

NATIONAL JUDICIAL COLLEGE OF AUSTRALIA
SCIENCE, EXPERTS AND THE COURTS CONFERENCE

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**COURTS ASSESSING CHILDREN'S EVIDENCE
- A COMMENTARY ON TODD WAKEFIELD'S PAPER.**

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(This is an edited transcript of Ms Lannen's presentation))

1. One of the main lessons that we need to take away is what Todd is reminding us of: often it's the adults that need to be pooh poohed, not the children. Re the Salem Witches, I just wonder how many adults would now pass DSMB criteria believing in witches.

2. I would like to help put what Todd has given you into some sort of NSW criminal perspective because effectively I'm lawyer. I'm going to try to put it into that criminal legal perspective and also hope to enlighten some, that aren't as familiar with the NSW system as I fortunately am, in relation just how the police nowadays going about looking at dealing with allegations of child sexual assault.

Children's understanding of obligation to tell the truth –S13 Evidence Act

3. NSW it is different to the Queensland perspective. I imagine in the criminal jurisdiction of the Queensland courts Todd's expertise would be incredibly valuable due to the legislation that exists up there. But our starting point in NSW is presumption of competence for all witnesses, and they are your psychopathic offender type witnesses coming along to courtrooms as adults as well as all those children who come along to give us evidence of eyewitness reports in various stages.

Starting point in NSW is the presumption of competence - S13 Evidence Act Speaks of 'incapacity of understanding an obligation to tell the truth, incapacity to give a rational reply and incapacity of hearing, understanding or communicating'. - No psychological research indicating a connection between a moral duty to tell the truth and whether the evidence is reliable. - Children can still give reliable information even if they do not understand the nature of an obligation.
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4. The difficulty for us is that Section 13 of our Act speaks of competency as an understanding of the obligation to give truthful evidence. Now, the research seems to suggest that a lot of children at that pre-school age, and probably up to about 10 or 11 years, probably don't understand the nature of an obligation to tell the truth before a court. There is a lot of research that is coming out about that and whether in fact it is even appropriate for children to be asked about their knowledge of an obligation to tell the truth before the court. Adults certainly understand the obligation, they just don't subscribe to the obligation.

5. The difficulty for us then of course is that, if a child can't give sworn evidence, can a child give unsworn evidence? Our Act helps us out there and basically allows us to put children in court to give unsworn evidence to tell their version of their eyewitness events. The particular issue that we look at is just purely and simply, does the child understand the difference between truth and lies and is the child able to promise to tell the truth ?

- Research appears to confirm the presumption that children are competent -
- Children as young as 4 or 5 recognise deliberately false statements as lies but over-inclusive and more stringent
- May include incorrect guesses and exaggerations as lies.
- Children expect to be caught out if they lie and they tend to be: Adults are better at detecting lies by children of adults but biased to expect adults to be more truthful.
- Children expect to be punished and may believe they will go to gaol if they lie in court
- Children may not have an 'adult' definition of truth and might see a promise as something more than a speech act, where promising includes the promised act
- *G S Goodman, TL Luten, RS Edelstein and P Ekman (2006) Detecting lies in children and adults, Law and Human Behavior, 30, 1-10 (with thanks from Dr. Cashmore)*
- *Astington, J.W., (1988). Children's understanding of the speech act of promising. Journal of Child Language, 15, 157-173*

6. The current psychological research, particularly in the last maybe 5 or 6 years, seems to confirm that children do understand the nature of telling truth and lies. The difference, for us, with truth and lies versus the obligation to tell the truth seems to be something that the psychological research basically suggests that we shouldn't be looking at - children can deliberately give false allegations, and of course they can as with everyone else that comes before the court. The fact is though, that research seems to suggest that children of four or five can recognise deliberately false statements and lies. But they probably do include incorrect guesses. And of course children do expect to be caught out when they do lie, and that is something that has come forward into some very recent research that Kay Buzzy and her colleagues have done at the Macquarie University. What they have actually seen happened there is that children expect to be punished if they tell a lie. If the adult interviewer or the judicial officer, or the other social adult that is talking to the child about an eyewitness account, actually tells the kiddie that it is very important to tell the truth and ask the kiddie about the consequences to them if they don't tell the truth, those children who believe that they are to be punished if they tell a lie are more likely to tell the truth.. It is early research yet. Of course we're not too sure, as with all this psychological research, in relation to lies and truth telling are in fact real life transgressions in whether in fact it's just all fun and games for some of the kiddies.

7. The difference for us too, particularly when lawyers are asking children to give evidence before a court, is that children don't seem to have an adult definition of truth. It seems to be that it is more than a speech act to a child. From my perspective as a lawyer asking the child to go ahead and tell the truth before the court, they don't see that just as "yes, I promise to tell the truth" - what they see as is more that "I have not completed my promise until I have done the act of telling the truth". That seems to be something that the research particularly in Canada is bearing out lately.

8. Todd talked to you a little about Sam Stone and I really would like to have Sam Stone rest in peace. The difficulty that I see in relation to the Sam Stone research, was that it was done in an era in the early 1990's where there was a lot of allegations of, and probably accurately so, massive day care centre abuses. The Martin Day Care Centre case was one very big one with Kelly Michaels, and there have been some wonderful Hollywood depictions of particularly the Martin Day Care Centre case in the video stores. The difficulty for me in relation to just looking at the Sam Stone studies is that we need to look at the exact questions that were asked of the children and also bear in mind that we are talking about pre-schoolers.

9. I was telling Todd earlier, I can't remember the last time I put a pre-schooler in the witness box to give evidence in a matter and shame on me for one I did remember putting through. Basically the child was giving evidence in a closed circuit TV room and her parents were loving parents that probably loved the system to death more than the kiddie and the kiddie went into the CCT room. There was a legal argument so the machinery was turned off so our kiddie wasn't looking at us in the courtroom. The sheriff's officer wanted to keep her busy so the sheriff's officer found whatever she could find in the room at the time to keep this little 4 year old busy and it was a roll of masking tape and when the screens came back on for me to ask the kiddie some questions the masking tape was across the child's mouth.

10. So, it is a very, very rare thing that we would consider putting 3 to 4 year olds in the witness box. For many reasons and not just because they may be more suggestible than an older child. Just have a look at the control group. Let's look at the control group. Sam Stone was a stranger and he came into the class and the kids were actually listening to a story that the teacher was reading and Sam was actually introduced to the class, Sam says "I know that story, it's one of my favourites", and he walked around the classroom and then he left. He absolutely did nothing else.

11. Now, what seems to have happened is that because of the backdrop of sexual assault allegations under that suggestibility cloak at the time, there were a number of studies done. Stephen did four of those. The children were 176 pre-schoolers divided into two groups, so 3 to 4 year olds and 5 to 6 year olds and they were interviewed four times initially over a 10 week period. They were equally able to get into any of these four groups, so basically it was chance which way that the kiddies were selected.

12. In the control group they are interviewed in a neutral and non-leading manner about Sam Stone's visit and effectively they were asked 'tell me what happened' - that it is what we advocate in NSW in relation to the interviewing of child sexual assault matters or even in relation to child eyewitness reports of any type of crime. The stereotype group have been told on four separate occasions before his visit that he was clumsy and absent minded - which is very much underpinning the social strategies that some adults may use in some families to actually have a child favour one parent or the other. For the suggestion groups it was suggested to the kiddies that Sam had ripped a book and soiled the bear - it was what we say was quite inappropriate.

13. Having a look at the 5th interview which was some weeks later, the control group again were asked 'tell me everything that happened the day that Sam Stone visited your classroom'. Now after that though there were some probing questions, and those probing questions: 'did Sam Stone rip a book, did he spill anything on a teddy bear'. And what seems to be suggested is as a result of some of those probing questions, some of the children particularly in the younger group, saw this, if you like, as some sort of suggestion that perhaps Sam did rip a book or dirty the teddy bear. And then there was a counter-balancing (which is what some police are taught) when they hear something, check it, and then counter-balance it with 'did you really see him, or did you hear that he did that'. That is something that was mimicked from the Martin Day Care Centre case from one of the psychologists who was interviewing some of the children who had alleged some wonderful and weird things that were going on at this Day Care Centre. The suggestion group, of course, was what we would say it just outwardly say is just ridiculous and we would hope that this doesn't happen in any criminal jurisdiction.

14. Now, the results are, as you have already indicated, but have a look at the particular issue here. In the control group, 10% of the 3 to 4 year olds assented, 5% continued after the counter-balancing, but no kiddie from the 5 to 6 year old group assented at all, if there were no non-leading questions, even relation to the probing issue. And of course as you would expect, the worse it got the worse it became.

15. So effectively there is no way in the world that I'm suggesting that children cannot be suggestible and there is no reason in the world to suggest that, if they are around conspiratorial adults, concerning the child in their life, in their social environment or even as a professional speaking to the kiddie, that there wouldn't be submissions that we as the criminal prosecution for this state would have to be address. The issue is of course whether we get that information. In the family jurisdiction, I think you get a lot more information than we do from our wonderful police service.

16. However, the reliability of children's evidence has been looked at for many, many years. Dr Jones, as I quoted from Colorado in the States, tells a story and published a short paper in relation to how he was convinced that even a young 3 year old, after being kidnapped, and actually identifying the perpetrator from a video collage of photographs and then later a physical line-up was actually creditable after his probing and testing questioning in relation to it.

17. I do also want to commend you to Chief Justice Spigelman, who was considering our dreaded Longman direction in a case of JJB [2006] NSW CCA 126 and I would commend you to have a look at what Chief Justice Spigelman indicates in relation to children's suggestibility. The Chief Justice seems clearly to have done his homework in his particular dicta in the case in relation to the body of psychological research out there that suggests that children can be relied upon.

18. My argument is that in the normal case - that is without the normal suggestibility issues, without the normal taint, without the barrage of adults that have got some sort of sick vested interest in ensuring that this child has some sort of memory of sexual abuse that didn't occur - it is not an issue.

19. Perhaps it's not so much an issue where we have experts speak to children before they give evidence, but perhaps it's an issue in relation to whether we are communicating properly with children, and whether we and the child that we are speaking to actually speak the same language. In our jurisdiction, and I'm sure in everyone else's jurisdiction, if there is a cultural issue and the witness giving evidence doesn't have English as their first language, we are readily able to look at thinking about getting an interpreter. We of course pay for that and we hope that as a result of using an interpreter we are doing to get the best, reliable evidence, not necessary credible evidence from a speech acquisition perspective. Perhaps this is something we have to look at for children as well and that may be done in one or two ways.

Sas [2002]
<http://canada.justice.gc.ca/en/ps/rs/rep/2002/interaction/inter.pdf>
- 'Mentalism' does not seem to come much before 10 years
e.g.-"What would I see if I walked into the room"
- Cannot always change a perspective under about 12 years of age
e.g. - "What if I said..."

20. Sas in Canada has done some great research in relation to some of the reliability issues that surround children's language and how adults interpret language. There is an issue of mentalism, and for about 10 years we were not too sure if children under 10 can actually take another person's perspective. Perhaps it is the way in which we ask questions of some children that can make them in our minds a little bit more unreliable than what they actually are. Children can actually change perspective; and I see that and I have been guilty of that myself.

21. There doesn't seem to be a great deal of reliability in relation to children's estimations of time, distances and to use scale models. That is a big problem for us, particularly if I see a child asked to draw a sketch plan for a bedroom. You look at that sketch plan and you think "well, I don't know what bedroom this is, but that sure as hell not the bedroom that I think the child was in" and it's just about my stupidity sometimes in looking at just how clearly children are able to estimate this sort of stuff.

Language Acquisition
- Little understanding of a Hierarchy before about 10 years (at least) e.g. Singer & Revenson (1996) example.
- Under extension or narrow use; "touch"

22. Language acquisition is the big problem for me and the under extension of the use of touch. I'll just use this as an example that perhaps it is more about education in relation in talking to children and talking to children in the appropriate ways. Children don't understand the word 'touch' much before about 10 to 12 years the way an adult does. I learnt that lessons many, many years ago when I put a young kiddie in the witness box and the allegation was that the male perpetrator came into this child's bedroom and placed his penis on her mouth. Now, we got that evidence out. There was no issue there. The question from the defence lawyer was, "now tell me again how he touched you". The child then said "he didn't touch me". Of course the judiciary in here would then be jumping up and down at me if I tried to cross-examine my own witness. The difficulty for us is the child doesn't understand 'touch' that

way, the child understood 'touch' as the hand and a hand only. There is such an under-extension, or very narrow use of the word 'touch' as an example, in the forensic criminal perspective

23 So what I'm say is: 'is it really a case for an expert ? is it something where we actually, from the NSW perspective at least, want to bring experts into the criminal field to firstly examine children, as one option and to assist us and perhaps to assist the jury?' A second option perhaps is for a more educative role. The third option of course is to leave the expert out of the criminal domain, at least in NSW, and help us in another way - at the end of the day still try to get the best information possible for children when they are presenting themselves as witnesses in our State.

Reluctance to intervene esp in absence of objection

Leg Council Inquiry 2002

Wood Royal Commission 1996

Cashmore & Bussey 1996

- Few objections by prosecution lawyers

- Number of judicial interventions correlated with:

-Number of prosecution objections

-But not with age of child or linguistic style of defence lawyer

Recognition that questioning is developmentally inappropriate, oppressive or intimidating for a child (Dr. J Cashmore, 2006)

24 What we're arguing of course is that experts are very, very valuable and of course there have been many recommendations made- the Legislative Council inquiry in 2002; the Wood Royal Commission 1996, Cashmore & Bussey 1996. What we found though, is that the result of these studies is that we as lawyers just don't know when to intervene. Not all judicial officers know exactly whether we need to intervene in some questioning of some children. The bottom line is that probably the lawyers, particularly from the DPP perspective, is: we know our witness, we've supposedly met with our witness, we have some sort of understanding of that witness's cognitive capacity, and yet we're not intervening. We have legislation in this State that allows the judicial officer to ensure that appropriate questions are asked.

S 275 A Crim Procedure Act

In any criminal proceedings, the court must disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the court is of the opinion that the question (referred to as a "disallowable question"):

is misleading or confusing, or

(2) Without limiting the matters that the court may take into account for the purposes of subsection (1), it is to take into account:

any relevant condition or characteristic of the witness, including age, education, ethnic and cultural background, language background and skills, level of maturity and understanding and personality, and

any mental, intellectual or physical disability to which the witness is or appears to be subject.

(3)

(4) A party to criminal proceedings may object to a question put to a witness on the ground that it is a disallowable question.

(5) However, the duty imposed on the court by this section applies whether or not an objection is raised to a particular question.

25 My argument is that unless we educate both lawyers before the courts and the judiciary, in some meaningful way, we're not going to be able to properly utilise section 275A Criminal Procedure Act. There are some wonderful things published in the children and young people's equity paper that's in the NSW Judicial Commission's bench book – it is just a wonderful start to educating some groups in relation to those issues that help determine whether the questions in court are appropriate.

Is there a need for the court/Jury to have expert assistance ? – Pt 3.3 Evidence Act - In the interests of justice

26 But does that mean we need an expert ? In New Zealand they went down a path very similar to Queensland. An expert, either a psychologist or a psychiatrist, is able to actually assist the court on intellectual attainment, mental ability and emotional maturity of the complainant.

S 23G Evidence Act (NZ)

(1) An expert is-

(a) a medical practitioner whose scope of practice includes psychiatry, practising or having practised in the field of child psychiatry and with experience in the professional treatment of sexually abused children; or

(b) a psychologist practising or having practised in the field of child psychology and with experience in the professional treatment of sexually abused children.

(2) In any case to which this section applies, an expert witness may give evidence on the following matters:

(a) The intellectual attainment, mental capability, and emotional maturity of the complainant, the witness's assessment of the complainant being based on—

(i) Examination of the complainant before the complainant gives evidence; or

(ii) Observation of the complainant giving evidence, whether directly or on a videotape:

(b) The general development level of children of the same age group as the complainant:

(c) The question whether any evidence given during the proceedings by any person (other than the expert witness) relating to the complainant's behaviour is, from the expert witness's professional experience or from his or her knowledge of the professional literature, consistent or inconsistent with the behaviour of sexually abused children of the same age group as the complainant.

27 In Queensland it is in a very similar vein - expert evidence is admissible, to talk to the child's level of intelligence, the child's powers of perception, memory, expression and so on.

S 9C EVIDENCE ACT QLD

9A 2) The person is competent to give evidence in the proceeding if, in the court's opinion, the person is able to give an intelligible account of events which he or she has observed or experienced

9C Expert evidence about witness's ability to give evidence (1) This section applies to a proceeding if— under section 9A, the court is deciding whether a person is able to give an intelligible account of events which he or she has observed or experienced; or

under section 9B, the court is deciding whether a person understands the matters mentioned in section 9B(2)(a) and (b); or

(c) the evidence of a child under 12 years is admitted. (2) Expert evidence is admissible in the proceeding about the person's or child's level of intelligence, including the person's or child's powers of perception, memory and expression, or another matter relevant to the person's or child's competence to give evidence, competence to give evidence on oath, or ability to give reliable evidence.

28 What I'm saying, and this has been endorsed not just by the Australian Reform Law Commission, but by the very recent Attorney General's Sexual Assault Task Force.

ALRC RECOMMENDATIONS

79 Exception: opinions based on specialised knowledge

(1) If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.

(2) To avoid doubt, subsection (1) applies to evidence of a person who has specialised knowledge of child development and child behaviour (including specialised knowledge of the effect of sexual abuse on children and of their behaviour during and following the abuse), being evidence in relation to either or both of the following:

(a) the development and behaviour of children generally;

(b) the development and behaviour of children who have been the victims of sexual offences, or offences similar to sexual offences.

ALRC & Criminal Justice SO Taskforce (2005) RECOMMENDATIONS - TAS

79A Specialised knowledge of child behaviour

A person who has specialised knowledge of child behaviour based on the person's training, study or experience (including specialised knowledge of the impact of sexual abuse on children and their behaviour during and following the abuse) may, where relevant, give evidence in proceedings against a person charged with a sexual offence against a child who, at the time of the alleged offence, had not attained the age of 17 years, in relation to one or more of the following matters:

(a) child development and behaviour generally;

(b) child development and behaviour if the child has had a sexual offence, or any offence similar in nature to a sexual offence, committed against him or her.

29 Under our legislation we can use an expert who has specialised knowledge, a psychologist or a psychiatrist, to assist the jury in relation to their field of expertise.

30 What the Law Reform Commission has recommended, and what we endorse, is that there should either be generalist evidence to assist the court in those very, very special circumstances where the issues of child development - particularly language acquisition and child behaviour which sometimes can explain a delayed complaint - it be given to the court in some shape or manner.

31 The fact is, is that that is very similar to the legislation that exists now in Tasmania. I have some colleagues in Tasmania and have spoken to them recently and it doesn't seem that there has been anything in Tasmania in relation to this at this point. It's been in for a little while now and in fact, when I saw the legislation come in, I commended the initiative of the Tasmanian judiciary to actually consider that in some cases children probably aren't on an even playing field in the courts. At this point there doesn't seem to be any decisions in the appeal courts in relation to the provision of that legislation.

32 What we're saying at the end of the day is that there's always going to be issues where there is suggestibility and of course in those areas where there is highly suggestible conduct by persons or adults who some sort of social status over children, it is really important for us to receive expert advice. Firstly, we hope that the police have sanctioned those ones out - they are like our gate people. Our joint investigation team, the response between a Department of Community Services officer and a police officer interview the child - basically video tape that initial interview and that is for us to see. That of course is then always available for anyone that appropriately needs to access that through the police, but the difficulty for us is that in most of those types of cases, the suggestibility aspect perhaps might have occurred before the interview with police. Now there is nothing anyone can forensically control there, that is obviously when we rely upon gathering hindsight from other cases, and just some stuff that the kiddies may say. They are not the sorts of matters we say deserve this legislation. We're saying those sorts of matters need to be very, very carefully scrutinized not by the police only but by the Department of Community Services. We hope that at the end of the day, on the basis of the director's guidelines of reasonable prospect of conviction not many of those would be going to the court if we believe that they are that serious.

33 We also have the power, just as a general right, to actually go and speak to an expert about our feelings in relation to some groups of evidence, and we do that regularly. In those areas - where we may feel that the child appears unreliable but in fact it is just that the child is speaking a different language to us - we actually need some help. We as lawyers need some help and we hope that the judiciary gets some help.

34 Whether that means enacting this type of legislation or further education through the system, that's a matter for you all and a matter for everyone that sits in the criminal courts. At the end of the day my view is of course that experts have got a very valuable role, but my recommendation is that children ought not to be interviewed by any further adults than necessary.