



***(IL)LEGALLY WOUNDED***  
***Children and cross-examination***  
**Children and the Courts**  
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# Speaking in tongues: the battle for credibility

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- Taylor (2004; 2001)) Brennan (1995; 1994; 1988)
- Complex use of language
- Language and body parts
- De-contextualisation
- Repetitive questioning
- Complex structure and length of questions (sometimes several questions in one statement)
- Forced errors
- Accusations of lying, coaching, perjuring
- Intimidation of courtroom; lawyers, legal process and XXN can result in children becoming so overwhelmed; fearful; traumatised they are unable to speak to give coherent evidence

# Complex use of language

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- To a 10 year old:

Defence: Was the vehicle a sedan or station wagon?

Child: What's a sedan?

No response to child's question; no attempt to clarify and no intervention by prosecutor or judge

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- To same child in XXN

Defence: I put to you that the clear impression from the evidence was that you were contending that (accused) got out of the vehicle?

Child: no response

Defence: Do you recollect the image depicted in the foreground? (showing a photograph to child)

Child: Inaudible response

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- Same case, child used the term 'touch' in a specific way, when detailing alleged anal penetration. Clear from transcript that child understood 'touch' to mean something very particular
- In XXN defence lawyer used the term 'touch' in three very different ways that meant three very different things. From the child's evidence they were clearly confused in the way 'touch' was being used by the lawyer in XXN. However there was no intervention by the prosecutor or judge on this and other areas of XXN. This XXN impaired the child's ability to understand questions and respond coherently and confidently. A feature Taylor and Brennan have identified across child abuse trials.

# Implications

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- In a number of cases child complainants began to show signs of distress and frustration which at times was used by defence lawyers to damage the child's credibility in front of the jury by suggesting that these behavioural signs or outbursts were the result of the child being caught out in their 'lies'.
- Children showed signs of losing confidence in their evidence and becoming anxious and frustrated
- Children exhibited distress and sometimes anger when repeatedly accused of being a 'liar'.
- Number of 'non responsive answers' or no answer at all or 'inaudible response' recorded.
- Lack of prosecution or judicial intervention in many cases even when child made explicit they could not understand the question.

# Language and body parts

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**Case A** 7 year old child using 'bum' and 'dick'

In XXN defence lawyer asked child about 'penile penetration' of her 'back passage'.

Child gave no response to these questions.

**Case B** 6 year old child describing her vagina and offender's penis as 'rudey' bits and described where they are on body and what they look like.

Forensic evidence corroborated vaginal and anal penetration/injuries. Accused pleaded guilty.

In court judge critical of child's use of the term 'rudey' suggesting possibility of coaching of the child and suggesting that such terminology was abnormal.

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- Child and adolescent complainants asked to provide details of length of accused's penis; depth of penetration (of penis or fingers); how long penetration took and lasted; how many times penis entered during the act;
- Aggressive or humiliating questioning when children cannot provide this evidence; are mistaken in their evidence; or when they demonstrate a reluctance/embarrassment in providing this information.
- Taylor, C. *Court Licensed Abuse*. Peter Lang: New York, 2004 provides detailed analysis across trials of entire XXN's of children

# Language and Oath

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- Need for consistency when determining whether a child is competent to give sworn evidence to reduce problems of assessment for both for child witnesses and judges.
- A recent example of question to children to determine competency:
- 10 year old asked open ended question 'what is the truth' which reduced child to confused silence

# De-contextualisation

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- De-contextualisation fragments evidence.
- Creates gaps and silences that lawyers seek to fill with alternative storylines (Taylor, 2001 & 2004 & Feiner, 1997)
- May put child complainant under considerable pressure as they must tailor their evidence to suit evidentiary boundaries
- These pressures are often evident during XCN and may damage child's credibility in front of jury.

# Judicial comment on de-contextualisation

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- “In cases involving children you have to expect some slipping up of the plan...(legal) rules are designed to favour the accused and can lead to some confusion and unreality in the evidence of (children)...she wants to explain...to tell the whole truth (but) she was told before we started that...she has been advised not to volunteer (excluded evidence) and that is causing difficulties for her....(but) Bear in mind that with a different judge on a different day all this evidence might have been let in.”

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- Taylor has argued that de-contextualisation and XCN that is confusing and intimidating does not allow child complainants to explain certain things from their perspective, using their own language and frames of reference.
- Thus a child's evidence is more malleable to alternative defence narratives
- The evidence of children is easily overpowered and nullified in such a forum
- Their attempts to explain and impart answers to sometimes confusing and complex questions impairs the quality of their evidence and may create a sense of disjointed evidence as opposed to the seamless storyline of the defence lawyer.

# Forced Errors: prior inconsistent statements

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- Focus on and demand for peripheral and minutiae details
- Eg. Model of car, interior design, number of buttons on clothing; sequence of undressing; colour of underwear; room décor; whether lamp on or off; position of furniture; how far door open; climatic temperature and weather details etc.
- Research notes that children have good recall of events and simple sequence but may be easily confused by demands for minutiae of details, such as those routinely demanded in XXN

# Repetitive Questioning

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- VLRC (Final Report, 2004) noted research that showed that repetitive, persistent questioning of children on an issue may cause a child to alter their answers to try and appease the questioner and because of the intimidation associated with such a process. Children have difficulty understanding why they are being repeatedly questioned and with defence assertions that they are mistaken or not telling the truth, a child may actually withdraw truthful answers because they think they are giving the 'wrong' answer.
- Lawyers use this technique to emotionally bludgeon children, wear them down, intimidate them, humiliate them, create fear and anxiety with the ultimate aim of causing the child to shift, or lose confidence in their evidence.

# Delayed Disclosure: lost in translation

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- This common feature in sexual offences remains poorly understood in law
- Is often a site of rigorous XCN that may turn a delay in disclosure into a parody on the child's part; or may humiliate child as they attempt to explain a traumatic reaction that they often have trouble articulating or where evidentiary rules may make explanation difficult.
- Through XCN lawyer seeks to build a verbal momentum around the both the lack of disclosure and the supposed failure of the complainant to make an immediate hue and cry.
- The lawyer's propositions build a scenario of bizarre responses by a child in the face of such abuse
- NSW Standing Committee on Law and Justice (2002) critical of High Court interpretation of the role of hearsay evidence around disclosure in child sexual abuse trials, noting their interpretation would lead to the exclusion of evidence of complaint by most victims of child sexual abuse.

# Reform Where?

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- Legislative reform not enough and does not always filter down into practice
- Specialist list of judges and prosecutors
- VLRC noted lack of systemic education for judges and magistrates on child development or the problems child witnesses are likely to experience when giving evidence.
- Education around developmentally appropriate terminology and recognition of tactics that have capacity to traumatise child and severely impair the quality of evidence they would otherwise be capable of providing to the court.
- A courtroom where 'legal drama' of lawyers is controlled/limited; less intimidating (removal of wigs and gowns; lawyers to sit when XXN child)
- Uniform adoption of the WA model of pre-recorded evidence
- Reform at level of legal culture