procedures. In LK (above, page 108) it was highlighted that balancing the elements of the triad and the interest of the victim would lead to a just sentence.

**Interest of the victim and recognition of mental harm**

Considering the interest of the victim, inter alia, implies a recognition of the mental harm caused by the crime of rape. Changes in behavioural and personality patterns following on incident(s) of sexual abuse should therefore not be confused with normal child development. Grievous harm caused by the offence should be proved. All available evidence with regard to the possible effect of the crime on the victim(s) should be received by the court. In considering the impact of the crime, the evidence of parent/guardian/teacher about symptoms of harm or impact may be accepted, if such evidence is not challenged (S v Abrahams above). A finding of serious harm should also be given substantial weight (Abrahams above). Trauma experienced by male and female child victims of sexual assault should be perceived as equally harmful.

'The time may have come also to bear in mind the circumstances of the victim and the effect the crime has had on her. This is particularly the case where a rape has been committed. … Expert evidence is necessary for a court to evaluate whether there was ‘grievous bodily or mental harm as a result of the rape’ as contemplated in s 3(1)(a)(iii) (aa) of the Combating of Rape Act 8 of 2000. Such grievous bodily or mental harm should not be confused with injuries caused in the process of raping the complainant and which constituted coercive circumstances as s 2(2) of the Act provided for’ (S v M above).

The question to be established is whether the complainant suffered grievous bodily or mental harm as a result of the rape. If there is no proof that the complainant suffered grievous bodily or mental harm as a result of the rape, and the rape does not resort under any of the other circumstances mentioned in s (3)(1)(a)(iii), the accused cannot be sentenced to fifteen years. The court should thus be satisfied of the damaging and long-term effect of the act of rape. Detail should be provided and a direct link between the crime and alleged harm is of importance (S v M above).

Professionals considered to be expert witnesses with regards to whether grievous harm had been caused by the rape incident, would include psychiatrists, psychologists, criminologists and forensic social workers. They will have to satisfy the court that they are indeed experts in their fields and that their evidence is of assistance to the court.

From the above it is evident that in the case of offences falling under minimum-sentence legislation only particularly damaging or distressing effects of the crime upon the victim should be taken into account by the court when imposing sentence, since the incorporation into minimum sentences already took account of the inherent harm caused in child rape cases.
Victim impact statements from complainants or on behalf of complainants should still be presented. By hearing their voices, it would serve as recognition of the victim's personal story of how their lives have changed (Müller & Van der Merwe 2006: 663).

Sentencing aims

Though earlier discussions considered the sex offender’s possible rehabilitation as an overriding aim to be taken into account during sentencing, it appears that, currently, the main objective of sentencing in cases of child rape is to punish offenders. In S v Ndakolo 2014 (2) NR 371 (HC) the High Court held the following:

‘More often than not, our courts, when considering an appropriate sentence in cases of this kind, ought to afford more weight to the punitive, retributive and deterrent aspects of sentence. The personal circumstances of the accused, although relevant and worthy of consideration, must yield to the other competing considerations.’

The above dicta was applied in both S v Van Wyk 1993 NR 426 (SC) (1992 (1) SACR 147) and S v Iilonga 2014 (1) NR 53 (NLD): dictum at 60B – D. However, rehabilitation of sex offenders would be in the interest not only of the accused themselves, but is also in the interest of the young children with whom they may come into contact when released from prison. The mere question of treatment programmes for sexual offenders per se, as well as whether it should be conducted inside or outside of prison, are controversial matters (Bergh 2007). In addition, treatment programmes for sexual offenders are often few and scarce. Nonetheless, courts have the option to make a written instruction to the Department of Correctional Services by referring the offender for evaluation by a psychologist. Including this into a warrant may ensure that he or she receives priority for participation in offender programmes (ibid). It can serve as an attempt to prevent future offences and thereby protect children. Thereby the judicial officer can strive to ensure that the sentence is not only appropriate, but also effective. Whenever, treatment becomes relevant during the sentence of a sex offender, some form of motivation is needed to prevent them dropping out from the treatment programme. A suspended sentence linked to the treatment may serve this purpose.

Minimum prescribed sentences

Notwithstanding child rape being a serious crime, it may be classified according to differing degrees of seriousness, with some cases, depending on the relevant aggravating and mitigating circumstances, being considered more serious than others. Surrounding circumstances can, on a scale of abhorrence, make it more or less serious.

In Namibia section 3 of the Combating of Rape Act 8 of 2000 prescribes minimum sentences based on the circumstances of the rape and the offender, as well as the age of the complainant. It may vary between five, ten of fifteen years for first offenders and between ten, twenty and forty-five years for second offenders. Section 3 provides as follows:

Penalties 3. (1) Any person who is convicted of rape under this Act shall, subject to the provisions of subsections (2), (3) and (4), be liable- in the case of a FIRST CONVICTION –
(a) (i) where the rape is committed under circumstances other than the circumstances contemplated in subparagraphs (ii) and (iii), to imprisonment for a period of not less than FIVE YEARS;
(ii) where the rape is committed under any of the coercive circumstances referred to in paragraph (a), (b) or (e) of subsection (2) of section 2, to imprisonment for a period of not less than TEN YEARS;

[Comment: The above situations include cases where physical force is used against the complainant or someone else, where threats are made via word or actions, or where the complainant is unlawfully detained during the act of rape]

(iii) where –

(aa) the complainant has suffered grievous bodily or mental harm as a result of the rape;

(bb) the complainant - (A) is under the age of thirteen years; or (B) is by reason of age exceptionally vulnerable;

(cc) the complainant is under the age of eighteen years and the perpetrator is the complainant’s parent, guardian or caretaker or is otherwise in a position of trust or authority over the complainant;

(dd) the convicted person is infected with any serious sexually transmitted disease and at the time of the commission of the rape knows that he or she is so infected;

(ee) the convicted person is one of a group of two or more persons participating in the commission of the rape; or

(ff) the convicted person uses a firearm or any other weapon for the purpose of or in connection with the commission of the rape, to imprisonment for a period of not less than FIFTEEN YEARS;

(b) in the case of a SECOND or subsequent CONVICTION (whether previously convicted of rape under the common law or under this Act) –

(i) where the rape is committed under circumstances other than the circumstances contemplated in subparagraphs, (ii) and (iii), to imprisonment for a period of not less than TEN YEARS;

(ii) where the rape in question or any other rape of which such person has previously been convicted was committed under any of the coercive circumstances referred to in paragraph (a), (b) or (e) of subsection (2) of section 2, to imprisonment for a period of not less than twenty years;

[Comment: The above situations include cases where physical force is used against the complainant or someone else, where threats are made via word or actions, or where the complainant is unlawfully detained during the act of rape]

(iii) where the rape in question or any other rape of which such person has previously been convicted was committed under any of the circumstances referred to in subparagraph (iii) of paragraph (a), to imprisonment for a period of not less than FORTY-FIVE YEARS.

[Comment: Such matters include, inter alia, where grievous bodily or mental harm is suffered as a result of the rape; where the complainant is younger than thirteen years; or by reason of age exceptionally vulnerable; or the complainant is under the age of eighteen years & the perpetrator is the complainant’s parent, guardian or caretaker or is otherwise in a position of trust or authority over the complainant (See para (a)(iii) above.]

**Those minimums highlighted above are, however, not absolute. Section 3(2) provides that:**

‘if a court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the applicable sentence prescribed in subsection (1), it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence’.

Thus, courts must impose at least the appropriate minimum sentence, unless they find ‘substantial and compelling circumstances’ which then warrant a sentence below the prescribed minimum. The court must enter those circumstances on the record. As the legislature has not defined ‘substantial and compelling circumstances’, it has been up to the courts to do so. Precedent should be followed as guidance in this regard.

The High Court and Supreme Court of Namibia has agreed with the definition of and approach to substantial and compelling circumstances as dealt with in the South African case of *S v Malgas* 2001 (2) SA 1222 (SCA) (2001 (1) SACR 469. In *S v Lopez* 2003 NR 162 (HC) it was confirmed that Namibian courts should adopt a similar approach.
The key points adopted in the Lopez case are as follows:

- Courts should approach the imposition of sentence conscious that the legislature has prescribed minimum sentences which should be imposed in the absence of weight justification and truly convincing reasons for a different response.
- The specified sentences are not to be departed from ‘lightly and for flimsy reasons’. The court should not consider ‘speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders’.
- All other factors traditionally taken into account in sentencing can be taken into account, to see if they ‘cumulatively justify a departure from the standardised response that the legislature has ordained’.
- If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.
- The court must take account of the fact that rape has been singled out for severe punishment and any sentence which departs from the prescribed minimum ‘should be assessed paying due regard to the bench mark which the legislature has provided’.

In *S v Gurirab* 2005 NR 510 (page 514) Heathcote J relied heavily on *S v Malgas* 2001 (2) SA 1222 (SCA) (2001(1) SACR 469) in the interpretation of the phrase ‘substantial and compelling circumstances’. The first essential point reiterated was that presiding officers should be mindful that ‘a court was not to be given a clean slate on which to inscribe whatever sentence it thought fit.’

Heathcote J further reiterated that the court in *S v Malgas* found that all the factors normally taken into account in sentencing should be considered in the decision whether or not in a particular case there are substantial and compelling circumstances (page 482).

“All factors traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process. The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ("substantial and compelling") and must be such as cumulatively justify a departure from the standardised response that the Legislature has ordained.”
It is only after considering all the circumstances, both mitigating and aggravating that a determination can properly be made whether considering the circumstances cumulatively, substantial and compelling circumstances exist. In *S v Matityi* 2011 (1) SACR 40 (SCA) (page 52) Ponnan JA criticised the court a quo’s finding of substantial and compelling circumstances in the absence of any information relating to the victims, thus only relying on an assessment of factors relating to the accused:

‘Despite our particularly strong commitment to the promotion of the rights of victims of sexual crimes, particularly rape, we still do not have a clear strategy for dealing inclusively with it, either at a primary preventative or secondary protective level. The result is that, as alarmed as we may be by the reported incidence of rape, the true extent of the scourge appears far more widespread. … It follows that, to borrow from Malgas, it still is “no longer business as usual”. And yet, one notices all too frequently a willingness on the part of sentencing courts to deviate from the minimum sentences prescribed by the legislature for the flimsiest of reasons - reasons, as here, that do not survive scrutiny. As Malgas makes plain, courts have a duty, despite any personal doubts about the efficacy of the policy or personal aversion to it, to implement those sentences.’

The endorsed Malgas guidelines were adopted in numerous cases. For example, in *S v Limbare* 2006 (2) NR 505 (HC) (para [8] – [10]), it was accepted that in the sentencing decision there was no need for the factual findings, based on evidence at conviction and sentencing, to be special or exceptional. All the normal circumstances should be weighed cumulatively. It is, however, important to spell out the reasons for justifying a deviation from the minimum prescribed sentence – with a concentrated mind, leading to a sound decision. It was further highlighted that, despite the accused being legally represented, it remains the court’s duty to ultimately determine substantial & compelling circumstances, and therefore has to conduct its own investigation (para [11]-[12]). This is in line with the court’s role of being more active during the sentencing phase.

The factors accepted as aggravating to the sentencing decision should be proved beyond reasonable doubt (*S v Libongani* above page 570). The reason for this is because it might change the sentencing category.

In *S v JB* 13/11/2015 NASC it was held that the cumulative impact of factors and circumstances normally taken into account did not justify the departure from the mandatory minimum sentences prescribed by the Act. A sentence of fifteen years was imposed on the biological father who raped his daughter under 18. It was described as a heinous crime. The victim’s feeling was highlighted where she said that ‘It hurts me a lot that my father could have done something like this to me’.

The sentencing regime in the Combating of Rape Act only limits, but does not take away the court’s sentencing discretion. There is no automatic application of the provisions in section 3, and the question should always be what the proper sentence in the circumstances would be.

As far as the unrepresented accused is concerned, it was stated in *S v Gurirab* (above) that the court must explain the important concepts relevant during sentencing. This must include the following:
- the meaning of coercive circumstances
- the applicability of minimum sentences
- the concept of ‘substantial and compelling circumstances’

The accused must also understand that they have an opportunity to call witnesses and make a statement before sentence is imposed by the court.

With regards to child offenders (all children under 18), the minimum sentences prescribed in subsection (1) shall not be applicable in respect of a convicted person who was under the age of eighteen years at the time of the commission of the rape and the court may in such circumstances impose any appropriate sentence (s 3(3)). When a minimum prescribed sentence is imposed no suspension of that sentence is permitted (s 3(4)) - ‘If a minimum sentence prescribed in subsection (1) is applicable in respect of a convicted person shall, notwithstanding anything to the contrary in any other law contained, not be dealt with under section 297(4) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977): Provided that, if the sentence imposed upon the convicted person exceeds such minimum sentence, the convicted person maybe so dealt with in regard to that part of the sentence that is in excess of such minimum sentence’. In S v Kalingindo (CC 09/2007 10 May 2007) the sentence was accordingly 20 years imprisonment with 5 years suspended on condition that the accused (aged 21) not convicted of rape during that period.

It may be noted that when a court, based on substantial and compelling circumstances, deviates from the prescribed sentence, that the prohibition on suspension is not applicable anymore (Terblanche 2016: 88).

May minimum prescribed sentences be increased?

Case law illustrate that the prescribed minimum sentence may be increased. In the cases below the prescribed sentence of fifteen years was increased with a period of two years imprisonment, as well as six years. In S v Ndakolo 2014(2) NR 371 (HC) the sentence of 17 years imprisonment was confirmed where a 19-year-old perpetrator had raped a 9-year-old boy anally. In S v Libongani above a 21-year-old perpetrator raped a 10-year-old girl in her sleeping hut (twice in one night at least). The sentence of 12 years imprisonment was changed to 17 years after the state appealed the sentence. It was held that when the rape had been committed with a ‘degree of aggravation and viciousness’, it would call imperatively for the most extreme punishment … meaning that more than the minimum prescribed sentence may be imposed (page 568), and that the seriousness of the crime required a sentence more than that imposed by the magistrate (page 569). The trial court was criticised for focusing only on the pre-sentence incarceration period of 11 months and the accused’s swollen feet. Other important aggravating factors which were not considered by the court a quo include the age difference of 11 years; the fact that the complainant was raped in the comfort zone of her home, and that the accused threatened the complainant with a knife if she screamed or told anyone. In S v Kanyuumbu CC 03/2007 26 April 2007 the rape of a six-year-old girl was described as brutal and a sentence of 21 years was imposed. See also S v AK (High Court) CA 19/04 - 2 Nov 2005).

Overview of widely recognised aggravating and mitigating factors in child rape

Aggravating and mitigating factors influence the ‘extent to which the offender is to be blamed for his crime and how much he or she therefore deserves to be punished’ (Terblanche 2016: 211). Mitigating factors are those factors that are favourable to the accused and generally result in a lighter sentence, while aggravating factors have the opposite effect. Although there has been very little theoretical discussion of the concepts of aggravating and mitigating factors, the courts refer to them in the context of determining substantial and compelling circumstances as though these concepts have a clear and definite meaning. First, it was held in S v Malgos (2001 1 SACR 469 (SCA) para 9) that the content or meaning of the term ‘substantial and compelling circumstances’ (in the South African legislation - s 51(3)(a) of the Criminal Law Amendment Act 105 of 1997) should be determined by weighing the mitigating and aggravating factors. When the aggravating factors are outweighed by the cumulative effect of the mitigating factors, then, in order to avoid an unjust and disproportionate sentence, the court may deviate from the prescribed minimum sentence. Secondly, in S v Abrahams (above) it was held that,
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although precedents in respect of sentences imposed prior to the Criminal Law Amendment Act 105 of 1997 should not be followed with regard to length of sentence, they could still be followed (and used in the above process) with regard to the factors considered to be aggravating and mitigating. The court’s acquired insight into the characteristics and effect of incest, as well as its sensitivity to, and awareness of, the constitutional values of dignity and equality, led to the consideration and recognition of an aggravating factor overlooked by the court a quo. The attitude of the father to his daughter, whom he regarded as a chattel, not merely to be used at will, but, once the first entitlement had been exercised, to be discarded for similar use by others, was accorded substantial aggravating weight and contributed to the increase in sentence from seven years’ to 12 years’ imprisonment (at 122g 123c).

Thus, where a judicial officer fails to recognise the existence of a particular factor, or wrongly recognises it, or attaches the incorrect weight to a factor in a particular case, the process becomes unbalanced and the sentencing decision may be overturned on appeal. Another example where the trial court failed to recognise and take into account all the aggravating factors is the case of S v Libongani (above). As highlighted earlier, a recognition of all the relevant aggravating factors in this case (inter alia repeated rape), guided the supreme court to increase the sentence imposed in the court a quo with five years. However, it has also been acknowledged that, though many factors may be listed as aggravating or mitigating, some only have a neutral value and do not really influence the process (S v E 1992 2 SACR 625 (A) 632a). In the analysis below neutral factors are listed separately and previous cases where these factors had been regarded as mitigating should thus no longer be followed.

Although the categories of offences selected by the legislature in the minimum sentencing (s 3 of the Combating of Rape Act 2000), are qualified by aggravating features and factors in order that the offences concerned may be ranked amongst the most serious of sexual offences, in those same categories, other aggravating and mitigating factors will influence the final grading done by judicial officers in court, however strange this may sound. In the absence of any other source, such as legislation or sentencing guidelines, case law would appear to be the main source for establishing mitigating and aggravating factors. However, it may be noted that in South Africa a legislative intervention, namely the Criminal Law (Sentencing) Amendment Act 38 of 2007 (s S1(3)(aA)), has excluded certain factors that may serve as a single mitigating factor justifying deviation from the minimum sentence in cases of rape. They include the complainant’s previous sexual history, the apparent lack of physical injury to the complainant, an accused person’s cultural or religious beliefs about rape or any relationship between the accused person and the complainant prior to the offence being committed.

Normally, factors that were present before, during or after the commission of the crime will be taken into account. Depending on how long it will take to finalise a case, the accuracy of information on future harm may be influenced. Courts will nevertheless have the benefit of having handled the trial and may hear expert evidence on the matter.

Traditionally, the factors influencing the imposition of a sentence have been grouped under the factors of the Zinn sentencing triad, namely the crime, the offender and the interests of society (see S v Zinn 1969 2 SA 537 (A). With the victim having been accorded an independent position in sentencing (Müller and Van der Merwe 2004: 17; Matyiti above; LK above page 108), it is submitted that aggravating and mitigating factors should be divided into four categories:

• factors relating to the circumstances surrounding the commission of the crime
• factors relating to the personal circumstances of the accused
• factors having a bearing on society’s interests
• factors pertaining to the harmful effects of the crime on the victim.

Each type of offence has its own inherent set of aggravating factors. The following is, in addition to selected foreign practices, a compilation of the most important aggravating or mitigating factors as recognised over the years in cases of child rape. It is based on an analysis of case law and minimum-sentence legislation. The factors are divided into four categories, namely, the interests of the child victim, the offender, circumstances related to the commission of the crime and society’s interests. The first category addresses the after-effects of the crime, other than physical injuries, since the courts have traditionally taken the physical injuries of the victim...
into account under the circumstances related to the commission of the crime. Those aggravating and mitigating factors which are criticised for being outdated or incorrect are highlighted. The aggravating and mitigating factors identified in cases of rape against children appear from both Namibian and South African court judgments, since the latter has been held to have ‘particular persuasive value’ (LK above [para [56]).

**The victim: Aggravating factors**

The physical injuries and the psychological effects of the incident on the complainant in child sexual abuse cases are essential factors to consider in cases where minimum sentences are prescribed. Section 3(a)(iii)(aa) of the Combating of Rape Act therefore recognises grievous bodily or mental harm as aggravating factors deserving of a minimum of fifteen years imprisonment.

When the psychological effects of the incident on the complainant are considered, the Supreme Court of Appeal further accepted that the following symptoms displayed by the victim justify an interpretation and conclusion that a complainant has been deeply and injuriously affected by rape:

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**Aggravating Factors**

- Reluctance to enter her own room after the rape
- A fear of sleeping alone
- Sudden rejection of a parent or care-giver and the repelling of physical contact
- Deterioration in schoolwork/failure of examinations for the first time
- Rebelliousness and disobedience at school
- An inability to work through the rape
- Nightmares and the development of phobias
- Decreased ability to concentrate for long
- The victim is ill-tempered, aggressive and rebellious and has withdrawn from family members as well as neighbourhood children
- An inability to discuss the rape and a need for long-term psychotherapy (Abrahams above 124c)
- Victim becomes aggressive bully and may develop personality disorder (*S v Dayimani* unreported case no cc12/2007 (e) 26 Aug 2007)

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In the case of incest the court found that the after-effects are more lingering and stigmatising than other forms of sexual assault Abrahams 125c). Of importance is the fact that recent research found that stranger rape, relationship rape and acquaintance rape are experienced as equally traumatic and harmful by victims (Sentencing Advisory Panel Research 2002). See for example the cases of AK, Kanyuumba and Kalingindo in this regard, appearing in the addendum.
Other aggravating factors accepted by courts refer to the following circumstances:

- where the victim does not complete her schooling as a result of the rape (Rammoko v Director of Public Prosecutions 2003 1 SACR 200 (SCA) 205f),
- where the victim is ostracised by some members of the community for sleeping with men and is intimidated by the accused’s family and friends (S v Njikelana 2003 2 SACR 166 (C) 174h),
- the victim and her family had to move house because they were not able to live where the crime had taken place (S v M 1993 2 SA 1 (A) 7g)
- the victim becomes pregnant (S v B 1996 2 SACR 543 (C) 554a)
- the victim was a virgin (S v Rooi & X CC 35/07 21 Dec 2007; S v Boer 2000 2 SACR 114 (NC)117e; S v G 2004 2 SACR 296 (W) 301e 300h)
- the victim became pregnant and gave birth to a still-born child (S v AK (High Court) CA 19/04 - 2 Nov 2005))
- the victim is very young (s 3)(1)(a)(iii)(bb)(B) of the Combating of Rape Act 2000; S v Gomaseb 2014 (1) NR 269 (HC); S v Pius CA63/2003 29/10/2003; S v Kanyuumbu CC 03/2007 26 April 2007; S v Tyatyame 1991 2 SACR 1 (A) 6e; Blaauw (fn 13) 2001 2 SACR 255 (C) 261a)

The victim: Mitigating factors

Mitigating factors referring to the victim in child rape have been held to be where the victim has overcome the after-effects of the rape incident, or is making good progress in that regard (Rammoko 205f). Courts should, however, be aware of the danger of a finding that no harm has been caused, based purely on the victim’s appearance in court (cf S v G 2004 2 SACR 296 (W) 297j–298a). The fact that a victim was raped by people from the same social milieu and who were known to him or her, should not be accepted as mitigating (van der Merwe 2008: 596).

The victim: Neutral factors

The fact that a complainant is refined, civilised or from a good home should not play any role during the sentencing decision, neither should the fact that a victim had sexual intercourse with someone else two days before the rape, nor where the victim has not lost her virginity as a result of the crime of rape. In fact, section 51(3)(aA) of the new Criminal Law (Sentencing) Amendment Act excludes taking into account the victim’s sexual history. Another factor that should not be to the accused’s advantage is when the victim, despite the accused being aware of his HIV-positive status, did not contract AIDS (S v Snoti 2007 1 SACR 660 (E) 663c).

The offender: Aggravating factors

- Where the accused is in a position of trust, such as a father, teacher, pastor or care-giver, and abused the trust of the child or their position of responsibility it has always been regarded as one of the most important aggravating factors (s 3)(1)(a)(iii)(cc) of the Combating of Rape Act 2000. See also S v AK (High Court) CA 19/04 - 2 Nov 2005).

- The attitude of the accused towards the victims as an important aggravating factor, a factor that is often overlooked trial courts. For example, a father who is sexually/possessively jealous with regard to his daughter and is determined to precede other young males in any possible carnal access to her should not be tolerated. Such an attitude, as mentioned above, results in the daughter being viewed as a chattel, not merely to be used at will, but, once the first entitlement has been exercised, to be discarded for further similar use by others (Abrahams above 122g). Further, an accused who considers young girls as objects to be used to satisfy his lust is considered by the courts to be a sexual thug (S v Mahomotsa 2002 2 SACR 435 (SCA) 443d; S v Shigwedha (CC 12/2008) [2009] NAHC 33 (13 March 2009).
• Repeated acts of raping a victim, who has been kidnapped and locked up, were found to be indicative of the accused’s use of his position of power to the full (Mahomotsa above; also S v Rooi above). Likewise, it was accepted as aggravating that the accused used his superior physical strength when he gagged or overpowered the victim (S v Jackson 1998 1 SACR 470 (SCA) 478a).

Other aggravating factors refer to circumstances where the accused has previous convictions for sexual offences against children, or for crimes against the person, where the accused was awaiting trial for a similar offence when he committed the rape, where the accused displays certain character traits, such as the commission of another rape only six weeks before, where a youthful offender consumes alcohol together with adults before the rape, where the accused committed the rape with ‘degree of … viciousness’ (Libongani above) and where a degree of planning/ cunning was involved in the accused’s commission of the offence (Blauw above 261a). Further, not only apparent methods or conduct, but also the grooming process used by the sexual offender to win the trust of a child in a manipulative way and to obtain access to the child, are indicative of planning (Gillespie 2004: 587).

• With regard to whether the accused shows remorse or not there has been conflicting views. On the one hand showing no remorse has been considered as aggravating (S v R 1996 2 SACR 341 (T) 344j; S v M 1994 2 SACR 24 (A) 30h), while on the other hand it was held that the total lack of remorse on the part of the accused was not in itself an aggravating factor, but simply meant that he could not rely on remorse as a mitigating factor (S v Njikelana 2003 2 SACR 166 (C) 175d). It is submitted that the latter viewpoint is to be followed. Terblanche (2016: 212) argues in this regard that, in light of the accused’s right to plead not guilty, their exercise of such right should never be seen as a lack of remorse to be held against them during the imposition of sentence.

The offender: Mitigating factors

• It would appear that where the accused, although not a juvenile any more, is of a young age, he deserves a lesser punishment (Njikelana above 175d). In Mabuza, Simongo, Sithole v The State 2007 (SCA) 110 (RSA) para 23, the accused were 20, 19 and 18 years during the commission of the crime and it was held that despite their ages not per se being a mitigating factor, the court cannot disregard youthfulness because it would ‘deny the youthful offender the human dignity to be considered capable of redemption’. See also the cases of S v Kalingindo (above) and S v G & G CA 61/2008 10 October 2008.

When the accused is immature or has deficient and inadequate personality traits this could make them less blameworthy (Blauw above 262a–j). The effect of alcohol on the accused has also been accepted by courts to diminish his sense of judgment (inter alia Njikelana above 174d–e). Terblanche (2016: 224) submits that diminished responsibility is one of only a few factors that have a mitigating influence on sentencing.

• Other factors favourable to the accused refer to circumstances where he was under the influence of an older accused (S v V 1996 2 SACR 133 (T) 138j–139a; Kalingindo above), where he shows remorse (Matyiti above; see also Kanyuumbo above) and, lastly, where he has no previous convictions (especially where the accused is already middle-aged or older (Abrahams above).

Further, it has been mitigating where the accused has the potential for development or rehabilitation (S v V 1996 2 SACR 133 (T) 138j–139a; Kalingindo above), where he shows remorse (Matyiti above; see also Kanyuumbo above) and, lastly, where he has no previous convictions (especially where the accused is already middle-aged or older (Abrahams above).

Offenders being older seems to be irrelevant for sentencing purposes, but when being older than 60 years, it is cautioned that it may have the implication of a life sentence when a lengthy sentence is imposed (Terblanche 2016: 223-224). However, old age simply serves as one of many mitigating factors during sentencing and can never, as such, be a bar to imprisonment. Maya DP in S v Hewitt 2017 (1) SACR 309 (SCA), adopted such approach (at para 15). She cited, inter alia, S v Munyai and Others 1993 (1) SACR 252 (A), where the court held that old
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age serves as a mitigating factor ‘on the basis of compassion coupled, I think, with the perception that the community expects old people to be treated with sympathy’ (at 255h). In Hewitt his age of 75 years and the perceived expected sympathy were, however, trumped by the gravity of the offences of child rape and other serious aggravating factors resulting in a custodial sentence of eight years.

Lastly, the time spent in custody before sentence is a mitigating factor (S v Limbare above; S v AK above). See also Terblanche 2016: 232-233 for a discussion.

The offender: Neutral factors

Factors that should not influence the sentencing process refer to situations where the offence was not premeditated, the accused has marital problems that caused sexual frustration, the accused’s cultural or religious beliefs and the virility of a young man (S v Mahomotsa above 442d–e). Further, in cases involving intra-familial child abuse or breach of trust, less emphasis than usual should be placed on the fact that the offender is of good character or has no prior criminal record (Canadian Department of Justice 2003: 3). Finally, a plea of guilty does not necessarily indicate remorse – its sincerity should be investigated (S v M 2007 2 SACR 60 (W) paras 70-82; S v Matityi above).

Circumstances related to the commission of the crime: Aggravating factors

Children are vulnerable and therefore defenceless, thus by choosing a child as victim the accused increases his blameworthiness (S v D 1995 1 SACR 259 (A) 260g–h; Terblanche 2016: 216). As mentioned earlier, this was acknowledged by the Namibian legislature when the rape under coercive circumstances of any child under the age of 13 years was categorised as deserving of the most severe sentence in terms of s 3(1)(a)(iii) of the Combating of Rape Act 2008, namely fifteen years. Other aggravating features elevated to this category are instances where the victim is under the age of 18 and the perpetrator is the complainant’s parent, guardian or caretaker or is otherwise in a position of trust or authority over the complainant, where grievous bodily or mental harm is caused by the crime of rape, where more than one person is involved in committing the rape, where the accused knew that they were HIV-infected at the time of the rape, or where a firearm or any other weapon for the purpose of or in connection with the commission of the rape was used. It has also been accepted that circumstances which contribute to the accused deserving a more severe (middle-range) punishment of ten years, include situations where physical force is used against the complainant or someone else, where threats are made via word or actions, or where the complainant is unlawfully detained during the act of rape (in terms of s 3(1)(a)(ii) of the Combating of Rape Act 2008.

In S v Kanyuumbo (above) the six-year-old was raped twice (vaginally and anally) causing permanent physical and psychological harm, and its brutality was described as an aggravating factor. In S v Tyatyame (above 6f) the act of rape committed by the accused was found to display callousness or a lack of feeling. Where the victim was exposed to further humiliation it was also taken into account as unfavourable to the accused, for example, where the victim was left naked while witnesses arrived (Boer above 117g), and where the two accused had posed as policemen, had taken the complainants by force to a dam, and had laughed at and mocked the complainants while they took turns in raping them (S v V 1989 1 SA 532 (A) 539j). Other aggravating factors relating to the circumstances under which the offence is committed refer to the abduction of the victim (V above 540a); where the accused left the victim behind in a deserted spot (Tatyama above), when the rape was committed after breaking into the victim’s house (S v G and G above), or the rape took place in the presence of other family members, including other children. In Kalingindo (above) the accused raped the 10-year-old sister of his girlfriend while his own young child was in the room. He also threatened to beat her if she cried.

Circumstances related to the commission of the crime: Neutral factors

A factor that has been held not to be aggravating is where the accused did not use a condom during the act of rape (Gagu v S 2006 SCA 5). On the other hand, factors that should be regarded as neutral factors, with no mitigating weight include the swollen feet of the accused (S v Libongani above) absence of a weapon, the absence of any physical threat by the accused, the absence of any cruelty or unnecessary violence, the rape incident caused
no physical harm (see s 51(3)(aA)(ii) of the Criminal Law (Sentencing) Amendment Act 38 of 2007 for the south African statutory guideline excluding it) and any relationship between the accused person and the complainant prior to the offence being committed (S 51(3)(aA)(iv) of the above Act). The fact that the victim ‘consented’ to the sexual act(s) after a grooming process is also not mitigating, as this amounts to ostensible consent.

The interests of society: Aggravating factors

The high incidence of rape has always been taken into account during sentencing. In light of an escalation of child rape cases, where sentences are too lenient, those cases may cause a public outcry (S v Kaanjuka above page 206).

4. CONCLUSION

This contribution consolidates judicial and legislative guidelines regarding the sentencing process in child rape cases. Such guidelines address general matters, as well as, the factors relevant to the accused, the complainant, the circumstances relating to the commission of the crime and society’s interest. The aim is to assist all role players involved in the sentencing process in child rape matters in their task of identifying the factors that must go onto the scales to determine a proportionate sentence.

READING LIST

ADDENDA
ADDENDUM 1: SUMMARY OF APPLICABLE CASE LAW

S v Lopez 2003 NR 162 (HC)

• Accused convicted of raping and kidnapping his estranged wife. Coercive circumstances were the context of the unlawful confinement.
• Mitigating: first time offender, self-employed, father of a young daughter (the previous not enough but when coupled with following), no overt threats or force used, complainant not a stranger to sex with accused.
• 10 year minimum reduced to 5 years.

S v Limbare (CA 128/05, CA 128/05) [2006] NAHC 24 (16 June 2006)

• Accused worked on farm where complainant lived. Accused raped her in her home.
• Issue of whether substantial and compelling circumstances fully explored. Accused was represented.
• Mitigating: Accused in custody for 11 months before sentencing, degree of force used was little, no injuries other than pain in stomach or arm
• Remitted back to magistrate. Court must consider whether there are substantial and compelling circumstances and make enquiries if issue not addressed by counsel.
• The High Court held that ‘… it is important to stress that the minimum sentencing provisions contained in s.3 of Act 8 of 2000 limit, but do not take away, the trial court’s discretion to impose a proper sentence based on all the circumstances of the case. The Act does not require sentencing according to a formula in which the discretion of the sentencing officer has no role to play. In other words, it is not a matter of placing the particular offence of rape in a certain category according to its circumstances and then to impose the minimum prescribed sentence as if it follows automatically and without any further consideration of what a proper sentence would be’.

S v Bezuidenhout NHCCC4/05; CC4/05 [2006] NAHC 8 1 March 2006

• Accused convicted of abduction and rape.
• Issue of previous conviction for rape and whether it can be disregarded after 10 years.
• Aggravating: previous conviction for rape for which Accused received 8 year sentence.
• 45 year minimum
• As accused only released 2 years before this offence, his previous conviction is still relevant.

S v Kaanjuka 2005 NR 201 (HC)

• Accused raped two 8-year-old girls in one incident.
• Sentenced to 2 consecutive 20 year terms.
• Was it one transaction or 2 rapes?
• Mitigating factors as argued by accused were not found.
• Appeal dismissed.

S v Guirirab 2005 NR 510 (HC)

• Accused raped a 13-year-old girl.
• Issue of self-presented accused at sentencing.
• Guidelines issued for courts and how must explain minimum sentences and process for self-represented accused.
S v G & G CA 61/2008 10 October 2008

- 2 accused pled guilty to rape and housebreaking and sentenced to 15 year minimum on rape. Both represented at sentencing. One of accused was 16 at time. Other was 18.
- Issue: should represented accuseds be informed of substantial and compelling circumstances?
- Mitigating: Youthfulness is a strong mitigating factor weighing heavily as substantial and compelling circumstance.
- Aggravating factor: gang rape.
- Judge only has duty to provide information about substantial and compelling circumstances to self-represented accused.
- Sentence varied to 15 years with 5 years suspended on condition not convicted of rape or attempted rape in that period.

S v AK (High Court) CA 19/04 - 2 Nov 2005

- Accused had repeatedly raped his 14-year-old stepdaughter who had a stillborn child as result. Sentenced to 20 years (15 would have been minimum due to complainant’s age and position of trust)
- Issue: was going above minimum excessive?
- Aggravating factors: fact that complainant had stillborn child, effect on victim, multiple rapes.
- Mitigating factors: force not considerable, no weapons, no injuries, 2 years pre-trial custody, no previous convictions
- Courts can impose a sentence in excess of the minimum.
- Accused’s sentence was varied to 17 years minus 2 years pre-trial custody to 15 years.

S v Pius CA63/2003 29/10/2003

- Accused convicted of raping a 6-year-old. Sentenced to 15 year minimum. Appealed minimums as unconstitutional and disproportionate.
- Defence argues there were substantial and compelling circumstances as accused was young (20), first offender, intoxicated, no violence used.
- Appeal unsuccessful. Not unconstitutional.
- Mitigating factors submitted by defence viewed cumulatively are not substantial and compelling, especially considering young age (6) of complainant.

S v Rooi & X CC 35/07 21 Dec 2007

- Rape x 2, kidnapping, attempt murder. Rooi (25 years old) and X (17 years old) abducted complainant from her home, both raped her, Rooi told X to stab her and X stabbed her 7 times. They left her in the veld. Complainant was 13 years old and a virgin.
- Aggravating factors: complainant’s age and virginity; circumstances were some of worst encountered by the court.
- Rooi sentenced to 19 years imprisonment on first rape, 15 on second, 7 for kidnapping, 10 for attempted murder. Some portions to run concurrently. 29 years total.
- X sentenced to 12 years on first rape, 8 on second rape, 5 for kidnapping, 8 for attempted murder. 19 years total as some ran concurrently.

S v Kanyuumbo CC 03/2007 26 April 2007

- Accused raped 6-year-old complainant vaginally and anally.
- Evidence of complainant’s trauma and continuing effects of rape led by prosecutor.
- Accused did not testify in mitigation but submissions were made on his behalf.
- Mitigating factors: Accused is supporting 13 minor siblings. Court comments that other factors (intoxication, remorse) might have carried more weight had accused testified about them.
• Aggravating factors: brutal rape, 2 acts of penetration, small girl, permanent physical harm, psychological and emotional effects.
• 21 years imprisonment (minimum was 15).

S v Kalingindo CC 09/2007 10 May 2007

• Accused raped 10-year-old sister of girlfriend while his young child was in the room. Threatened to beat her if she cried.
• Accused’s youth (21), possibility of rehabilitation.
• No physical injuries but emotional scars.
• 20 years imprisonment with 5 years suspended on condition accused not convicted of rape during that period.

S v Bezuidenhout 2006 (2) NR 613 (HC)

• The minimum sentence of 45 years’ imprisonment provided for in section 3(1)(a)(iii)(f) of the Act was relevant because the accused was a second-time rape offender who used a knife in the commission of the crime. After holding that no substantial and compelling circumstances existed to justify a departure from the minimum sentence, Damaseb JP continued as follows:

• ‘The accused is now 33 years old. He is unemployed and has 2 children. The best part of his productive life has been spent in prison. He has been in prison now for about 3 years awaiting his trial. I cannot ignore that fact and I take it into account in the sentence I impose. He will be a very old man by the time he has served the minimum sentence required by law. I do not therefore propose to impose a heavier sentence than what the law requires.’


• The crime of rape is mostly committed with the purpose to satisfy the sexual urge of the offender – which accused admitted in the court a quo – and it seems to me that it can only in the most exceptional circumstances contain mitigating factors which could explain the commission of the crime and diminish the moral blameworthiness of the offender”
ADDENDUM 2: RELEVANT LEGAL PROVISIONS

PROVISIONS OF CRIMINAL PROCEDURES ACT 51 OF 1977 as amended

Section 158A  Special arrangements for vulnerable witnesses

(1) A court before whom a vulnerable witness gives evidence in criminal proceedings, may on the application of any party to such proceedings or the witness concerned, or on its own motion make an order that special arrangements be made for the giving of the evidence of that witness.

(2) “Special arrangements” means one or more of the following steps:

(a) The relocation of the trial to another location while the evidence of the vulnerable witness is being heard;
(b) the rearrangement of the furniture in a court room, or the removal from or addition of certain furniture or objects to or from the court room, or a direction that certain persons sit or stand at certain locations in the court room;
(c) notwithstanding the provisions of section 153 the granting of permission to any person (hereinafter referred to as a “support person”) who is a fit person for that purpose to accompany the witness while he or she is giving evidence;
(d) the granting of permission to the witness to give evidence behind a screen or in another room which is connected to the court room by means of closed circuit television or a one way mirror or by any other device or method that complies with subsection (6);
(e) the taking of any other steps that in the opinion of the court are expedient and desirable in order to facilitate the giving of evidence by the vulnerable witness concerned.

(3) For the purposes of this section a vulnerable witness is a person-

(a) who is under the age of eighteen;
(b) against whom an offence of a sexual or indecent nature has been committed;
(c) against whom any offence involving violence has been committed by a close family member or a spouse or a partner in any permanent relationship;
(d) who as a result of some mental or physical disability, the possibility of intimidation by the accused or any other person, or for any other reason will suffer undue stress while giving evidence, or who as a result of such disability, background, possibility or other reason will be unable to give full and proper evidence.

(4) The support person is entitled to-

(a) stand or sit near the witness and to give such physical comfort to the witness as may be desirable;
(b) interrupt the proceedings to alert the presiding officer to the fact that the witness is experiencing undue distress:

Provided that subject to subsection (5), the support person shall not be entitled to assist the witness with the answering of a question or instruct the witness in the giving of evidence.

(5) The court may give instructions to a support person prohibiting him or her from communicating with the witness or from taking certain actions, or may instruct the support person to take such actions as the court may consider necessary.

(6) When a witness gives evidence behind a screen or in another room, the accused, his or her legal representative, the prosecutor in the case and the presiding officer shall be able to hear the witness and shall also be able to observe the witness while such witness gives evidence.

(7) When a court is considering whether an order under this section should be made, it shall also consider the following matters-

(a) the interest of the state in adducing the complete and undistorted evidence of a vulnerable witness concerned;
(b) the interests and well-being of the witness concerned;
(c) the availability of necessary equipment and locations;
(d) the interests of justice in general.
164 When unsworn or un-affirmed evidence admissible

(1) Any person-
   (a) who, from ignorance arising from defective education or other cause, is found not to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation; and
   (b) who is younger than 14 years shall be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation:

Provided that such person shall in lieu of the oath or affirmation be admonished by the presiding judge or judicial officer to speak the truth, the whole truth and nothing but the truth.

(2) If such person wilfully and falsely states anything which, if sworn, would have amounted to the offence of perjury or any statutory offence punishable as perjury, he shall be deemed to have committed that offence, and shall, upon conviction, be liable to such punishment as is by law provided as a punishment for that offence.

(3) Notwithstanding anything to the contrary in this Act or any other law contained, the evidence of any witness required to be admonished in terms of the proviso to subsection (1) shall be received unless it appears to the presiding judge or judicial officer that such witness is incapable of giving intelligible testimony.

(4) A court shall not regard the evidence of a child as inherently unreliable and shall therefore not treat such evidence with special caution only because that witness is a child.

166 Cross-examination and re-examination of witnesses

(1) An accused may cross-examine any witness called on behalf of the prosecution at criminal proceedings or any co-accused who testifies at criminal proceedings or any witness called on behalf of such co-accused at criminal proceedings, and the prosecutor may cross-examine any witness, including an accused, called on behalf of the defence at criminal proceedings, and a witness called at such proceedings on behalf of the prosecution may be re-examined by the prosecutor on any matter raised during the cross-examination of that witness, and a witness called on behalf of the defence at such proceedings may likewise be re-examined by the accused.

(2) The prosecutor and the accused may, with leave of the court, examine or cross-examine any witness called by the court at criminal proceedings.

(3)(a) If it appears to the court that any cross-examination contemplated in this section is being protracted unreasonably and thereby causing the proceedings to be delayed unreasonably, the court may request the cross-examiner to disclose the relevance of any line of examination and may impose reasonable limits on that cross-examination regarding the length thereof or regarding any particular line of examination.

(b) The court may order that any submission regarding the relevancy of the cross-examination be heard in the absence of the witness.

(4) Notwithstanding the provisions of subsections (1) and (2) or anything to the contrary in any other law contained but subject to subsection (5), the cross-examination of any witness under the age of thirteen years shall take place only through the presiding judge or judicial officer, who shall either restate the questions put to such witness or, in his or her discretion, simplify or rephrase such questions.

(5) The court may allow the cross-examination of a witness referred to in subsection (3) to occur through a person other than the presiding officer if-
   (a) that person has the qualifications determined by the Minister by notice in the Gazette; and
   (b) that person is immediately available when the witness concerned gives evidence.

(6) If the person referred to in subsection (5) is not in the full time employ of the state, the relevant provision of section 191 shall apply to that person as if he or she is giving evidence for the party for which the witness concerned gives evidence.
Court to decide upon competency of witness

The court in which criminal proceedings are conducted shall decide any question concerning the competency or any witness to give evidence compellability of.

216A Admissibility of certain statements made by young children

(1) Evidence of any statement made by a child younger than 14 years is admissible in order to prove any fact alleged in that statement if-

(a) the child concerned is unable to give evidence relating to any matter contained in the statement concerned; and

(b) such statement considered in the light of all the surrounding circumstances contains indications of reliability.

(2) If a child younger than 14 years gives evidence in criminal proceedings, evidence of any statement made by that child is admissible in order to prove any fact alleged in that statement if the child concerned gives evidence to the effect that he or she made that statement.

(3) Evidence of a statement contemplated in subsection (1) or (2) may be given in the form of-

(a) the playing in court of a video or audiotape of the making of the statement if the person to whom the statement concerned has been made, gives evidence in such criminal proceedings;

(b) a written record of the making of that statement if the person to whom the statement has been made gives evidence in the proceedings concerned;

(c) oral evidence relating to the making of the statement, if it is not possible to give evidence in the form contemplated in paragraph (a) or (b).