

**THE CHILD WITNESS  
IN THE  
ACCUSATORIAL SYSTEM**

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# 1. A BASIC APPROACH TO THE CHILD WITNESS IN THE ACCUSATORIAL SYSTEM

## 1.1 Introduction

The present concern in many jurisdictions throughout the world about children and the legal system can be traced to the work of the American paediatrician, Henry Kempe, and his colleagues in the early 1960s. They conclusively demonstrated that physical violence to children was far more prevalent in the United States of America than was generally supposed. These results were accepted in the United States and rapidly acted upon, resulting in a number of enactments regulating the reporting of child abuse to authorities. These views spread to the United Kingdom where the National Society for the Prevention of Cruelty to Children started a publicity campaign about battered children (Spencer and Flin 1990:8-9).

This new awareness and concern about the abuse of children resulted in an increasing number of cases going to court where children were called upon to testify. Public attention was focused on the unsatisfactory way in which the legal system treated the evidence of children. The experience of giving evidence was a frightening and distressing one for children and led, in the early 1980s, to demands for changes in the rules regulating the evidence of children. In the United States changes were introduced to the rules relating to competency and corroboration, and alternative methods of giving evidence were introduced, enabling children to give evidence, for instance, via closed-circuit television (Spencer and Flin 1990:10).

In the United Kingdom the public were further roused in the early 1980s by studies which highlighted the indignities the legal system forced witnesses, especially those involved in sexual offences, to undergo. Public outcry came to a head in 1983 when a well-known television actor was charged with indecently assaulting two eight year old girls. One of the girls was so disturbed by having to appear in court that she attempted to commit suicide. This led the defence barrister, George Carman QC, who had cross-examined the girls and reduced them to tears, to make the following statement in his closing speech for the defence, as quoted by Spencer and Flin (1990:11):

"It may be that a case such as this may require the law to look again and reappraise the problem of how children may give evidence more informally and more privately rather than in the presence of the public and the press."

The matter was not only taken up by the press and the public, but paediatricians, lawyers, psychiatrists, psychologists, policemen and social workers also began to research the problems associated with children's evidence. Psychiatrists at Great Ormond Street Hospital experimented with new techniques for interviewing child victims, while police joined with social welfare in an experiment to improve the investigation of child sexual abuse cases. This resulted in the Bexley Report, the proposals of which have now been introduced throughout the United Kingdom. In response the Government introduced a number of legislative reforms to the law relating to children's evidence. A Home Office Advisory Committee was set up as a result of pressure in Parliament for more radical

changes, and culminated in the introduction of videotaped evidence and closed-circuit television for children who had to give evidence in sexual abuse cases (Spencer and Flin 1990:11-12).

In South Africa increased attention to the plight of children giving evidence in court led to an investigation on this topic by the South African Law Commission in 1989. Proposals were published by the Law Commission in their Working Paper 28, and resulted in the introduction of s170A of the Criminal Procedure Act 51 of 1977 which enables child witnesses to give evidence via closed-circuit television.

## **1.2 Purpose of Study**

For the purpose of this study the child witness in the accusatorial system will be viewed as a source of information. When a witness gives evidence in court, the function of the witness is to provide the court with certain information. A number of crucial questions arise when the witness is a child. Do children have the ability to remember and relate an event accurately? Are children prone to suggestion and fantasy? What effect, if any, does the court environment have on a child's ability to convey information? What perceptions do children have about the legal process, and how do these perceptions affect their ability to testify? Do adults influence the information which children impart by the techniques they employ to obtain such information?

Accepting the hypothesis that child witnesses are sources of information, the purpose of this study is to evaluate all aspects of the criminal justice system relating to child witnesses as well as available research on children to determine whether it is possible to obtain reliable and accurate information from children. Proposals will be formulated regarding the most successful methods of obtaining reliable and accurate information from children, and how these can be adapted for use by the legal system. The purpose of the study is to develop an approach to children in the legal system that will be fair to children while at the same time protecting the rights of the accused, and which will lead to a successful method of obtaining accurate information.

## **1.3 A Model for Evaluating Children as Sources of Information**

In order to understand children as participants in the criminal process, an ecological systems approach will be used. In terms of this approach an individual's experiences are seen as subsystems 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, therefore, focuses on the interplay between various social systems (Gabarino and Stott 1989:292-5).

When evaluating children as sources of information, the ecological perspective will be used to focus on two kinds of interaction. The first is the interaction between the child as a biological organism and its immediate social environment. The second is the interaction between the child's social environment and larger social systems (Gabarino and Stott 1989:8). According to Cashmore and Bussey (1990:177) it is essential to study the child witness within his or her social environment. It is impossible to evaluate the evidence of a child without looking at the context in which this evidence is given. The quality of a child's evidence is dependent on a number of

interacting factors, namely the child himself (his age, competence, educational and family background, cognitive ability and perceptions of the court process), the setting in which evidence is given (open court, videotaped evidence or closed-circuit television) and the personnel involved in the court process. The most important characteristic of an ecological perspective is that it requires one to look inside the individual child and simultaneously beyond the child to the environment in order to understand a child's behaviour in the legal process. The focus here is therefore the social and physical environment presented by legal institutions (Gabarino and Stott 1989:292-3).

In terms of the ecological perspective, these factors are interrelated and any single change in one system is going to have an effect on another system. The following example given by Gabarino and Stott (1989:298) illustrates this principle by showing how the competence of a child can be affected by the personnel the child comes into contact with:

"A child who appears competent when interviewed by a supportive and skilful therapist or a specially trained and intuitively sensitive prosecutor may appear incompetent when cross-examined by a hostile and intimidating defense attorney bent on undermining the child. The same child might not say anything at all to a bored, brusque judge."

In accordance with this model, it would, therefore, not be correct when evaluating the competence of a child to focus exclusively on the child's ability to understand and communicate without paying attention to the person interviewing the child as well.

Since all systems are linked in this model, intervention can take place at any level. Intervention in one system will have an effect on another system. For instance, the introduction of videotaped evidence will lead to the defence having access to the videotape on the basis of discovery. This, in turn, will assist the defence attorney in preparing his cross-examination and place him in a better position to attack the credibility of the child (Gabarino and Stott 1989:297). In this way certain procedural changes designed to improve the position of the child may result in an increase in stress for the child. This is, in fact, what has happened in the United Kingdom. Legislation was introduced permitting the videotaped evidence of a child to be admissible in court in lieu of the child personally giving evidence-in-chief, provided that the child was available for cross-examination at the trial. The defence are entitled to a copy of the videotape to enable them to prepare for trial. This gives the defence an opportunity to prepare their cross-examination in detail. At the trial the child is then cross-examined in detail about the contents of a statement he made many months before. The child is thus placed in a very stressful position where he is forced to remember the details of his statement or have his credibility attacked, and thus finds himself in an even worse position.

An ecological systems approach argues that it is not possible to predict reliably the future of a system without knowing something about the other systems to which it is linked. For instance, when trying to determine whether courtroom participation as a witness will harm a child's development, the answer will depend on the child's age, level of development, emotional state, the quality of adult support available, the timing of interrogations, the quality of the judge's training as well as the child's understanding of the proceedings (Gabarino and Stott 1989:295-6). In terms of an ecological perspective, the immediate relationships and situations of the child's life would form microsystems, and would include family, school and friends. Legal microsystems that affect child witnesses would

include the training of judges, the preparation of the child witness and reorganising the courtroom to maximise the child's potential. In order to assist the child witness, as many links as possible should be developed between the different microsystems. Links would be used to strengthen the child's ability to cope in the different microsystems. Possible links would include having professionals from the courtroom visit the child at home, and where appropriate drawing the parents into the process. 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 used to participate in both as well, as in the case where a young child is allowed to sit on a parent's lap in the courtroom, then the links become stronger (Gabarino and Stott 1989:297-300).

Settings which exercise an influence over the child's life without playing a direct role therein, are referred to as exosystems. These would include, for instance, the parent's place of work, which would exercise an influence over the child via the parent. Exosystems would include governmental bodies that make decisions affecting the child's life. Legal exosystems are found in policy-making, as when legislation alter rules of evidence to make them compatible or incompatible for children (Gabarino and Stott 1989:297-302).

All these systems operate within macrosystems which are the broad cultural, economic and political systems which provide the blueprints 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 (Gabarino and Stott 1989:298-303).

This ecological perspective on children as sources of information forces us, therefore, to look both inward to the child's capabilities and outward to the social and physical contexts in which information is sought from children. It is impossible then to view the child witness in isolation since all systems are interlinked. For this reason this study aims to focus on all interrelated aspects of the child witness, broadly divided into the child himself and the context in which he is required to perform.

In focusing inward on the capabilities of the child witness and outward on the environment, the following issues will have to be addressed:

### **1.3.1 Child Development**

In the course of development, children change physically, emotionally and intellectually as they progress through different stages. Child development is viewed as a progression through generally accepted milestones. It is, therefore, necessary to know what the developmental milestones are and to understand the general characteristics of each age period in order to determine a child's ability to supply information about events they have witnessed or experienced. As Gabarino and Stott (1989:9-10) explain, the better the knowledge one has of child development, the better prepared one is to identify effective ways of communicating with children.

### **1.3.2 Competence**

A child's ability to provide accurate information depends on his ability to perceive, remember and communicate. In order to determine a child's competence, one will have to understand the basic processes of cognitive and language development (Gabarino and Stott 1989:16). This will include an investigation into the development and accuracy of memory in children, including the ability to store a memory and retrieve it at a later stage. It is important as well to understand the development of language in children, so that questions can be framed in a manner understandable to the child. For instance, children develop the ability at a certain stage to understand concepts of time and place. In questioning a child, one needs to be aware of these stages so that questions are not posed in a manner that is incomprehensible to the child.

### **1.3.3 Children's Perceptions**

A child's ability to provide accurate information will depend on the child's feelings about being competent and how the child reacts towards adults. Issues of self-esteem and coping may influence the way a child communicates. A child may act in a particular way in an effort to cope with stress rather than to reflect what the child is really feeling (Gabarino and Stott 1989:11).

A child's perceptions of court proceedings and court personnel will have an effect on the child's ability to give effective evidence. Research has shown that children find a court appearance stressful, and that one of the sources of this stress has been traced to their lack of understanding of the trial procedure and what their role as a witness in this particular procedure would entail (Flin, Davies and Stevenson 1989:286). A study conducted by Cashmore and Bussey (1990:179) found that the majority of seven year olds in the study believed that a court was a jail or a police station. If children as old as seven view the court as a jail, then this has serious implications on their effectiveness as witnesses, increasing the stress and trauma associated with testifying.

Since a child's perceptions of court proceedings and the role he has to play therein have important implications on his effectiveness as a witness, children's perceptions will have to be investigated and proposals forwarded as to how these perceptions could be corrected.

### **1.3.4 Credibility**

The manner in which people, and court personnel in particular, perceive the abilities of children can have a dramatic effect on a child's evidence. Evidence of these perceptions can be found in laws governing the testimony of children. The most obvious example of this would be the cautionary rule which requires a presiding officer to warn himself against the dangers of convicting on the evidence of a child. Children have been viewed as inept and

even described as "the most dangerous of all witnesses" (Goodman 1984:22). Children have been accused of lying, not being able to distinguish between fact and fantasy and of being highly suggestible. An investigation of relevant research will have to be undertaken to determine whether children do tell lies more frequently than adults, whether they have the ability to distinguish between fantasy and reality, and whether they are more suggestible than adults.

### **1.3.5 Environment**

A child witness has to give evidence in a particular court environment. It is possible for a child to give evidence in an open court or via closed-circuit television. In certain instances a court appearance is avoided and replaced with a videotaped deposition. The various options available will have to be investigated to determine which setting will enable the child witness to give evidence effectively while at the same time protecting the accused. A further issue to be addressed is whether proceedings involving child witnesses should be open to the public or whether they should be held *in camera*.

### **1.3.6 Personnel**

A child witness is forced to come into contact with a number of personnel involved in the criminal justice system. These would include police, prosecutors, defence attorneys and judges. The professional role as well as the motives, attitudes and expectations of personnel will have a great influence on the nature of the information obtained from the child. For instance, if an adult has a preconceived idea of what he is looking for, he will 'find' evidence that confirms his own bias (Gabarino and Stott 1989:14).

Personnel involved in the criminal justice system must be trained in appropriate techniques of eliciting evidence from children. An obvious example would be the training of police in interviewing techniques that are appropriate to children and which, at the same time, are legally acceptable.

### **1.3.7 Rules of Evidence**

An important exosystem relevant to child witnesses would include rules of evidence, whether created by legislators or the courts. These rules of evidence operate within a broader procedural environment, namely the accusatorial system. Elements of the accusatorial system relevant to the child witness will be identified and examined to determine what effect they have on a child's ability to testify effectively. These would include the rule against hearsay, competency requirements and the cautionary rule.

### **1.3.8 Influence of Social and Political Systems**

Since all systems operate within a larger macrosystem, it is important to investigate the implications of these social and political norms on the child witness. The most important influence here would be the Constitution and the Bill

of Rights, in terms of which all the other subsystems operate. Of particular relevance here would be the rights afforded an accused person in terms of the Constitution, namely the right to confront witnesses and to cross-examine witnesses. One would then have to examine the effect of confrontation and cross-examination on children, and whether it enables children to give evidence effectively.

### **1.3.9 Conclusion**

In order to understand children as sources of information, it is assumed that an interplay of various factors motivates the developing child's behaviour (Gabarino and Stott 1989:10). The child, and questions relating to his competency and credibility, cannot be viewed apart from the context in which the child operates. For this reason an ecological perspective has been adopted for the purpose of developing an approach to children in the legal system that is fair to them and respects their developmental needs while at the same time being fair to the accused and protecting his rights with the overriding aim of obtaining accurate information.

## **1.4 Accusatorial System of Procedure**

Legal microsystems and exosystems all operate within a larger legal macrosystem, namely the model of procedure adopted in a particular country. Since the model of procedure used will determine the roles of parties involved, it is important to analyse what the essential features of a particular model are and what effect it will have on the child witness. Finally, it will have to be determined whether a child is able to give evidence effectively in the model adopted.

Modern systems of criminal procedure are divided into two basic models: the accusatorial model or the inquisitorial model (Herrmann 1978:3). Although traditionally the English and American systems are quoted as examples of the accusatorial model, and the French and German systems as examples of the inquisitorial system, it should be noted that almost no civilised country today has a system which is purely accusatorial or purely inquisitorial (Dugard 1977:117). This is explained by Goldstein (1974:1019) as follows:

"These portraits of accusatorial and inquisitorial systems are, of course, idealized. European criminal procedures are no more purely inquisitorial than ours are purely accusatorial. Europeans too have accusatorial elements and mixed systems; they may tolerate more discretion than their literature concedes and may, in many instances, be moving toward a greater role for counsel and more explicit protection for the accused. Nevertheless, there are central tendencies."

The accusatorial process originated from the first form of litigation in post-primitive society where confrontation between two parties before an impartial arbiter replaced private vengeance. The procedure was oral and took place in public (Snyman 1975:101). This element of confrontation forms the basis of the accusatorial model. Here each party tries to prove its own case and destroy the case of the other party by highlighting the latter's weaknesses. Both parties constantly try to prove to the presiding officer that different answers can be given to the charge, thus giving the latter a stereoscopic view of the dispute (Herrmann 1978:4).

The inquisitorial model, on the other hand, began to develop towards the end of the middle ages. In this procedure the judge investigated the case himself, with all evidence taken down in writing. The accused was seen as the object of the inquiry and had no procedural rights. The confrontation here took place between the accused and the court, rather than between two parties (Snyman 1975:101-2). The modern approach is to view the inquisitorial procedure as "a quasi-scientific search for the truth rather than a dispute" whereby the presiding officer makes an objective and comprehensive analysis of the offence by integrating all available evidence (Herrmann 1978:6).

The essential features of the accusatorial system will be investigated in order to understand the model in which the child gives evidence, and comparisons with the inquisitorial procedure will be made. The description of the features here will be somewhat superficial since only general trends will be examined.

#### **1.4.1 The Role of the Presiding Officer**

The role of the judge in the accusatorial model is mainly passive. His function is to listen to the evidence that is presented to him by both parties and then to make a decision thereon, often leading to him being described as an umpire (Snyman 1975:103). In *Thomson v Glasgow Corporation* 1961 SLT 237 Lord Justice-Clerk Thomson described the role of the accusatorial judge as follows: "Like referees at boxing contests they see that the rules are kept and count the points" . He is, however, not completely inactive since he has to decide on the admissibility of evidence and may intervene when necessary to control the proceedings or ensure the necessary expedition of the trial. He also has the power to put supplementary questions to the witnesses, and to call witnesses who have not been called by either party but whom he believes will be able to assist the court in the matter before them (Herrmann 1978:5).

The inquisitorial judge plays a more active role, both during and sometimes even before the trial. He introduces and elicits the evidence by questioning the witnesses and the accused, and only then allows the prosecutor and defence to put questions to the witnesses. He is not bound by the evidence introduced by the parties but can ensure that necessary information be investigated and produced at the trial. This has often given rise to the view that the inquisitorial judge searches for the material truth, whereas the accusatorial judge searches only for the formal truth since he relies upon the information that has been placed before him (Snyman 1975:103). The term 'inquisitorial' is used to describe a system in which the state, rather than the parties, has an overriding responsibility for eliciting the facts of the crime, but there are many variations of this system.

Herrmann (1978:12-3) argues that an advantage of the active judge in the inquisitorial model is that, since he has to decide the case, he knows best what information he requires and what questions he needs to put to the witnesses and the accused. By being able to conduct the interrogations himself, he obtains the necessary evidence rather than having to wait for the evidence to be presented to him by the parties.

In different accusatorial systems the judge will exercise the powers which he has in different ways. For instance, in some states of the USA the judge in jury trials may not comment on the weight of the evidence nor on the credibility of the witnesses, whereas in other states he may comment on the evidence. In England the judge is more

active and may exercise his power to control the trial and call witnesses where deemed necessary (Herrmann 1978:7). However, he is not allowed to descend into the arena since this would cause him to lose his objectivity, as held in *Yuill v Yuill* (1954) 1 All ER 183 at 189 where the Court of Appeal explained that:

"a judge who himself conducts the examination..., descends into the arena and is liable to have his vision clouded by the dust of the conflict. Unconsciously he deprives himself of the advantage of calm and dispassionate observation".

In South Africa the power of the judge to play an active role in proceedings is contained in s186 of the Criminal Procedure Act 51 of 1977 which provides that the court 'shall' subpoena and examine any person if his evidence appears 'essential to the just decision of the case'. The judge, therefore, does not have a discretion to intervene, but must do so when it is essential to the just decision of the case. His discretion, however, lies in the determination of when it would be essential to a just decision.

One of the main criticisms levelled against the inquisitorial system relates to the double role which the judge has to fulfill. He has to act as both an investigator who has to find the evidence and the arbiter who has to make an objective decision. Snyman (1975:107-8) argues that these two functions contradict one another as it would be difficult for a judge to be completely unprejudiced against the accused if he has to act as prosecutor and judge at the same time. Although the judge also has to investigate circumstances which favour the accused, he is, nevertheless, perceived by the accused to be associated with the state-prosecuting authorities.

The accusatorial system, on the other hand, is criticised as not being a search for the material truth, since the judge is limited in making his decision to the evidence placed before him by the parties and has very little discretion to move beyond this (Snyman 1975:108).

#### **1.4.2 Two Opposing Parties**

In the accusatorial system the trial is party-centred, with each party presenting his case to the judge or the jury. Both parties have to collect their own evidence in order to prepare for the trial. They will decide the order in which evidence is to be presented and examine witnesses. Goldstein (1974:1016) explains that both parties "play an aggressive role in presenting and examining witnesses and in shaping legal issues". The parties are, however, not on an equal footing. The prosecution must prove their case beyond a reasonable doubt while the defence only have to raise doubt. The prosecution is also not under a duty to obtain a conviction, but must rather present all relevant evidence to the court in an attempt to see that justice is done. The defence, on the other hand, is entitled to "fight for an acquittal with all legitimate means" (Herrmann 1978:5). This has given rise to the 'contest' or 'sporting' theory of justice where parties are left to prove their own case and the judge acts as an impartial umpire to see that the rules of the game are observed (Snyman 1975:109). The fact that there are two opposing sides highlights the combat between the two parties. Volkmann-Schluck (1981:2) describes the proceedings as "combative or aggressive" while Brouwer (1981:207), quoting Dressler, puts it as follows:

"Today, instead of fighting with legal weapons, we use legal arguments. Where combatants formerly met face-to-face, they now have surrogates - attorneys - who fight for them. The judge

acts as a referee, theoretically protecting the contenders against foul blows. The jury decides which 'side' fought the better fight. But fight it is and the object is to win, not necessarily to reveal the truth."

The existence of two opposing parties has caused the accusatorial model to be criticised as being partisan. The judge relies on what he is being told by the parties, and the parties can manipulate the truth in order to favour their own cases. The aim of each party is to win the case irrespective of whether the outcome will be in accordance with truth and real justice. A further criticism levelled against this model is that, because each party presents a one-sided picture of evidence that supports their side, it is very difficult, if not impossible, to create a coherent picture of the facts of a case (Snyman 1975:108).

In the inquisitorial model the prosecution and the accused are in principle not seen as two parties opposing each other. The prosecutor is not perceived as the adversary of the accused. Both he and the judge "must objectively consider and examine all evidence with a view simply of discovering the truth" (Snyman 1975:106). This has the effect that no party has to bear the burden of proof. Since there are no opposing parties, there is no burden of proof on the prosecution to prove beyond a reasonable doubt nor a burden of adducing evidence on the defence. The burden is on the court. The court must be satisfied beyond a reasonable doubt once it has heard all the evidence (Langbein 1979:208).

### 1.4.3 Cross-examination

An essential element of the accusatorial trial is the distinction between evidence-in-chief and cross-examination, and the right to cross-examination. Once a witness has given evidence in a trial, the opposing party is afforded an opportunity to cross-examine the witness. If the party does not take advantage of this opportunity to cross-examine the witness, then the court will accept the evidence of the witness. In fact, cross-examination is so vital that evidence in respect of which cross-examination is not possible must be excluded, even if it is relevant (Brouwer 1981:220).

Cross-examination is so fundamental to the accusatorial model that it has been regarded as a right and not a privilege, as explained by Cleary (1984:47):

"For two centuries, common law judges and lawyers have regarded the opportunity for cross-examination as an essential safeguard of the accuracy and completeness of testimony, and they have insisted that the opportunity is a right and not a mere privilege."

In fact, Wigmore (1974:32) has referred to cross-examination as "the greatest legal engine ever invented for the discovery of the truth".

In the inquisitorial system little emphasis is placed on oral presentation of evidence or on cross-examination (Goldstein 1974:1018-9). Rather, cross-examination is regarded as "an attempt to 'corner' a witness into an attitude which the cross-examining party has himself decided upon beforehand, and as a method whereby the most honest witness can be driven or twisted into contradicting himself" (Snyman 1975:109). Snyman (1975:109), quoting

Schmidt, explains that, viewed from the inquisitorial model, cross-examination is seen as being able to achieve anything except the discovery of the truth.

Since all questioning of witnesses is done by the judge, the distinction between examination-in-chief and cross-examination is unknown (Herrmann 1978:5). In the German criminal trial there is no cross-examination. Section 239 of the German Criminal Procedure Code does provide for cross-examination, but in practice this section is never invoked. A further restraint upon the use of cross-examination is the fact that both the prosecution and defence must agree that cross-examination is needed (Richings 1978:55). Although in the German system the judge must give the prosecution and the defence an opportunity to put additional questions once he has completed his interrogation of the witness, amendments to this procedure have been introduced. In 1975 an amendment was introduced to the German Code of Criminal Procedure which provided that a witness under the age of sixteen had to be examined solely by the judge. The purpose of this amendment was to protect both the minor as well as the factfinding process against the danger of improper questioning (Herrmann 1978:9). In the French system the interrogation is conducted by the presiding judge. The latter will decide the order in which the witnesses are to give evidence, although generally witnesses for the prosecution are heard first. Witnesses are not interrupted while giving evidence. Once they have completed their evidence, the interrogation will be conducted by the judge. The prosecution and the accused are then given an opportunity to direct questions through the judge. This does not mean that the judge repeats the questions, he merely signifies to the witness to respond to the question (Brouwer 1981:217-8).

#### **1.4.4 Rules of Evidence**

Closely related to the presence of cross-examination in the accusatorial system is the existence of an elaborate law of evidence. For instance, the general rule is that an accused may not be questioned about previous convictions, and hearsay evidence is inadmissible. The detailed law of evidence is also linked to the presence of juries, since lay persons may not be in a position to accord the correct weight to certain prejudicial evidence. The various components are so intertwined that Snyman (1975:109) explains that "any proposed introduction of cross-examination is seen in Germany as necessarily entailing a take-over of the whole Anglo-American law of evidence".

In the accusatorial procedure the emphasis is placed on the admissibility of evidence. There are strict rules which exclude certain types of evidence. For instance, in order to give evidence in court a child must be found to be competent. The presiding officer will conduct an examination to determine whether a child is competent. If the child is found to be incompetent, the child's evidence will be excluded. The cautionary rule warns against the dangers of convicting on the evidence of a child and requires corroboration of this evidence in certain instances. The rule against hearsay requires that evidence, which is not capable of being tested by cross-examination, must be excluded. The intricacies of these rules vary from one accusatorial system to another, but they are all based on a system which emphasises admissibility.

In contrast, the rules of evidence are less technical and less restrictive in the inquisitorial system. The Germans believe that "the presence of professionals in deliberations and the requirement of written findings of fact and law

are sufficient safeguards against the misuse of potentially prejudicial varieties of evidence" (Langbein 1979:207). The general principle, therefore, is that nearly all relevant evidence will be admissible. Richings (1978:254-5) illustrates this with reference to the German system. The function of the court in this system, according to s244 of the German Criminal Procedure Code, is "to investigate the truth" which has the effect that exclusionary rules are virtually unknown. Hearsay evidence is, therefore, admissible as well as the accused's previous convictions, since the latter indicate that the offence is not foreign to the accused's nature.

The emphasis in the inquisitorial model is not on the admissibility of evidence, but rather the weight that is to be attached to the evidence. In the case of hearsay evidence the focus is on how much weight will be attributed to the hearsay, not on whether it will be admissible or not.

This does not imply that there are no exclusionary rules of evidence at all. In order to be admissible evidence must be relevant. Any statements obtained by unfair means, such as duress or deception, are also excluded (Richings 1978:255). There are obviously rules of evidence in the inquisitorial model, but these are far less in number and not as restrictive as those found in the accusatorial model.

#### **1.4.5 Conclusion**

Only a few of the important differences between the accusatorial and the inquisitorial models have been highlighted here. Since the procedural model provides a macrosystem within which children have to give evidence, the model itself will have to be evaluated to determine whether it enables children to act as effective witnesses. Any possible reform will also have to be evaluated in terms of this macrosystem.

In conclusion, the accusatorial model is characterised by two opposing parties who have to place their version before the court, in accordance with elaborate rules of evidence. Each party is given an opportunity to cross-examine opposing witnesses. The presiding officer, whose role is mostly passive, has to listen to the evidence presented to him and then make a decision. It should be noted that both the accusatorial and the inquisitorial systems are the consequence of historical growth and political developments. They have not developed as a result of scientific inquiry into which of the two models is better equipped for accurate factfinding. Belief in either system is based on popular conviction and speculation rather than on empirical research (Herrmann 1978:12). Finally, it must be borne in mind that it is an over-simplification to talk about accusatorial and inquisitorial systems as if they are mutually exclusive. All systems have characteristics drawn from both models, the final flavour, according to Spencer and Flin (1993:80), depending only on the mix.

It is the above-mentioned elements of the accusatorial model which will have to be evaluated in terms of child witnesses and any possible reforms suggested. The following issues will have to be addressed: does the partisan nature of the procedure affect children negatively? Should presiding officers be better trained and accorded more power to deal with children? Can a truthful account be obtained from children using the traditional tools of cross-examination? What effect does the elaborate network of rules of evidence have on child witnesses? How do the rules of evidence affect child witnesses? Is the competency examination effective? Do the rules against hearsay

prejudice children? What is the basis of the cautionary rule and what effect does it have on a child's evidence? In short, can child witnesses give evidence effectively in an accusatorial framework?

## **1.5 Conventions and Constitutions**

Conventions and constitutions form another macrosystem in which courts, and ultimately the child witness, have to operate. In terms of the ecological model, any change in legislation relating to the child witness will have to be evaluated within the framework of the constitution or convention regulating that particular country. As explained *supra*, a change in any one system will have an effect on another system. This became particularly apparent in the United States of America when a number of states introduced legislation enabling a child witness to give evidence outside of the courtroom while simultaneously relaying the child's image via closed-circuit television to the court. The change in this legal microsystem had an immediate effect on the macrosystem created by the constitution, since the United States Constitution provides that an accused is entitled to face-to-face confrontation.

Since rights have been entrenched by constitutions and conventions, it is important to investigate those sections which would be relevant, whether directly or indirectly, to the child witness. As the study is to be conducted from the point of view of the child witness in the accusatorial system, and a comparative study will be made of the United Kingdom and the United States of America with reference to certain inquisitorial features in the French and German systems, aspects of the following conventions and constitutions will be discussed in this study: the European Convention on Human Rights, the Constitution of the United States of America and the Constitution of the Republic of South Africa.

### **1.5.1 European Convention on Human Rights**

In the United Kingdom there is no written constitution, therefore there is no question of rules of evidence being held to be unconstitutional. However, any legislative act of Parliament would have to conform to the European Convention on Human Rights, although this is not directly binding on the courts (Spencer and Flin 1993:78). The European Convention does not support the accusatorial system in the same unqualified way as the Constitution of the USA, and the provisions have to be considered in the context of both the accusatorial and inquisitorial models since the convention applies to the European communities and includes countries which fall into either or even both of these models (Jacobs and White 1996:158).

The relevant provision concerned with the right to a fair trial is contained in Article 6, and the text provides as follows (Jacobs and White 1996:122):

- "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interest of juveniles or the protection of private life of the parties so require,

- or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interest of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
  3. Everyone charged with a criminal offence has the following minimum rights:
    - (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
    - (b) to have adequate time and facilities for the preparation of his defence;
    - (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
    - (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
    - (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

Article 6 of the European Convention on Human Rights undertakes to provide a party with a fair trial in civil and criminal cases, which is a basic element of the rule of law. However, for the purpose of this study only those elements relevant to the child witness will be highlighted.

#### **1.5.1.1 Public Hearing**

Article 6(1) provides that everyone is entitled to "a fair and public hearing" and judgement must "be pronounced publicly". Publicity is regarded as a guarantee of the fairness of the trial, which creates confidence by allowing the public to see justice being administered (Jacobs and White 1996:140).

Article 6(1) contains a number of limitations on the right to a public trial. The public may be excluded in the interest of morals, public order or national security, where it is necessary to protect the interests of juveniles or the private life of the parties, and where it would be necessary in the interests of justice. The public can, therefore, be excluded in a wide variety of cases, but of special relevance is the provision relating to juveniles. In terms of article 6(1) the courts would be entitled to exclude the public in order to protect children. The language employed is very vague ("where the interests of juveniles...require") and a further discretion is given to exclude the public where it would be in the interests of justice to do so.

#### **1.5.1.2 Confrontation**

Article 6(3)(d) provides that an accused has a right "to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him". The purpose of this article is to ensure that the accused is placed on an equal footing with the prosecution irrespective of whether the system is accusatorial or inquisitorial (Jacobs and White 1996:158).

According to Spencer and Flin (1993:79) this right is not the same as the right to confront a witness face-to-face while the latter is giving evidence personally at the trial. The European Court of Human Rights has emphasised that the Convention does not give an accused the right to insist on a witness being brought to court to give evidence personally. In *Delta v France*, Judgement of 19 December 1990, Series A, No.191-A (1993) 16 EHRR 574 the

accused was convicted of robbery on the basis of identifications which were made at the police station by the sixteen year old victim and her friend, neither of whom gave evidence at the trial. This was held to be a violation of the Convention, although the European Court of Human Rights added that the Convention does not insist on a witness facing the accused in court, all that was necessary was that the defendant be given "an adequate and proper opportunity to challenge and question [the] witness against him, either at the time the witness made his statement or at some later stage of the proceedings". This was also the approach adopted by the court in *Unterpertinger v Austria*, Judgment of 24 November 1986, Series A, No.110 (1991) 13 EHRR 175. The court relied on witness statements at the trial, the makers of which declined to attend court and give evidence in person, since they were members of the accused's family and had the right to decline to testify. The European Court of Human Rights held that in certain circumstances the use of statements of this kind would not necessarily breach the Convention, but in this case they formed the essential proof of the accusations made against the accused and the evidence could not be tested in the normal way.

In *Kostovski v The Netherlands*, Judgement of 20 November 1989, Series A, No.166 (1990) 12 EHRR 434 the identity of a witness was kept confidential to avoid the possibility of intimidation. One of the accused was convicted on the basis of evidence which had been taken down by the judge in the absence of the prosecution, the accused and his counsel. The European Court of Human Rights found that the Convention had been violated because the accused had not been given a proper opportunity to challenge the witness.

From the above cases it would appear that Article 6 does not provide the accused with the right to insist that a witness face him personally in court. Rather, the emphasis would seem to be on the right to challenge the evidence against the accused.

### 1.5.1.3 Cross-examination

Article 6(3)(d) provides that an accused has a right "to examine or have examined witnesses against him". This must be seen in the context of both the accusatorial and inquisitorial models. In the accusatorial system witnesses are examined and cross-examined by the parties or their representatives while in the inquisitorial system witnesses are examined by the court (Jacobs and White 1996:158). The emphasis here is on the right to challenge the evidence against the accused rather than give the accused himself the right to cross-examine the witness. This is supported by the decision in *Delta v France* (*supra*) where the European Court of Human Rights held that the prosecution can make use of written statements obtained from witnesses before the trial, provided the defendant was afforded an opportunity to have the evidence tested, and this could be done either at the time the statement was made or at the trial. The Convention, therefore, does not insist that cross-examination has to be conducted by the accused or his representative, nor does it have to take place at the trial.

In *Unterpertinger v Austria* (*supra*) the Convention was found to be violated because the evidence could not be

tested in the normal way, and in *Kostovski v The Netherlands (supra)* the accused had not been afforded an adequate and proper opportunity to challenge and question the witness.

The Convention, therefore, insists that an accused be given an opportunity to challenge any evidence which is to be used against him at the trial. The provision would include the procedures adopted in both inquisitorial and accusatorial countries, namely that the questioning be conducted by the accused, his legal representative, a judge or other court official. The questioning also does not have to take place at the trial, but could be conducted at an earlier stage of the proceedings.

### **1.5.2 Constitution of the United States of America**

In the United States there are certain minimum rights for litigants which are guaranteed by the Constitution. These rights are not absolute in the sense that exceptions can never be made, but they are legal absolutes in that it is not open to any United States Court or the legislature to make exceptions to them on the grounds that it seems fair and sensible to do so (Spencer and Flin 1993:77).

The rights which are relevant to this study are contained in Amendment VI and Amendment XIV which entrench certain aspects of the accusatorial system. Amendment VI deals with specific rights in an accusatorial system, such as confrontation and cross-examination, whereas Amendment XIV entitles a citizen to due process of law.

The relevant amendments, as quoted by Tribe (1988:xli-xliii), are set out below:

**"Amendment VI [1791]**

In all criminal prosecutions, the accused shall enjoy a right to a speedy and a public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have previously been ascertained by law and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

**Amendment XIV [1868]**

Section 1. All persons born or naturalised in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

#### **1.5.2.1 Public Hearing**

The Sixth Amendment provides that "the accused shall enjoy a right to ... a public trial". This provision, according to Tribe (1988:959), implies that the government does not have the discretion to treat trials as a confidential matter. This publicity, although an aspect of Anglo-American tradition, is an explicit constitutional command. In *Gannett Co. v DePasquale*, 443 U.S. 368 (1979) the US Supreme Court held at 368 that "the Sixth Amendment... presumes open trials as a norm".

Although the right to a public trial is an express constitutional command, it is not absolute and can give way in certain circumstances to competing interests. However, any exception to this right must be construed as strictly as possible (Spencer and Flin 1993:425-6). In *Globe Newspaper Co. v Superior Court*, 457 U.S. 596 (1982) the court was faced with a Massachusetts law which required a trial judge to exclude the public and press from the courtroom when minor victims of sexual offences give evidence. The trial judge, relying on this statute, closed the entire trial where it was alleged that the defendant had forcibly raped three girls, aged sixteen and seventeen at the time of the trial. The US Supreme Court found the Massachusetts statute to be unconstitutional. At 607-8 the court conceded that the protection of young victims from further trauma and embarrassment was a competing interest, but even such a compelling interest couldn't justify a mandatory closure rule which did not take account of the interests of the public, the parties involved and the witnesses. The majority added that a case-by-case determination would have to be made after the presiding judge has reviewed "the victim's age, psychological maturity and understanding, the nature of the crime, the desires of the victim, and the interests of parents and relatives" (608).

### 1.5.2.2 Confrontation

The Sixth Amendment provides further that "the accused shall enjoy a right ... to be confronted with the witnesses against him". The right to be confronted, according to Gordon (1992:59), includes the following rights: the right to face-to-face confrontation between the witness and the accused; the right to cross-examine witnesses; the right for the jury and/or the court to view the demeanour of the witness; and the right to have hearsay evidence excluded. In *United States v Benfield*, 593 F.2d 815 (8th Circ. 1979) the court held that the right to confrontation included a face-to-face meeting at trial which was "additional to the right of cold, logical cross-examination" (at 821).

The right to face-to-face confrontation is not absolute. The Supreme Court in *Ohio v Roberts*, 448 U.S. 56 (1980) held at 64 that the preference for face-to-face confrontation can in certain instances give way to competing interests where this would be in the interests of justice. Therefore, when the need for accurate evidence and the trauma suffered by children as a result of face-to-face confrontation are balanced against the defendant's right to face the child in an open court, the preference for face-to-face confrontation can be yielded (Myers 1987:401).

The most important component of the right to confrontation is the right which an accused has to confront witnesses who give evidence against him. In *Douglas v Alabama*, 380 U.S. 415 (1965) the Supreme Court explained that "an adequate opportunity for cross-examination may satisfy the clause even in the absence of physical confrontation" (at 418). In fact, Wigmore (1974:28) is of the opinion that confrontation is simply another term for cross-examination.

### 1.5.2.3 Due Process

The Fourteenth Amendment of the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law". The due process clause requires that judicial proceedings must comply with the principles of fundamental fairness. According to Tribe (1988:772-3) the Court, in

interpreting the Fourteenth Amendment, has looked to the Bill of Rights for guidance to such an extent that many of the rights guaranteed in the first eight Amendments have been absorbed into the Fourteenth Amendment. The due process has, therefore, been held to include, amongst all the other rights incorporated in the first eight Amendments, the right to a speedy and public trial before a jury and the right to confront opposing witnesses. These rights have been included in the due process clause as they are regarded as fundamental in the American system of jurisprudence.

In determining whether the due process will yield to a competing interest, the interest will have to be balanced against the degree to which the defendant is deprived of a fair trial.

### **1.5.3 Constitution of the Republic of South Africa**

The Constitution of the Republic of South Africa Act 108 of 1996 was adopted by the Constitutional Assembly on 8 May 1996. Chapter 2 of the Constitution incorporates the Bill of Rights. The rights which are of particular relevance to this study are contained in s35:

- "s35(3) Every accused has a right to a fair trial, which includes the right -
- (a) .....
  - (b) .....
  - (c) to a public trial in an ordinary court;
  - (d) .....
  - (e) to be present when being tried;
  - (f) .....(h)
  - (i) to adduce and challenge evidence;"

In addition to the above section, s28 relates specifically to the rights accorded to children; and provides as follows:

- "s28(1) Every child has the right -
- (a) .....(c)
  - (d) to be protected from maltreatment, neglect, abuse, or degradation;
  - (e) .....(i)
- (2) A child's best interest is of paramount importance in every matter concerning the child.
  - (3) In this section, "child" means a person under the age of 18 years."

#### **1.5.3.1 Public Hearing**

Section 35(3)(c) of the Constitution provides that an accused has a right to a public trial in an ordinary court. In *S v Baleka and Others* (2) 1986(4) SA 192 (T) at 200 the court accepted that the guiding principle was that the courts are open to the public and should always be so, except in exceptional circumstances.

The reason for making judicial proceedings public is to ensure that evidence is trustworthy and complete, according to *S v Leepile and Others* (1) 1986(2) SA 333 (W) at 338D-F. In addition, allowing the public to be present at a trial increases respect for the law and gives the public confidence in judicial remedies.

Although an accused person has a right to a public trial, this right is not absolute and exceptions to this right are to be found in legislation. The decision whether an accused's right to a public trial should yield "involve[s] a careful weighing up of all the factors in the two scales, namely those favouring the open trial and those favouring the protection of the witness against harm", according to *S v Leepile(I)* (*supra*) at 340A.

Exceptions to this right are found in s153 of the Criminal Procedure Act 51 of 1977, which allows a hearing to be closed in the following instances: where it would be in the interests of the State to do so; where a witness would be harmed by giving evidence in public; where the witness is a complainant in a case relating to indecency; and where the witness is a child under the age of eighteen.

### 1.5.3.2 Confrontation

Section 35(3)(e) of the Constitution provides that the accused has the right to be present when he is being tried. This right enables an accused to be present in court at his trial. It does not specifically set out that he has the right to confront or face witnesses, as does the US Constitution, which grants an accused the right to be confronted with the witnesses against him.

Joubert (1995:521-3) argues that the right to be present at a trial is very closely linked to the right to present your case and the right to cross-examination. He argues further that the right to be present encompasses more than simply requiring that the trial and the decision of the court take place in his presence. In fact, he believes that it demands confrontation in the sense of being able to see the witnesses and view their demeanour. Joubert (1995:522) explains it thus:

"'n Konfrontasie word vereis: die beskuldigde moet getuies op 'n kort afstand kan waarneem, sodat hy (bykomstig tot die inhoudelike van hulle getuienis) ook hulle gesigsuitdrukkings, houding en stembuiging kan evalueer."

The denial of confrontation amounts to an irregularity, on the basis of which a conviction can be overturned. In *S v Motlatla* 1975(1) SA 814 (T) the court held that a denial of confrontation amounted to a failure of justice. The accused in this matter was only added as an accused after the complainant had already given evidence. The recorded evidence of the complainant was played back to him, and the trial proceeded from there. The court referred to s156(1) of the Criminal Procedure and Evidence Act 56 of 1955 which provided that every criminal trial, except in special circumstances, shall take place and the witnesses shall give their evidence in open court and in the presence of the accused. Colman, J. explained the meaning of this section at 815E-F:

"That is a very important provision in our criminal law and it means more than that an accused person must know what the State witnesses are saying or have said about him. It means even more than that he shall be able to hear them saying it. There must be a confrontation; he must see them as they depose against him so that he can observe their demeanour. And they for their part must give their evidence in the face of a present accused."

Although the Constitution does provide an accused with the right to be present at a trial, this right is not absolute. There are certain statutory provisions which specifically exclude confrontation. Section 159 of the Criminal

Procedure At 51 of 1977 provides that if an accused at criminal proceedings conducts himself in a manner which makes the continuance of the proceedings in his presence impracticable, then the court may remove the accused and have the proceedings conducted in his absence.

Section 158 of the Criminal Procedure Act 1977, as amended, enables both witnesses and the accused to give evidence via closed-circuit television, where it would prevent unreasonable delay, save costs, be convenient, be in the interest of justice or prevent prejudice or harm to anyone. Another statutory exception is contained in s170A of the above-mentioned act, and provides that child witnesses can give their evidence via an intermediary while they are situated in another room. The accused will be able to observe the child with the aid of electronical equipment. Traditional confrontation is thereby excluded. This has been justified on the grounds of the trauma experienced by youthful witnesses (Joubert 1995:77).

A further exception is found in s171 of the Criminal Procedure Act 1977 which provides for evidence to be taken on commission. In terms of this section, where it is not possible to obtain the attendance of a witness without undue delay, expense or inconvenience or where the witness is outside the Republic, a magistrate or competent person may go to the witness and take down his evidence. Confrontation in these circumstances is, therefore, not possible. When making an order for evidence to be taken on commission, the court has to be very careful. In *S v Hassim and Others* 1973(3) SA 443 (A) the court at 453A explained that "in such circumstances it would not be in the interests of justice to take the evidence of the witness on commission where the advantage of cross-examination, and benefit of observing his conduct and demeanour, would be lost". In *S v Hoare and Others* 1982(3) SA 306 (N) James AJP, in granting an application that evidence be taken on commission, moved away from the approach in *Hassim (supra)*. At 309 D-E it was explained as follows:

"[t]he fact that the ultimate triers of fact do not physically see and hear the witness is a factor that must be given due weight but to a large extent its importance is reduced because the triers of fact are not a jury but men of some legal experience, who are fully aware of the dangers of accepting the disputed evidence of witnesses who are not personally heard in preference to the evidence of witnesses who have given evidence *viva voce*".

### **1.5.3.3 Cross-examination**

Section 35(3)(i) of the Constitution provides that the accused has a right to adduce and challenge evidence. According to *Klink v Regional Court Magistrate NO and Others* 1996(3) BCLR 402 (SE) at 409F-G, "[a]lthough the right to cross-examine is not mentioned in this section, the right to cross-examine is regarded as so fundamental that its denial will almost invariably lead to prejudice".

This right is regarded as a fundamental right of our criminal procedure at common law and is also enshrined in s166 of the Criminal Procedure Act 1977, which reads as follows:

- "(1) Any accused may cross-examine any witness called on behalf of the prosecution at criminal proceedings or any witness called on behalf of such co-accused at criminal proceedings..."

Although cross-examination plays a vital part in a trial court's decision, this right is not regarded as absolute. Melunsky J at 410A-B in *Klink (supra)* accepted that "[v]ital as the right to cross-examine may be, it is not an absolute right, for the trial court retains a discretion to disallow questioning which is irrelevant, unduly repetitive, oppressive or otherwise improper".

Although the right to cross-examine is not absolute, any limitation of this right will have to be construed as narrowly as possible. In each case the court will have to determine whether the limitation of cross-examination has resulted in the negation of the right to a fair trial.

#### 1.5.3.4 Rights of Children

Section 28(1)(d) of the Constitution provides that every child has the right to be protected from maltreatment, neglect, abuse or degradation, while subsection (2) provides that a child's best interests shall be of paramount importance in every matter concerning the child.

The right relevant to this study is the right which a child has to be protected from neglect and abuse. This subsection is specifically aimed "against executive or administrative action or legislation which renders children vulnerable to neglect or abuse" (Chaskalson et al 1996:33-8). The position in South Africa would be much wider than that currently in force in the USA. For instance, in *DeShaney v Winnebago County Department Social Services*, 489 US 189, 109 SCt 998 (1989) the United States Supreme Court held that a state's failure to protect a child from his father, after reports of possible abuse were made, did not violate the child's right to due process in terms of the Fourteenth Amendment. At 199 the court explained that the "[p]urpose of the due process clause was to protect the people from the state, not to ensure that the state protected them from each other". The South African position would, however, appear to be different since s28(1)(d) specifically provides that the child has a **right to be protected**. According to Chaskalson et al (1996:33-8), a child in the position of Joshua DeShaney would be successful in a South African court.

The right which a child has to be protected from abuse and neglect may, according to Chaskalson et al (1996:33-8), have implications for the rules of evidence in the case where a child is a witness. For instance, it is suggested that a refusal to admit a child's hearsay statements or to allow a child to give evidence via closed-circuit television in cases of child abuse may be unconstitutional.

Since child abuse is capable of being defined so widely that it would include a psychological interpretation (where the abuse is of a psychological nature), a sociological interpretation (where the abuse is linked to the environment, as in poverty), and a cultural interpretation (where society views children as being weaker and therefore capable of being victimised), the efficacy of the law to eliminate child abuse is minimised (Chaskalson et al 1996:33-9).

However, the above section would serve to place an obligation on the state to initiate programmes, both therapeutic and educational, which would attempt to address the problem of abuse. This would have important implications insofar as programmes aimed at preparing child witnesses are concerned. There would then, in terms of this interpretation, be an obligation on the state to provide such programmes. According to Chaskalson et al (1996:33-9) constitutional law in this way "gives the law greater scope than the common law or statute to combat the problem".

Subsection (2) further provides that a child's best interests is of paramount importance in every matter concerning the child. The common law determinant of judicial decisions in matters relating to children has always been the best interests of the child. This common law standard has now been constitutionalised in s28(2). In terms of this section the best interests of children are paramount (Chaskalson et al 1996:33-1).

Although the standard 'best interests' has traditionally been used in matters relating to family law, such as issues of custody and access, the question that is raised is whether this standard has now been extended to include criminal matters as well. In balancing the interests of the child witness with the accused's rights to confrontation and cross-examination, are the child's interests paramount? In *Klink v Regional Court Magistrate NO and Others* (*supra*) Melunsky J referred to this section at 413H, implying that the concept of best interests may be extended to matters of evidence in criminal proceedings. The actual wording of the section would support this argument, since it uses the phrase "in every matter concerning the child". However, it was not necessary in this case to deal with this issue:

"In the circumstances it is not necessary for me to consider whether a declaration that section 170A was unconstitutional would conflict with section 30(3) of the Constitution which provides, *inter alia*, that in all matters concerning a child his or her best interests shall be paramount."  
(413H)

In referring to s30(3) the court was referring to the counterpart of s28 in the Interim Constitution Act 200 of 1993.

## 2. PROCEDURES ADOPTED IN OTHER ACCUSATORIAL SYSTEMS WITH RESPECT TO CHILD WITNESSES: UNITED KINGDOM

The legal system of England is based on the accusatorial system and this has the following implications insofar as criminal cases are concerned:

- i. there is a trial at which witnesses give oral evidence;
- ii. a witness who gives evidence is cross-examined by the opposing party;
- iii. witnesses give evidence in the presence of the accused;
- iv. trials are conducted in an open court;
- v. there are specialised rules of evidence relating to:-
  - a) the competence of child witnesses; and
  - b) the cautionary rule relating to child witnesses (Spencer and Flin 1990:66).

### 2.1 The Constitutional Position

England does not have a written constitution, so the accusatorial system is not guaranteed protection in this way. An Act of Parliament would be able to change any aspect of the system (Spencer and Flin 1990:68). Although the courts themselves are quite ready to allow departures from the accusatorial system when they are of the opinion that it is necessary, in practice, however, any changes introduced by means of a statute or judicial decision would have to conform to the European Convention on Human Rights (Spencer and Flin 1990:68).

The European Convention on Human Rights does guarantee certain of the rights which form part of the accusatorial system, although perhaps not as strictly as does the American Constitution. Briefly, the European Convention guarantees the following rights which form part of the accusatorial system in the United Kingdom:

#### 2.1.1 Oral Evidence

Article 6(1) provides that the accused is entitled to a "hearing...by an independent and impartial tribunal established by law". Article 6(3)(d) refers to the right that the accused has "to examine or have examined witnesses against him and to obtain the attendance of witnesses".

#### 2.1.2 Cross-examination

Article 6(3)(d), mentioned above, grants an accused the right to cross-examine witnesses himself or have the cross-examination done on his behalf.

### 2.1.3 Presence of Accused

Article 6 simply gives the accused the right to cross-examine witnesses called against him, but does not specifically grant the accused the right to face-to-face confrontation, as is found in the Sixth Amendment of the American Constitution.

There have been a number of decisions of the European Court of Human Rights which have condemned convictions which have been based on out-of-court statements made by witnesses who have not been called to give evidence at the trial. This was the decision in *Delta v France supra* where a French court convicted a man of robbery on the basis of identifications made at a police station by a 16 year old victim and her friend, neither of whom later gave evidence at the trial. The European Court of Human Rights held that this was a violation of the European Convention, although they did emphasise that the Convention did not insist on the witnesses having to give evidence personally in court. This could be done by means of obtaining written statements from the witnesses before the trial, provided that the defendant was given a proper opportunity to challenge the evidence, either when the statement was made or at a later stage (Spencer and Flin 1993:79).

In *Asch v Austria*, Judgment of 26 April 1991, Series A, No. 203-A (1993)15 EHRR 597 the court made certain *obiter dicta* that the Convention would probably not even be violated in the situation where a defendant was convicted partly on the out-of-court statement of a witness, whom the defendant had not had an opportunity to challenge, since the latter had become impossible to arrange (Spencer and Flin 1993:79).

### 2.1.4 Public Hearing

Article 6(1) provides that the accused is entitled to a "fair and public hearing". The right is, however, qualified by a number of exceptions. The public can be excluded from a trial where it is in the interests of morals, public order, national security, juveniles, protection of private lives or justice. It would seem, therefore, that there would be no objection to a court being cleared in the interests of protecting a child witness.

## 2.2 Oral Evidence

### 2.2.1 Introduction

One of the fundamental assumptions on which the rules of evidence are based in an accusatorial system is that oral evidence of witnesses given personally at a trial is superior to any other form of evidence (Spencer and Flin 1990:218).

A number of rules of evidence emanate from the belief in the primacy of oral evidence. For instance, hearsay statements are generally regarded as inadmissible. In terms of English law hearsay evidence is evidence given by a person who is not present in court to prove the truth of its contents. Further, statements made by a witness, who

gives evidence at a trial, on a previous occasion are generally inadmissible except where it is introduced to show that the earlier statement was different and the witness is therefore untrustworthy (Spencer and Flin 1990:218).

Another major implication of the tradition of oral evidence is that it requires a trial at which witnesses are called to testify. This is often referred to as 'one's day in court'. Spencer (1990:113) explains it as follows:

"...and a preference for hearing witnesses orally, has traditionally meant that each party must put his case together and present it as one continuous hearing, orally, at a single 'day in court' on which everything turns, and at which everything is decided."

According to Judge Pigot, the use of oral evidence loses its validity when weighed up against the delays which are inherent in the present adversarial system. Since it has been proved that the younger the child, the more rapidly his memory will fade, this has the implication that by the time the matter comes to trial, the quality of the child's evidence will be impaired and would be used to undermine his credibility (Pigot 1990:211). Added to this is the fact that stress can impair the power of recall and witnesses are known to experience stress when giving evidence personally in court (Spencer and Flin 1990:220). This would seem to indicate that the quality of the evidence given by witnesses who appear personally in court, namely the giving of oral evidence, is not necessarily superior.

### **2.2.2 Exceptions to the General Rule**

The general rule in the United Kingdom is that evidence is given orally by all witnesses, including children, at a trial. There are, however, certain limited circumstances under which this rule is departed from, as far as child witnesses are concerned.

Provision is made for the evidence of a child under the age of fourteen years to be taken before the trial begins. This section was introduced so as to enable a child to give evidence against the person who had abused the child where the latter had been too badly injured to appear in court. This is provided for by s42 and s43 of the Children and Young Persons Act of 1933:

"s42 (1)Where a justice of the peace is satisfied by the evidence of a duly qualified medical practitioner that the attendance before a court of any child or young person in respect of whom any of the offences mentioned in the First Schedule to this Act is alleged to have been committed would involve serious danger to his life or health, the justice may take in writing the deposition of the child or young person on oath, and shall thereupon subscribe the deposition and add thereto a statement of his reason for taking it and of the day when and place where it was taken, and of the names of the persons (if any) present at the taking thereof.

(2)The justice taking any such deposition shall transmit it with his statement -

- (a) if the deposition relates to an offence for which any accused person is already committed for trial, to the proper officer of the court for trial at which the accused person has been committed; and
- (b) in any other case, to the clerk of the court before which proceedings are pending in respect of the offence.

s43 Where, in any proceedings in respect of any of the offences mentioned in the First Schedule to this Act, the court is satisfied by the evidence of a duly qualified medical practitioner that the attendance before the court of any child or young person in respect of whom the offence is alleged to have been committed would involve serious danger to his life or health, any deposition of the child or young person taken under...this Part of the Act, shall be admissible in evidence either for or against the accused person without further proof thereof if it purports to be signed by the justice by or before whom it purports to be taken: Provided that the deposition shall not be admissible in evidence against the accused person unless it is proved that reasonable notice of the intention to take the deposition has been served upon him and that he or his counsel or solicitor had, or might have had if he had chosen to be present, an opportunity of cross-examining the child or young person making the deposition."

The offences referred to in schedule one include: murder or manslaughter of a child or young person; aiding or abetting their suicide; infanticide; exposing children so as to endanger life; childstealing; common assault or aggravated assault where the victim is a child or young person; child cruelty or neglect; permitting a child under 16 to be in a brothel; permitting a child under 16 to beg; exposing a child to risk of burning; letting children take part in dangerous performances; certain statutory sexual offences against children under 16; indecency with children; and taking, possessing, distributing or publishing indecent photographs of children.

There are a number of limitations attached to the above procedure. In fact, the Pigot Committee Report mentions that the procedure is very rarely used in practice (Home Office 1989:12). Spencer and Flin support this view and say that they have found no written record of the procedure being used and have only heard of one attempt to use the procedure, which failed because the child was young and not believed to be competent (Spencer and Flin 1990:74).

This procedure can only be used where the court appearance is going to involve "serious danger to his life or health". Qualified medical evidence of the child's condition must be presented to the Court. A medical practitioner will have to examine the child and give sworn evidence to the magistrate who will take the deposition. The medical practitioner will also have to give evidence to the court before which the matter appears (Home Office 1989:12).

There appears to be uncertainty as to whether the danger referred to here is limited to physical harm or whether it includes psychological harm. The Ingleby Committee on Children and Young Persons assumed that it excluded the latter since it suggested that the wording be changed to include mental health. Spencer is of the opinion that the phrase is wide enough to include mental as well as physical injury (Spencer and Flin 1990:74). According to the Pigot Committee Report the danger would include both physical and mental injury (Home Office 1989:13).

The deposition must be made in the presence of a magistrate, and the accused or his legal representative must be afforded an opportunity to cross-examine the child. The deposition must be sworn, which implies that the child must be competent to take the oath.

A further restriction on the availability of the deposition is that it can only be used where the child is the actual victim of the offence. It is therefore not available where the child is simply a witness to an alleged offence i.e. where the child has seen her sister raped. The deposition can also only be used where the offence forms part of

schedule 1 of the Act (*supra*).

Section 42 does not set out where the deposition must be made, so it would seem that it could be taken down at any place that would be convenient for the child, for instance in a hospital or at a child's home, provided that the accused or his representative is given the opportunity to be present (Home Office 1989:13).

Spencer suggests that a further reason why this procedure has been used so rarely is the strength of the oral tradition of justice. A written statement of a witness's evidence makes a very poor comparison with the actual *viva voce* evidence of the witness. Spencer and Flin (1993:86) refer to the following statement made by the Departmental Committee on Sexual Offences against Young Persons in 1925:

"Save in...exceptional circumstances, we are convinced that it is necessary for the child to give evidence in court. A written statement is much less impressive than oral evidence. It is far less likely to carry conviction to the mind of the court or jury, especially when they know that the child could itself give evidence before them."

As Spencer suggests, if the sections were amended to include videotaped statements so that the court could actually hear and see the statement of the child, greater use may be made of this procedure in future. This amendment was attempted both in 1988 and in 1991, where it was argued that the sections already admit a written statement and a videotaped statement would simply provide a better record. However, these amendments were blocked by the government on both occasions (Spencer and Flin 1993:86).

### **2.2.3 The Position in Scotland**

Since 1980 the High Court and the Sheriffs Court have had the power to take the evidence of a witness on commission in a criminal case. The commissioner, accompanied by both parties or their legal representatives, will visit the witness, and the parties will be given an opportunity to put their questions to the witness. The proceedings will be recorded and the transcript will be handed in at the trial. Theoretically, this provision would apply to children as well and enable their evidence to be taken ahead of the trial, but in practice it is rarely used (Spencer and Flin 1993:90).

The Scottish Law Commission in their Report on the Evidence of Children and Other Potentially Vulnerable Witnesses evaluated the procedures adopted in some states of the USA which enabled a child to be examined before the trial. These proceedings were then videotaped and used at the trial to replace the child giving evidence (Scottish Law Commission 1990:16).

In their deliberations the Commission felt that the advantages of such a procedure would be that they would take place in small, comfortable surroundings and would therefore be less frightening for children. In addition, the child would be spared the isolation of being in the room on his own and the judge would be able to control the proceedings more effectively (Scottish Law Commission 1990:17).

Consequently the proposals, based on the American procedure, put forward by the members of the Commission in their Discussion Paper were accepted by most consultees. However, certain qualifications were suggested regarding the above procedures. It was proposed that pre-trial depositions take place as close to the trial date as possible. The advantages of this were perceived to be the following: that the accused be given an opportunity to prepare his defence properly so that he would know what questions to put during cross-examination; that it will make it more likely that the judge who is to hear the trial will preside over the deposition; and that by that stage it will be known whether the identification of the accused is going to be an issue at the trial, in which case a pre-trial deposition is not recommended (Scottish Law Commission 1990:17).

It was pointed out that an obvious disadvantage of this proposal was an account, taken as soon as possible after the offence when the event was still fresh and the child had not forgotten any of the details, would be lost. But the Commission felt, in view of the above, that the balance of advantage lay with the taking of the pre-trial deposition a few days before the trial, although they emphasised that this should not be an absolute rule. There might be exceptional cases where an early pre-trial deposition may be necessary or even a very late one where a child breaks down in court and cannot give evidence by conventional means (Scottish Law Commission 1990:17).

A further recommendation made in the Discussion Paper was that this procedure should not be available as of right but only by application to court. It was also proposed that the accused be allowed to be present during the proceedings, although he would not normally be seen by the child. He would either be separated from the child by one-way glass or observe the child by means of closed-circuit television, while he was linked to his legal representative by some form of earpiece. Since the purpose behind these proposals is to protect the child from having to face the accused in person, these proceedings will obviously not be appropriate where the accused is undefended (Scottish Law Commission 1990:18)

The above proposal of the Commission was enacted in 1993 as section 33 of the Prisoners and Criminal Proceedings (Scotland) Act, and came into effect on 1 January 1994. It provides:

- "(1) ...where a child has been cited to give evidence in a trial the court may appoint a commissioner to take the evidence of the child if -
- (a) in solemn proceedings, at any time before the oath is administered to the jury;
  - (b) in summary proceedings, at any time before the first witness is sworn;
  - (c) in exceptional circumstances in either solemn or summary proceedings, during the course of the trial,
- application has been made to the court in that regard; but to be so appointed a person must be, and for a period of at least five years have been, a member of the Faculty of Advocates or a solicitor.
- (2) Proceedings before a commissioner appointed under subsection (1) above shall be recorded by video recorder.
  - (3) An accused shall not, except by leave of the commissioner, be present in the room where such proceedings are taking place but shall be entitled by such means as seem suitable to the commissioner to watch and hear the proceedings."

Although the section does not expressly forbid the child to be examined a long time before the trial, this would in practice hardly be possible, because the section says that the child must have been "cited to give evidence in a trial"

and this happens at a late stage in the preparation of a trial in Scotland (Spencer and Flin 1993:92).

## 2.3 Cross-examination

The cross-examination of a witness is a fundamental part of the accusatorial procedure and is a right which belongs to the accused. The general rule is that children who give evidence, like adults, must undergo cross-examination. There are certain exceptions to this rule in civil proceedings that deal with the custody and the welfare of the child.

### 2.3.1 Custody Proceedings and Wardship

Here the court manages to avoid questioning the child by relying on reports prepared for the judge by people who have interviewed the child on behalf of the court (Spencer and Flin 1990:81). Usually it is the court welfare officer who interviews the children, but the judge can question the child if he so wishes. If he does, this will usually take place privately in his chambers (Spencer and Flin 1993:96). This procedure was approved by the Court of Appeal in *H v H* [1974]1 WLR 595 at 598:

"It is of course most desirable in matters of this sort that the judge hearing the case should see them otherwise than in an open court. One can well understand that in matters of this sort the children may be reluctant to express themselves freely and frankly when there is the possibility that what they say may be made known, particularly, perhaps, to their parents."

Although this procedure is available to a judge, magistrates have been forbidden to see the children privately. They are allowed to see the child in their retiring room but the parties' representatives have to be present (Spencer and Flin 1993:97). The above procedure remains in the discretion of the judge. The Children Act 1989 only provides that the child's welfare must be the court's paramount consideration, and does not prescribe how a judge is to see a child. In *Re R*, The Times, Law Reports, 3 November 1992, a judge refused to see the child privately, and the Court of Appeal rejected an appeal based on this ground.

### 2.3.2 Care Proceedings: Children's Hearings

In care proceedings the courts have moved away from the traditional adversarial procedure of cross-examination. If the child does appear in court, the presiding officer will do most of the questioning (Spencer and Flin 1990:81).

### 2.3.3 Cross-Examination by the Accused

A major stress factor experienced by children who give evidence in court, is cross-examination, especially when conducted by the accused himself. Since legal aid is routinely available in such cases in England, there would in theory be no need for the accused to conduct the cross-examination himself, but the accused does have the right to represent himself if he so wishes (Spencer and Flin 1993:95). Because of this, the Pigot Committee proposed that an unrepresented accused should not be allowed to cross-examine child witnesses:

"..and we believe that defendants should be specifically prohibited by statute from examining child witnesses in person or through a sound or videolink." (Home Office 1989:23)

This recommendation has become s55(7) of the Criminal Justice Act 1991. It provides that in a trial for a sexual offence, violence or cruelty, the defendant may not himself cross-examine a child who is the alleged victim or witness to the offence if the child is under 14, or under 17 in the case of a sexual offence.

#### **2.3.4 Appointment of an Interlocutor**

In 1987 Glanville Williams suggested, what at that time was regarded as quite far-fetched, that a child be allowed to give his evidence through the medium of a specially appointed examiner, who would conduct the interview in a room other than the courtroom. The accused would be allowed to observe these proceedings, either via closed-circuit television or through one-way glass. The accused would put his questions to the child via the examiner, to whom he would be connected by means of a microphone in the examiner's ear (Spencer and Flin 1990:157).

A practical example of how this procedure would work is recorded in an article by Jones and Krugman (1986:255), where a three year old girl was questioned by her psychiatrist. The interview was videotaped and counsel and judge were separated from the child by one-way glass. The interviewer was the child's psychiatrist and he had a micro-receiver in one ear so that the attorneys could pose their questions through him. He had been given authority to veto questions that were developmentally inappropriate or harmful to the child. Although the little girl had shown many symptoms of having experienced severe trauma after the offence was committed (nightmares, weight-loss, anxieties, post traumatic play), the above procedure adopted in court did not disturb her and it only took two sessions for her to re-establish a therapeutic relationship with her psychiatrist.

During the passage of the Criminal Justice Act 1988 certain proposals were forwarded for the taking of a child's evidence. One of these proposals provided for the cross-examination of the child to take place through an interlocutor, who would be a social worker, a child psychiatrist or a probation officer. In the course of the debate varying arguments emerged both for and against the use of a specialist interlocutor to question the child (Home Office 1989:6-7). Although this proposal was not accepted, the government referred the matter to the Pigot Committee for further investigation, since they felt that the employment of an interlocutor "would undermine the defendant's right to conduct adversarial cross-examination in practice" (Spencer and Flin 1990:93).

The Pigot Committee looked at the appointment of such an examiner, whom they referred to as an interlocutor, and proposed that the presiding officer be given the power to make special arrangements for the examination of very young or very disturbed children if he thinks this is appropriate. In such a case a judge should allow questions to be relayed through a paediatrician, child psychiatrist, social worker or a person who enjoys the child's confidence. The Pigot Committee admitted that the introduction of such a procedure would be a "substantial change", and that some of the advocate's forensic skills, timing and intonation would be lost, but felt that it was no different from conducting examination and cross-examination through an interpreter (Home Office 1989:24).

Despite the Pigot Committee's approval of the appointment of an interlocutor in certain circumstances, the Home Office did not accept the proposal and it has not been enacted.

The Scottish Law Commission also looked at the proposal put forward by Professor Glanville Williams. Their main objection to his proposal was that the accused would not be able to have all the relevant facts to put his case to the best effect since the interview was to take place as soon after the event as possible. A further objection was that "the limited opportunity given to the accused to put questions to the child would be no real alternative to cross-examination, and could cause grave prejudice". In view of the above, the Commission were of the opinion that it would not be appropriate to recommend such a "radical innovation" (Scottish Law Commission 1990:15).

## **2.4 Presence of the Accused**

Traditionally at a trial in the adversarial process, evidence is given in the presence of the accused. He has the right to confront witnesses who give evidence against him. This feature of the accusatorial system has a tremendous effect on child witnesses who, in many instances, are called to give evidence in the presence of their abusers. Spencer (1987:83) refers to incidents described in the Magistrates' Association's Memorandum on Criminal Procedure and Child Victims of Sexual Offences, 1962, where small children, when confronted in court with their attackers, dived screaming under the Clerk's desk in terror and hid there for the rest of the proceedings.

As a result of the trauma experienced by child witnesses confronting the accused, various ways have been devised in which a child can be protected from the physical presence of the accused. This can be done by rearranging the courtroom so that the child does not see the accused, by placing the child behind a screen, by allowing the child to give evidence in another room via a television link, or by allowing into evidence a videotape of the child's evidence which will replace his evidence-in-chief in court. Each of these options will be investigated in detail.

### **2.4.1 Rearranging the Courtroom**

The courtroom was rearranged as early as 1919 in the case of *Smellie* (1919)14 Cr App R 128 where the defendant was charged with various counts of assaulting and ill-treating his daughter who was aged about eleven years old. Before his daughter was called to give evidence against him, the judge made the defendant sit on the stairs leading from the dock to the cell so that the child could not see him, although he was able to hear her. The defendant appealed on the grounds that the whole trial was invalidated by the judge's removal of him during the hearing of the trial. He argued that he was entitled at common law to be within the sight and the hearing of all witnesses during the course of the trial, and that the effect of his removal on the jury at the moment his daughter entered the witness box was incalculable. He also argued that his removal would have an effect on the evidence of his daughter as she might be inclined to say untrue things in his absence which she would not have been able to say in his presence. Lord Coleridge J held the following at 130:

"If the judge considers that the presence of the prisoner will intimidate a witness there is nothing to prevent him from securing the ends of justice by removing the former from the presence of the latter."

A similar order was made by a judge in 1986 when he allowed an eight year old to sit next to him while she gave evidence and the defendant had to sit at the back of the court (Spencer and Flin 1990:83).

#### **2.4.2 Removing the Accused**

This procedure entails removing the accused from the courtroom. In criminal matters the accused has the right to be present when a witness gives evidence against him. Where the accused is not defended, his removal from the courtroom would be very prejudicial since the accused would not be able to hear the evidence given against him and it would be virtually impossible for him to cross-examine the witness (Spencer and Flin 1990:91). This argument becomes weaker when the accused is represented, because his legal representative will be able to hear the evidence that is being led and cross-examine the witness on his behalf.

In Denmark, which also has an accusatorial system, the defendant has a right to be present in court throughout his trial. This right is, however, curtailed where the witness is a raped woman who is giving evidence against her attacker. The accused can be removed temporarily where the court believes that the victim's testimony will be affected by giving evidence in the presence of the accused, and in order to protect the victim from fear and humiliation. There is the obvious proviso that the accused must be informed of the evidence which was led in his absence (Spencer and Flin 1990:91).

In Queensland, which also has an accusatorial system based on the English procedure, the court does have the option to exclude the defendant from court when a child under the age of 12 is giving evidence. Provision must then be made for the accused to see the proceedings, for instance via a television monitor i.e. basically the video link in reverse (Spencer and Flin 1990:91).

#### **2.4.3 Screens**

In 1987 Judge Pigot QC presided over a case where a group of men were tried for certain sexual offences involving children. A thirteen year old girl giving evidence at the trial broke down under cross-examination (Davies and Westcott 1992:215). There were five child witnesses in the case and the prosecution applied for screens to be used since the witnesses would be too scared to testify otherwise (Spencer and Flin 1990:83). This application was upheld, and the practice was used in a number of cases after that. The practice involved the child giving evidence behind a screen which protected him from seeing the accused but allowed the accused to observe the child as the latter gave evidence.

In the year that followed screens were used in over a hundred cases at the Old Bailey (Morgan and Plotnikoff 1990:191). The practice of using screens has spread to Crown Courts and even to certain Magistrates' Courts. This model has now been improved and has a television monitor and a microphone placed in such a way as to enable the accused to see and hear the child giving evidence. It would appear that this screen

prevents the accused from seeing the witness at all, since Spencer points out that they were originally used to preserve the anonymity of a witness giving evidence in the presence of a terrorist (Spencer and Flin 1990:83).

This practice was formally adopted by the Court of Appeal in 1989 in the case of *R v X, Y and Z* (1990)91 Cr App R 36. Here there were five child witnesses between the ages of eight and twelve, giving evidence against the accused who was charged with various acts of sexual perversion. In previous cases of a similar nature child witnesses had been unwilling or unable to speak and this had resulted in the cases being withdrawn. The Crown Prosecution Services had approached the trial court in the hope that the situation could be improved by the use of screens in the courtroom. The screen was erected in court in such a way that counsel could plainly see the children, but that the screen prevented the children from seeing the dock. At the beginning of the trial the judge told the jury not to allow the presence of the screen to prejudice them in any way against the defendants as the purpose of the screen was to prevent the children from being intimidated by their surroundings. Defence counsel opposed the idea and appealed on the ground that it was unfair and prejudicial to erect the screen, the suggestion being that the jury might have been unduly influenced and unfairly prejudiced against the accused by the use of the screen. The court refused the application and had the following to say at 515:

"...the trial judge had a duty to see that justice was done which meant that he had to see that the system operated fairly not only to the defendant but also to the prosecution and also to the witnesses....The Court agreed with the judge's conclusion that in the circumstances the necessity of trying to ensure that the children would be able to give evidence outweighed any possible prejudice by the erection of the screen."

No statutory authority exists for the use of screens, but none is needed, for the judge may rely upon his common law discretion to do what is necessary to ensure that the trial is fair. It would appear that screens cannot be used automatically. The judge must balance the trauma experienced by the child with any possible prejudice that the accused may experience by the use of the screen. The double advantage of using the screen is that it reduces the stress experienced by the child giving evidence, and it also enables them to give evidence more coherently (Spencer and Flin 1990:83).

One of the major problems associated with the use of screens in court is that some judges use screens and others do not - it all depends on individual preference and the use thereof is erratic. A court ruling or rule of practice on the matter is required. Morgan and Plotnikoff (1990:91) give an example of a case involving five girls between the ages of 11 and 14 who had been indecently assaulted. One judge granted an application for screens, but the case was then relisted to another court where the new judge refused the application for the use of the screens.

Another problem with the use of the screens is that since there is no clear directive as to who is responsible for applying for the screens, it has been left up to the prosecution to do so. There are some prosecutors who believe that it strengthens their case if the child becomes upset in the presence of the accused, and they therefore do not apply for the use of screens (Spencer and Flin 1990:84).

In 1989 the Scottish Law Commission (1990:19) evaluated various procedural adaptations for child witnesses in their Report. In their original discussion paper a number of reservations were expressed about the use of screens, based on the concern that the screens may not in fact reduce the child's stress since the child would still be aware that the accused was nearby. Further concerns were that, if erected on an *ad hoc* basis, they may prejudice the accused in the eyes of the jury. Also, the layout of the courts themselves may make the erection of the screen impractical.

Despite the above concerns expressed by the Commission, it appeared that screens had already been used in both the High Courts and the Sheriffs Courts and were found to be very helpful. They enabled fearful children to give evidence with greater confidence and were not perceived as being prejudicial to the accused (Scottish Law Commission 1990:19). Their increasing use, especially in England and Wales, suggests that the above possible disadvantages were overestimated by the Commission (Nicholson 1990:206).

It was, however, felt by the Commission that the practice of using screens should be regulated by a statutory provision. This would serve to remove any doubt regarding the Court's discretion to allow the use of screens, especially where the accused objects to their use. It would also be helpful if the grounds for authorising the use of screens were set out so that parties would be aware of what amounted to sufficient justification (Scottish Law Commission 1990:19).

The members of the Commission were also concerned about the nature of the screens themselves. They were afraid that the screen may also prevent the accused from seeing the child and they were of the opinion that it was important for the accused both to see and hear the witness. This problem could be overcome by using screens that were constructed of one-way glass or by allowing the accused to watch the witness giving evidence via closed circuit television (Scottish Law Commission 1990:20).

Consequently the Scottish Law Commission proposed a statutory provision in their draft Bill to regulate the use of screens, which granted the court the authority to use a screen to conceal the accused from the sight of the child, even where the defence objected. However, arrangements would have to be made to ensure that the accused both hears and sees the child while the latter is giving evidence.

The Commission made it clear that they were aware that the statutory provisions relating to closed circuit television in England did not set out the grounds when these applications would be allowed, but they felt that it would be helpful to give statutory guidance as to the factors which should be taken into account when hearing such an application. These specified criteria are not meant to be exhaustive and are simply examples of the factors which the court should take into account (Scottish Law Commission 1990:24). Section 4 of the draft Bill sets out the circumstances under which an application to use the screen will be authorised:

- "4. (1)The court may grant an application under section 1, 2 or 3 of this Act only on cause shown having regard in particular to:
- (a) the possible effect on the child if required to give evidence in open court; and
  - (b) whether it is likely that the child would be better able to give evidence if not required

- to do so in open court.
- (2) In having regard to the matters referred to in paragraphs (a) and (b) of subsection (1) above, the court may take into account, where appropriate, any of the following -
- (a) the age and maturity of the child;
  - (b) the nature of the alleged offence;
  - (c) the nature of the evidence which the child is likely to be called on to give; and
  - (d) the relationship, if any, between the child and the accused."

#### **2.4.4 Live Television Link**

A live television link, also known as a videolink or live link, requires a room near to the courtroom where the child will sit together with a court appointed supporter, known as an usher. A two way videolink connects the child's room to the court where monitors are available to observe the child giving evidence. The judge, the prosecutor and the defence counsel have their own screens and cameras. The child himself has a monitor so that he can see the courtroom and the people addressing him. Examination-in-chief and cross-examination take place in the normal way, except that counsel have to remain seated in order to be seen on the monitor (Davies 1991:184).

The videolink is live. This means that the court hears the child as he is testifying. The evidence is not prerecorded. The videolink only transmits the child's image to the courtroom. It does not make a recording of the evidence (Spencer and Flin 1990:84). The evidence will be recorded in the courtroom by the normal means.

##### **2.4.4.1 Statutory Authority**

The live link was introduced into England by s32 of the Criminal Justice Act of 1988 which came into force on the 5 January 1989. It reads:

- "(1) A person other than the accused may give evidence through a live television link on a trial on indictment or an appeal to the criminal division of the Court of Appeal or the hearing of a reference under s17 of the Criminal Appeal Act 1968 if -
- (a) the witness is outside the United Kingdom; or
  - (b) the witness is under the age of 14 and the offence charged is one to which subsection (2) below applies, but evidence may not be so given without the leave of the court.
- (2) This subsection applies -
- (a) to an offence which involves an assault of, or injury or a threat of injury to, a person;
  - (b) an offence under section 1 of the Children and Young Persons Act 1933 (cruelty to persons under 16);
  - (c) to an offence under the Sexual Offences Act 1956, the Indecency with Children Act 1960, the Sexual Offences Act 1967, section 54 of the Criminal Law Act 1977 or the Protection of Children Act 1978; and
  - (d) to an offence which consists of attempting or conspiring to commit, or of aiding, abetting, counselling, procuring or inciting the commission of, an offence falling within paragraph (a), (b) or (c) above."

The system in England at present works as follows: the technical equipment is automatic and therefore does not require the presence of cameramen. The court is able to see both the child and any person that accompanies the child in the room. The child sits in a room that is near to the court. This is a practical arrangement in case any

articles or documents need to be identified by the child. The child sits at a table, facing a television set, which has a concealed camera built into it or a small camera clipped on top of it. The face of whoever is speaking will appear on the screen. The room is supposed to be "agreeably decorated and furnished" (Scottish Law Commission 1990:21).

In the courtroom there are large screens for the accused, the jury and the public. Counsel have monitors with built in or clipped on cameras and their screens show the face of the child and the face of whoever is speaking to the child. The judge also has a monitor. The latter can see what is being shown to counsel as well as a view of the whole room where the child is sitting (Scottish Law Commission 1990:21). Some of the systems are voice activated so that the image moves to whoever is speaking, while in other systems the presiding officer can control what is on the screen (Davies and Westcott 1992:214).

There is one other adaptation of this system. A pilot study was carried out in Australia which involved placing the accused in an adjacent room and relaying his image to the court. Davies and Westcott (1992:213) argue that this loses sight of the fact that the main purpose of using the live link is to remove the child from the alien environment of the courtroom and make it easier for him to testify.

#### 2.4.4.2 The Usher

The first court case in which the videolink was used took place in Chelmsford Crown Court on 9 January 1989 (*R v Smith* 1989 unreported). The accused was charged with the rape and attempted rape of a 12 year old girl, Julie. Julie sat in another room and gave her evidence using closed-circuit television. At one stage during the course of giving evidence she began to cry and the screens were switched off and the court adjourned. The accused was found not guilty on both charges. A request was made that a victim support volunteer accompany Julie in the separate room, but this request was refused by the judge, and a female court usher accompanied her instead (Sharp 1989:95).

The judge has a discretion to allow a person to accompany the child when the latter testifies from a separate room. The judge usually sends a court usher who has had no previous dealings with the child and is, in fact, a stranger (Spencer and Flin 1990:87).

Sharp (1989: 95) argues that, although the court usher may have been acceptable in the *Smith* case *supra*, she may not be appropriate where younger or more traumatised witnesses are involved:

"However sympathetic a court usher may be, her appearance in a black gown, the fact that she is unknown to the child and the necessary restrictions upon the usher's ability to relate to the child may, in some cases, produce great difficulties."

The relevant section and the court rules do not contain any guidelines as to what the usher is allowed to do once she is in the room. It is presumed that her only function is to accompany the child in the room but she may not communicate with the child.

Sharp (1989:95) hypothesises about a situation, not difficult to imagine, where the child is reluctant to go into the room with the usher. Once there, the child will have to be persuaded to answer distressing and intimate questions. What will the role of the usher be? Is she simply to ignore the child? Since there are no guidelines available, this would depend on the discretion of individual judges.

Section 10 of the Crown Court Rule 23A (*infra*) provides that the child witness "shall be accompanied by a person acceptable to a judge of the Crown Court". The wording of this section is wide enough to include an independent adult who may accompany the child. This would appear to be supported by the prescribed form that is used for making application to use the live link. This form includes a section where the applicant may propose a named individual to accompany the witness and give his or her reasons for doing so. The final decision on who accompanies the child in the witness room rests with the judge who considers the application. A copy of the prescribed notice of application for leave to use the television link under section 32(1)(b) of the Criminal Justice Act 1988 is attached as Annexure A.

In 1991 the Deputy Chief Justice, Lord Justice Watkins, issued a set of guidelines to the judiciary in which it was clearly set out that a court usher, selected and trained for the task, was the only person allowed to be present in the video room when the child gave evidence. In very exceptional cases a social worker or a police officer may accompany the child, but only if the defence agrees, provided, of course, the defence is not being unreasonable. The social worker or police officer acting as the usher should not be the person who conducted the initial interview with the child witness (Watkins 1991).

#### **2.4.4.3 Application to Use the Live Link**

The use of the live link was confined to cases involving violence or sexual assault and to children under the age of fourteen. The 1991 Criminal Justice Act extended the age to seventeen where sexual offences were involved (Davies and Westcott 1992:24). The live link is only available for trials on indictment in the Crown Court, which means it cannot be used in Magistrates' Courts.

Anybody who wishes to make use of the live link for a child to give evidence, must do so by means of a written application to the judge. He will decide the matter without a hearing. This is provided for in the Crown Court Rules 1982, r 23A (SI 1988 No.2160), which provides that any party may apply for evidence to be given via live television link where the witness falls within the requisite age group. The application must be made by giving notice in writing on the prescribed form within 28 days after the date of the committal of the defendant. Notice of the application must be sent to the appropriate officer of the Crown Court and copies to all other parties to the proceedings. Any party who wishes to oppose the application must notify the applicant and the appropriate officer of the Crown Court within 14 days of his desire to oppose the application, setting out his reasons for so doing.

The application is decided by a judge of the Crown Court without a hearing, although the judge may decide to hold a hearing. The parties will then be informed of the judge's decision. If the application was successful, the notification to the parties will include the name of the witness and, if known, the name, occupation and relationship

(if any) of the person who is to accompany the witness, as well as the location at which the trial will take place.

Finally, the Rules provide that when a witness under the age of 14 gives evidence via a television link, that witness may be accompanied by a person who is acceptable to a judge of the Crown Court, but no other person.

Although the judge does have the discretion to decide applications without a hearing, there appears to be some unease because there is no official guidance in the Crown Court Rules as to how the judge should exercise this discretion (Spencer and Flin 1990:87). What is important is that the prosecution does not have to make a special case for the use of the live link, because there is a presumption of need (Davies and Westcott 1995:206).

Spencer and Flin (1990:87) refer to an unreported case in the Leeds Crown Court in December 1989 where the judge in the case, Judge Herrod QC, made a written ruling in which he set out the principles that should be taken into account when this discretion is exercised:

- i. The application should not be granted automatically. The risk of harm to the child should be weighed up against the prejudice that the accused might suffer.
- ii. If the prosecution wishes to make use of the live link, then they must put evidence before court that the child will be harmed.
- iii. Where the child is very young, the child's age itself can indicate that it will be harmful for the child to give evidence.

The Scottish Law Commission (1990:24) recommended that the court should take into account the following factors when trying to determine whether special precautions should be taken to assist a witness:

"The court should be entitled to grant authority for that on cause shown, taking into account matters such as: the age of the witness; the physical condition and mental capacity of the witness; the nature of the offence; the nature of the evidence which the witness is likely to be called on to give; the relationship, if any, between the witness and the accused; the possible effect on the witness if required to give evidence in open court; and the likelihood that the witness may be better able to give evidence if not required to do so in open court."

The Scottish Law Commission (1990:24) felt, as with the use of screens, that it was important that there be some statutory guidance as to when the live link should be used. It had been proposed that the use of the live link in Scotland be restricted to children under the age of 14 and to matters relating to "sexual misbehaviour" where the child was a victim or a witness, but the Commission disagreed with these restrictions as they felt there might be a case where the procedure could be advantageous in the case of a child older than 14.

"So far as the suggested restriction to sexual offences is concerned, we are even more firmly of the view that such a restriction would be unwise. Children may be required to give evidence in cases where they have been physically, as opposed to sexually abused, or they may, for example, have to give evidence as a witness to some horrific crime such as homicide. We are unable to accept that such children are any less likely to be in need of special procedures than those who

have been the victims, or the witnesses, of sexual misbehaviour." (Scottish Law Commission 1990:24).

#### 2.4.4.4 Evaluation of the Live Link

The Home Office funded research to determine whether the live link facility was operating effectively under the new legislation, and appraisals were conducted over a 21 month period in the fourteen specially equipped courts. The final report found that there was widespread acceptance of the live link's value among the judges, court clerks and barristers who had made use of the process (Davies 1994:225). The most widely cited reason for this acceptance was that the stress experienced by the child witness was reduced and the quality of the child's evidence was thus improved. Other positive features identified were the fact that the child did not have to face the accused and that the child did not have to go into the courtroom (Davies 1994:226). One of the judges, in his evaluation, made the following comment:

"My experience with the live link is that children no longer dry up from stage fright...their minds are flowing and not frozen." (Davies and Noon 1991:105).

A complaint forwarded by some barristers in the evaluation was that there was a loss of rapport and eye contact with the child when leading their evidence via the live link. Davies and Noon (1992:25) point out that communication via the live link is indeed an artificial medium and training and experience are required for it to function effectively. Many examples of inept use of the live link were noted during the evaluation. For instance, some barristers did not talk directly into the camera and therefore presented a view of the top of their head to the child (Davies and Noon 1992:25).

These improved conditions enabled a greater number of children to give evidence due to the reduction in stress (Davies 1994:226). Originally the Scottish Law Commission was unenthusiastic about the fact that the live link would reduce the stress experienced by child witnesses, since they thought that a child might be just as frightened by having to face all the technological equipment. However, it appears from practice that the equipment used is highly sophisticated, unobtrusive and therefore unlikely to appear threatening to children (Nicholson 1990:207). In fact, the Scottish Law Commission (1990:22) were so impressed with what they saw in England, that they recommended that the live link be introduced into Scotland, proposing that "[p]rovision should be made to enable courts in Scotland to authorise the use of a live closed circuit television link to enable children to give evidence from outside the courtroom".

In spite of the above, there appears to be a backlash against using the live link as a medium for enabling children to testify. Lawyers appear to have the perception that televised evidence is a second-hand form of evidence and will thus have less impact on a jury (Davies 1994:226). In the *Smith* case *supra* where 13 year old Julie gave

evidence via the live link, Sharp (1989:96) points out that the evidence seemed "impersonal and assumed a quality of unreality". As Julie gave evidence, according to the observations of Sharp, even the jury seemed to experience this sense of unreality because when she described intimate details and became distressed, the jurors remained impassive and did not seem to show any signs of sympathy. Also, when Julie broke down, the screens were switched off immediately and "...the jury filed out for a tea break, people began to chat and there was a feeling that we were having a 'commercial break'. When the screens were switched on, Julie was composed and she continued giving her evidence".

There appear to be two views: firstly, that seeing the child on a monitor enhances the impact of the child's evidence, which is supported by some judges in the USA (*Hochheiser v Supreme Court*, 161 Cal.App.3d 7771 208 Cal Rptr 273 at 278-9 (1984)); secondly, it has been argued that the videolink makes the evidence appear impersonal and unreal. Two American psychologists, who used adults instead of children, came to the conclusion that both views were true i.e. some witnesses came across better on a monitor while others did not (Miller and Fontes 1979:75).

Toby et al (1995:214) conducted a similar experiment in which children, giving evidence via live link about a harmless incident in which they had been involved, were rated by volunteers acting as jurors. The live testimony of the children was perceived as being more credible and more attractive than the testimony given via live link.

Davies (1994:226) argues that these results would have been strong evidence for preferring live evidence in court except that only a few of the children who were asked to give evidence in the experiment were actually prepared to do so. Many of the children refused to give evidence and he argues that one cannot compare a few children confident enough to give evidence with the large majority who are too intimidated to do so. The study itself emphasises the fact that the live link is probably the only way the court is going to hear the evidence of many children at all.

Although the live link appears to be successful in getting children, who would not normally have been able to give evidence, to do so, there has nevertheless been a decrease in the use of the live link. In 1990 it was used in 128 cases and in 1992 only in 91 cases (Davies 1994:226). Even after the 1988 Criminal Justice Act introduced the live link, it was found that in practice the equipment was not being used as often as had been anticipated.

Technically the live link appears to be working well. The equipment itself does not appear to be giving trouble. One of the complaints that has been raised is that it is difficult for the jury to get an idea of the child's size. This was observed as well in the *S v Smith* case (*supra*) where Sharp (1989:96) noted that monitors only showed a head and shoulder image, which made it impossible to judge the height or size of the witness. In this case, Julie was several inches shorter than the usher, but on the monitor they appeared to be the same height. This could definitely have an effect on the jury as, for instance, in a rape case where the complainant might be very small of build and this could not be seen on the monitor. According to Spencer and Flin (1990:88) this could be combatted by allowing the jury to see the child afterwards.

## 2.4.5 The Use of Videotapes

### 2.4.5.1 Introduction

The general rule is that videotapes of interviews conducted with children will be inadmissible as evidence in court because they contravene the rule against hearsay if they are used to replace the child's evidence in court. If the child does give evidence, the videotape will still be inadmissible as a previous consistent statement (Home Office 1989:11).

s23 of the Criminal Justice Act of 1988 is a statutory exception to this rule and provides that a statement made by a person in a document shall be admissible if direct oral evidence by that person would be admissible, and certain conditions have been complied with. The term 'document' is defined as including audiotapes and video-recordings. This section can be used where the person who made the statement has subsequently died, is mentally or physically unfit to attend the trial, is out of the country and it is not reasonably practical to secure his attendance, or if he is missing and all reasonable steps have been taken to find him without success. Included here are statements made to the police or investigating officers if the witness cannot give evidence due to fear. Even if all these requirements are complied with, this does not mean that the evidence will automatically become admissible. There is a statutory duty on the presiding officer to exclude evidence if he is of the opinion that it will be in the interests of justice to do so (Home Office 1989:13).

Videotapes were originally introduced into England in two ways. Firstly, through wardship proceedings, where interviews conducted by psychiatrists were videotaped, and, secondly, through a pilot project known as the 'Bexley Experiment', where police and social workers videotaped their interviews with children.

### 2.4.5.2 Wardship Proceedings

In wardship proceedings it was a common procedure for judges in the High Court to appoint a psychiatrist to examine a child and give his opinion on whether the child had been abused or neglected. In providing these children with treatment, video-recordings were made of interviews conducted with the children and their families. The purpose of these video-recordings was to enable other professionals involved in the treatment of the child to see the interview (Bentovim and Tranter 1988:55).

Originally the children referred for diagnosis were between the ages of eleven and fifteen, but as time progressed younger and younger children were being referred until interviews were being conducted with children as young as three. It soon became clear that the standard open-ended questions employed did not assist the children in talking about their experiences. Other forms of questions, such as hypothetical or circular questions, had to be used in an attempt to get the children to talk. Bentovim and Tranter, (1988:55-6) explain the type of questions that were used in the interviews:

"Thus, instead of asking a child 'what has happened to you', or 'has anything rude happened to you', we used the form of questioning: 'if something rude has happened to you, for instance being touched on the vagina (demonstrating on dolls with explicit sexual features), who would you speak about it to? Would you say if you had such a touch it would hurt more if the touch was just on the outside or inside, or a little way inside your vagina or a long way?' Then we might proceed to questions such as: 'if you were touched in this way, did it hurt a little or a lot?'"

Multichoice questions were also used to get the children to disclose allegations of abuse. Multichoice questions are those which list a number of options such as: 'Would it be the vaginal area or the anal area?' (Bentovim and Tranter 1988:56).

When psychiatrists were called to give evidence in court, they frequently made reference to these videotapes, which led opposing parties to demand access to the tapes in order to dispute the psychiatrist's evidence. This was allowed and it became the usual practice for judges to see videotapes of a psychiatrist interviewing a child (Spencer and Flin 1990:144).

The judges were not impressed with the techniques used in the videotaped interviews. The videos were criticised for the way in which the interviews were conducted which were found to contain strong elements of suggestion and reinforcement. These interviews had originally been developed as a clinical technique to assist in making a diagnosis and were now being analysed in court as a forensic technique (Bentovim and Tranter 1988:56). These interviews then had to be adapted to make them acceptable in court. Judge Ewbank in *Re E and G*, The Times, Law Reports, 16 July 1986, echoed this need for modification. In this particular case Judge Ewbank's criticism was aimed at the social worker assigned to the case, whom he alleged believed that abuse had taken place before the interview was even conducted, and then used a number of leading questions to come to the conclusion that sexual abuse had in fact taken place (Bentovim and Tranter 1988:57).

Mr Justice Latey in *Re M Minors*, The Times, Law Reports, 2 May 1982, identified that there was a contradiction between the needs of clinical therapeutic methods and the needs of the courts. For clinical therapy it was necessary to get the children to give an account of what had happened to them, which might necessitate the use of leading questions. However, this would not meet the needs of a legal interview. For this reason Justice Latey felt that it was necessary to videotape all interviews:

"There should always be a video recording. The reason is this: where there is a dispute whether there has or has not been abuse, the court is anxious whether it should accept the *ipse dixit* of the interviewer or interviewers, however skilled or experienced. This is because cases have shown that the precise questions, the oral answers (if there are any), the gestures and body movements, the vocal inflection and intonation may all play an important part in interpretation. Where there is a dispute, there should be an opportunity for another expert in the field to form a view. Often, no doubt, he would reach the same interpretation and conclusion. In other cases he might not and in the interest not only of justice between the parties but of doing its best to arrive at the truth of the matter in the interest of the child, the courts should have the benefit of such evidence to be informed." (Bentovim and Tranter 1988:58)

As a result of the difficulties experienced with these videotapes people began to assume that videotaping an interview with a child was a bad idea, and that videotaped interviews with children should therefore not be admissible. However, the interviews were still taking place, and the court, by refusing to see the so-called bad interview, was only camouflaging the problem. The fact that the interviewing techniques being used were not acceptable by the court was rather an argument for allowing the videotapes to be admissible so that the court could make an accurate evaluation of the expert's opinion (Spencer and Flin 1990:145). In fact, in *Re M* [1987]1 FLR 293 the court went so far as to insist that where there was no medical evidence of abuse or where the perpetrator denied the allegation, there had to be a videotape. The argument is that in such a situation the court is forced to accept the opinion of the psychiatrist. The availability of the videotape will enable another expert to form an opinion from what he sees of the interview.

### 2.4.5.3 The Bexley Experiment

In 1984 the Metropolitan Police set up a Working Party to review the methods used in conducting and recording interviews with victims of child sexual abuse. The purpose of such a working party was to address two troublesome issues. Firstly, the traditional methods of police interviews, which included the taking of written statements, gave rise to a number of problems where children were concerned. It created difficulty in developing sufficient rapport with the child to enable the child to make a statement. In addition to this there were evidential shortcomings in trying to put the child's words into an acceptable formal written statement, especially where the child's vocabulary did not extend to adult terminology (Bexley Report 1985:1). Secondly, the traditional procedure of the criminal justice system did not protect the child from undergoing multiple interviews by various agencies, including the courts (Bexley Report 1985:1). When a child has been abused and a charge has been laid, the child will have to be interviewed by a number of people ranging from a parent to a police officer, social worker, psychologist, doctor and prosecutor.

The danger of multiple interviewing is twofold:

- i. the child's memory becomes corrupted by false details that have been implanted as a result of the various people interviewing the child;
- ii. the child has to repeat his evidence so often to so many people that it loses all spontaneity and when the child gets to court, his evidence sounds rehearsed (Spencer and Flin 1990:146).

The Working Party was then called upon to investigate the two main areas of concern: whether the police investigative role could be improved by using new interview practices such as anatomically correct dolls, drawings and video recordings; and whether the various agencies involved in sexual abuse could interlink and work together in the interests of the child's welfare (Bexley 1985:2).

A pilot project was started in 1985 in terms of which the Metropolitan Police and the Department of Social Services for the London Borough of Bexley joined forces to form a joint investigation team with the above aims in mind. The fundamental objective remained at all times the protection of the child's interests (Bexley 1985:3).

It was felt that, since child abuse entailed so many different facets, it required a co-ordinated approach from all agencies. Traditional approaches were fragmented with each agency acting within its own territory. The benefit of joint investigation would reduce the number of times the child had to be interviewed and increase effective communication between professionals involved in child abuse. This would in turn give rise to more accurate and comprehensive knowledge of individual cases. In this way services could be delivered to both the victim and family in a co-ordinated way (Bexley 1985).

It was proposed that in the case of referrals one social worker and one police officer would be appointed as joint investigators. Only after background information on the particular case was obtained and interviews conducted with the informant would the victim be approached and interviewed in the specially equipped recording room where the interview would be videotaped (Bexley 1985).

The main purpose of the interview conducted with the child victim is to establish what has occurred. The normal procedure is for a police officer and social worker, who have been trained, to conduct the interview together. The report sets out guidelines as to how the interview should be conducted, namely how the interviewer should build rapport, where he should sit, how to use anatomically correct dolls in the interview etc. (Bexley 1985). Since the video was not intended for court, it was suggested that, where necessary, leading questions could be asked.

"If leading questions or other 'breeches' of the 'evidence rules' are necessary to do this, then use them. There is no point in sticking rigidly to rules of evidence and obtaining no information. An evidentially unacceptable interview is better than nothing and at least it may assist the investigator to find 'evidence' that is acceptable." (Bexley 1985)

The use of the above mentioned aids together with the videotaping of the interview had the following benefits, as summarised by Gwyn (1988:65):

- i. it captured gestures and non-verbal communication that were impossible to record in a written statement;
- ii. it enabled the child's spontaneity to be seen;
- iii. it could be used where the child did not have an adequate vocabulary to describe what had happened;
- iv. it removed the necessity of repetitive interviewing.

The police officer was responsible for the handling, recording and storing arrangements of the videotape. Representatives of other agencies involved in the case, for instance the child psychiatrist, were allowed to see the videotape, but access was only allowable within the scope of the written authority. The video recording of the interview with the victim was shown to the suspect and his defence solicitor. Security and privacy were, however, to remain paramount (Bexley 1985).

In 1987 the Metropolitan Police published a further report in which they evaluated the project, found it to be a success and the procedure was then introduced throughout the Metropolitan Police Area. The project produced very encouraging results. The members from both disciplines were able to work well and effectively together. The interviewing techniques were effective and facilitated communication, and also appeared to reduce trauma. The

videotape itself was seen as a major improvement on the written statement (Bexley 1985:7). The project was so successful that in 1988 the Home Office issued a circular to all English police forces urging them to join with social services when interviewing children and to videotape the interviews (Spencer and Flin 1990:146).

Although the original purpose of the interviews was to provide a co-ordinated approach to dealing with victims of child sexual abuse and thereby to prevent multiple interviews, it was not long before people began to argue that these videotapes should become admissible in criminal proceedings and replace the child's evidence-in-chief (Spencer and Flin 1990:147).

#### **2.4.5.4 The Pigot Committee**

##### **2.4.5.4.1 Introduction**

During the passage of the Criminal Justice Act 1988 which contained the proposal to allow children to give evidence via the videolink, certain other proposals relating to the video recording of children's evidence were put forward as well. It was proposed that the video-recorded interview conducted by the police officer and social worker with the child be admissible as evidence. The idea was to make these video recordings capable of replacing the child's evidence-in-chief. A further proposal was included to allow cross-examination to take place via a live television link system through the medium of an interlocutor (Home Office 1989:6).

The Government undertook to investigate the idea of the pre-recorded videotape, and so the Home Office issued a Consultative Paper. Although most of the responses favoured the idea, the Government nevertheless refused to support the idea (Spencer 1987a:1031). In the course of the debate it became clear that a number of varying opinions were held by the Members of Parliament. The main concerns raised can be briefly summarised as follows:

- i. There was doubt that the admission into evidence of the child's videotaped interview would actually reduce the stress since the child would have to be cross-examined later in court. At the stage when cross-examination took place, the child would have to reconcile his evidence on the videotape with his present recollection. This will encourage the defence to cross-examine the child in even greater detail (Spencer 1987a:1031).
- ii. There were serious reservations regarding the idea that cross-examination should take place through a professional person, called an interlocutor.
- iii. There were also concerns about the techniques employed by police and social workers in conducting the interviews, and whether these would affect the admissibility of video-recorded interviews (Home Office 1989:7).

Although the proposals, as they stood in the Bill, were not acceptable to the Government, they did receive so much support that the Government set up an advisory group to investigate the use of video technology as far as vulnerable

witnesses were concerned (Spencer 1992:120). The mandate of the advisory group was to investigate the question whether video recordings of interviews conducted with child victims should be admissible in criminal trials (Home Office 1989:i).

The Pigot Committee, so called because it was chaired by Judge Thomas Pigot QC, had access to all the available research in England as well as the procedures and reforms adopted in other countries. The advisory group viewed video-recorded interviews, considered written and oral evidence submitted by various bodies, including police, judiciary, social workers, doctors, psychiatrists and academics and made certain proposals and recommendations.

#### **2.4.5.4.2 Pigot Committee Proposals**

The following proposals and recommendations were forwarded by the Committee:

- i. The Committee was overwhelmingly in favour of making videotaped recordings of interviews with child witnesses more widely admissible (Spencer 1992:122).
- ii. Once a video recorded interview with a child witness had been made, it would have to be made available to the defence as soon as possible (Home Office 1989:21).
- iii. Children should only give evidence if they want to, whether in open court or via closed circuit television. This is important, both for the child's welfare as well as a means to overcome the reluctance of parents to assist the authorities. Parents are often not prepared to become involved because they do not want their child to be forced into giving evidence (Home Office 1989:22).
- iv. Where a video recorded interview was to be put in evidence, a pre-trial application would have to be made so that the judge could rule upon its admissibility since the video-recorded interview would replace examination-in-chief. This application would take place in the child's absence, either in the judge's chamber or another suitable place. Both parties would be afforded an opportunity to put forward arguments as to the admissibility of the recording. The judge, applying the ordinary rules of evidence, would determine whether the recording was admissible or not (Home Office 1989:22).
- v. At the preliminary hearing the examination and cross-examination of the child witness would take place in an informal setting and this would be videotaped and shown at the trial. The arrangements would be at the discretion of the judge, but the Pigot Committee suggested that wigs and gowns should always be removed and the judge should "control cross-examination with special care". This hearing could take place in a suitably equipped room in the court building or an interview suite at a hospital. The proceedings should be kept as informal as possible, and only the judge, advocates and a parent or supporter should be present in the room with the child. The accused should be able to watch the proceedings via closed circuit television and be linked to his representative via an audiolink (Home Office 1989:23).
- vi. The Committee was strongly of the opinion that the accused should be "prohibited by statute" from

examining child witnesses in person or through a sound or videolink. As far as the Committee was concerned, *Smellie's case (supra)* was authority for the proposition that there is no right of confrontation in English law. They were of the opinion that the damage to the child and the interests of justice far exceeded the limitation on the accused's rights:

"The limitation which this places upon the defence is, in our view, far less significant than the damage which can be inflicted upon the child and the interests of justice if, in certain circumstances, such an exercise is allowed to take place." (Home Office 1989:23).

- vii. The videotaped interview would be shown to the child at the preliminary hearing and the child would be required to confirm it. The prosecution could then focus on any aspect it might wish to before cross-examination took place (Home Office 1989:23).
- viii. Although the Committee disagreed on the more radical idea of making the defence put their questions to the child through a neutral person (interlocutor), the majority did propose that special arrangements be made when examining young or very disturbed children at the preliminary hearing. The judge should have the discretion to allow the questions to be relayed through a paediatrician, child psychiatrist, social worker or a person who enjoys the child's confidence (Home Office 1989:24).
- ix. It was recommended that at the trial the video-recorded interview be shown when the child would give evidence-in-chief and that the video recording of the preliminary hearing should be shown where the cross-examination would take place (Home Office 1989:25).
- x. It was recommended that these procedures be available to children under 14 in respect of violent offences, and to children under 17 in respect of sexual offences (Home Office 1989:25).
- xi. The Committee further proposed that these procedures should apply at trials on indictment for violent and sexual offences and would include offences of child cruelty and neglect. The procedure would therefore only be used in the Crown Court and not in the Magistrate's Court. The Committee added that this procedure should be available to all child witnesses and should not be restricted to victims only since children who witnessed some of the worst violent and sexual assaults were as badly affected by the experience as some of the victims. Children are themselves often witnesses of sexual offences against other children (Home Office 1989:25-6).
- xii. The Committee endorsed the Home Office recommendations, emanating from the Bexley Experiment, that there be early consultation and co-ordination between the police and the social services. This would include the sharing of information, joint investigations and joint interviews (Home Office 1989:34).
- xiii. It was further recommended that there should be joint training and specialist joint investigation teams. The training should include aspects of child psychology, cognitive development and the law relating to children,

especially the law of evidence as regards examination and cross-examination (Home Office 1989:36).

- xiv. The Pigot Committee recommended that a code of practice be drawn up which contained general guidance as to the conducting of the video-recorded interview and the rights of the accused. The Committee went so far as to discuss what the contents of the code should deal with. For instance, they suggested that the video interview be recorded as soon as possible after the offence was committed, although sufficient time should be allowed for consultation to take place between the various agencies so that they can consider the legal context and implications of the interview (Home Office 1989:37). The interview, it was said, could take place at video suites where available or even at police stations if suitable facilities were available. If the witness was badly injured or traumatised, there was no reason why the interview could not be done in the witness's own home (Home Office 1989:38).

In addition, the Committee specifically wished to record their endorsement of the 'step-wise' approach to interviewing proposed by Professor Yuille of the University of British Columbia. The 'step-wise' approach requires the interviewer to proceed from the most general to the more specific. The interview will begin with the building of rapport between the child and the interviewer and setting the boundaries for the interview, namely the seriousness of the context of the interview and the importance of telling the truth. Thereafter the child will be given an opportunity to relate his experience freely. Further questions can be asked afterwards where it is necessary for clarity (Home Office 1989:41).

Since the video recorded interview would replace the examination-in-chief of witnesses, the interview would have to be conducted in accordance with the rules which govern evidence. This has the implication that leading questions should be avoided. The Committee defined leading questions as "questions which suggest the answer and...assume that facts are established which are likely to be in dispute" (Home Office 1989:42).

#### **2.4.5.5 Reaction to the Pigot Committee Report**

The Government's reaction to the Pigot Committee Report was embodied in the Criminal Justice Act 1991, which introduced s32A into the Criminal Justice Act 1988. In terms of this section, video recorded interviews with children may be admitted in a criminal trial at the Crown Court or a Youth Court. The section provides as follows:

- "(1) This section applies in relation to the following proceedings, namely -
  - (a) trials on indictment for any offence to which section 32(2) above applies;
  - (b) appeals to the criminal division of the Court of Appeal and hearings of references under section 17 of the Criminal Appeal Act 1968 in respect of any such offence; and
  - (c) proceedings in youth courts for any such offence and appeals to the crown court arising out of such proceedings.
- (2) In any such proceedings a video recording of an interview which -
  - (a) is conducted between an adult and a child who is not the accused ("the child witness"); and
  - (b) relates to any matter in issue in the proceedings, may, with the leave of the court, be given in evidence in so far as it is not excluded by the court under subsection (3) below.
- (3) Where a video recording is tendered in evidence under this section, the court shall (subject to the exercise of any power of the court to exclude evidence which is otherwise

- admissible) give leave under subsection (2) above unless -
- (a) it appears that the child witness will not be available for cross-examination;
  - (b) any rules of court requiring disclosure of the circumstances in which the video was made have not been complied with to the satisfaction of the court; or
  - (c) the court is of the opinion, having regard to all the circumstances of the case, that in the interests of justice the recording ought not to be admitted; and where the court gives such leave it may, if it is in the opinion that in the interests of justice any part of the recording ought not to be admitted, direct that that part shall be excluded.
- (4) In considering whether any part of a recording ought to be excluded under subsection (3) above, the court shall consider whether any prejudice to the accused, or one of the accused, which might result from the admission of that part is outweighed by the whole, or substantially the whole, of the recorded interview.
- (5) Where a video recording is admitted under this section -
- (a) the child witness shall be called by the party who tendered it in evidence;
  - (b) that witness shall not be examined in chief on any matter which, in the opinion of the court, has been dealt with in his recorded testimony.
- (6) Where a video recording is given in evidence under this section, any statement made by the child witness which is disclosed by the recording shall be treated as if given by that witness in direct oral testimony; and accordingly -
- (a) any such statement shall be admissible evidence of any fact of which such testimony from him would be admissible;
  - (b) no such statement shall be capable of corroborating any other evidence given by him; and in estimating the weight, if any, to be attached to such a statement, regard shall be had to all the circumstances from which any inference can reasonably be drawn (as to its accuracy or otherwise).
- (7) In this section "child" means a person who-
- (a) in the case of an offence falling within section 32(2)(a) or (b) above, is under fourteen years of age or, if he was under that age when the video recording was made, is under fifteen years of age; or
  - (b) in the case of an offence falling within section 32(2)(c) above, is under seventeen years of age or, if he was under that age when the video recording was made, is under eighteen years of age."

There are a number of limitations on the availability of s32A. It cannot be used in all the courts, only the Crown Court, the Youth Court and the Court of Appeal. The procedure can only be used in the Youth Court where the offence would have been one heard in the Crown Court but for the age of the accused. The availability of the videotape procedure is further limited in that it is only available for crimes of sex, violence and cruelty against children. A third limitation relates to the age of the child. In cases of violence and cruelty the witness must have been under the age of 14 when the tape was made and under the age of 15 by the time of the trial. In cases of a sexual offence the witness must have been under the age of 17 when the tape was made and under the age of 18 at the date of the trial. The restriction on the age limit of the witness at the date of the trial does not seem to be sensible. Since one of the justifications for using the videotape of an early interview is that a more comprehensive and accurate record is obtained, it does not matter how old the witness is by the time the matter comes to trial. In fact, the longer the trial is delayed, the more necessary it becomes to see the original videotape (Spencer and Flin 1993:177).

Subsection 2 is phrased very widely and refers to a video recording of an interview between an adult and a child witness which relates to the proceedings. The video recording is not limited to interviews between the police and

a child witness, but would include diagnostic interviews and even, as Spencer and Flin (1993:178) indicate, home videos conducted by an adult or parent. The only limitation is the fact that the court has a very wide discretion to admit the recording.

Any party who wishes to introduce a videotape into evidence must make an application to the judge in terms of the Crown Court Rules. If the other party objects to the admission of the videotape, then there will be a hearing before the judge. The admissibility is governed by s32A(3) which requires that the child must be available for cross-examination in court, the court must be provided with enough information about how the video was made and, finally, the court has the discretion not to admit a video recording if it would not be in the interests of justice to do so.

The party who wants to introduce the video recording must supply the court with certain details as set out in Crown Court Rule 23C(4). Information must be provided regarding the times when the recording was started and finished as well as details regarding any interruptions; the place where the recording was made and the usual function for which the premises are used; personal details of any person present and his relationship, if any, to the witness; a description of the equipment used; and the location of the mastertape if the video recording is a copy.

Section 32(3)(c) is phrased very widely and gives the court the discretion not to admit a recording in the interests of justice. What factors would be taken into account in coming to such a decision? Spencer and Flin (1993:180) suggest that the most obvious reason would be if an interview was conducted in a manner that did not comply with the rules of evidence, for instance if leading questions were asked or the witness was pressured into answering questions. Birch (1992:271-3) suggests that the most likely possibilities would involve the inclusion in the videotaped interview of inadmissible material such as hearsay evidence or allegations of similar offences i.e. character evidence. She further urges the court not to declare video-taped interviews inadmissible simply because there has been some pressure placed on the child to disclose. Since children may be embarrassed or afraid to offer intimate details or may be shielding a parent, a certain amount of encouragement may be needed to get the child to speak. It would seem wrong in these situations to regard the videotaped interview as inadmissible since the abuser would be profiting from his own wrong in the sense that abusers often use mental or physical intimidation as a means of compelling silence. It would be preferable to admit the videotaped interview and to allow the nature of the question to affect the weight of the evidence and not its admissibility.

Butler (1993:4) refers to a letter written by a Crown Court on behalf of a judge in which he sets out the broad criteria under which he would allow a video recording to be used in court. The letter states the following:

"...where a child is aged under 10 years he would normally grant the application on the grounds of the age alone. From the ages of 10 to 12 years, the maturity of the individual child would become a relevant factor and you would not always be prepared to grant an application because of the child's age. From the age of 13 years upwards, we would normally refuse any application based on the child's age unless additional reasons were set out in the application"

This judge clearly did not take into account the vulnerability of the child or any trauma created by the court appearance. This serves to highlight the inconsistencies between different judges and the problems created when there are no specific guidelines. This was in fact, one of the dangers highlighted by the Scottish Law Commission (1990:24) when they dealt with the use of screens and live link. They recommended that there should be some statutory guidance as to when the above could be used.

Where a video recording has been found to be admissible, the videotape will then replace the child's evidence-in-chief. The witness will not be allowed to be examined in chief on any matter which has been dealt with in the video. This provision is qualified by the phrase "in the opinion of the court" which would appear to give the court the discretion to allow such examination if, in its opinion, a matter has not been dealt with properly in the videotaped interview.

One of the reasons submitted for requiring that the videotape replace the child's evidence and not supplement it, was to prevent the situation where the child is exposed to cross-examination on discrepancies between the videotape interview and the evidence given in court. Spencer and Flin (1993:182) admit that this is true since "where there is no examination in chief, there is no second telling of the story with which the earlier one can be microscopically compared".

However, despite this Spencer and Flin (1993:182) argue that there is a difficulty in the way the subsection has been drafted. No difficulties will arise if the videotaped interview has been conducted well, but if the videotaped interview has not provided very clear and distinct evidence, counsel will not be allowed to put any supplementary questions. Although, in terms of the section, the judge is given a discretion, Spencer and Flin refer to cases where counsel have requested to add supplementary questions and the judge, interpreting the section literally, refused to allow them to do so. There are also instances where other judges have been prepared to interpret the section in such a way as to allow the questions to be asked. In fact, this matter was raised in Parliament where it was proposed that the section be amended to read "has been adequately dealt with". This amendment was resisted since the government argued that the phrase used in the section "dealt with" implies "adequately dealt with".

From the above it can be seen that the central recommendation of the Pigot Committee (i.e. using video-technology to relieve child witnesses from giving evidence in court) "proved too radical for the Government" (Spencer 1992:126). Instead, the Act contained only the provision that videotapes of earlier interviews with children be admissible, provided that the child appears in court in order to undergo cross-examination personally.

The Pigot Committee had proposed a system whereby the child witness would give evidence in two stages: firstly, the interview by a trained interviewer operating under an official Code of Practice and, secondly, a cross-examination of the child in the presence of the judge in chambers. Although s32A of the Criminal Justice Act 1988 did make the videotape of the initial interview admissible, it was only a watered down version of stage one of the Pigot recommendations. The Act did not make the video recording of an initial interview with the child a routine procedure in a child abuse case or provide for an official Code of Practice. The Act did not provide for stage two of the Pigot Committee's proposals at all (Spencer 1992:127).

The Government did not, however, completely abandon stage one of the Pigot proposals. The Home Office, in response, initiated the drawing up of an official set of instructions for conducting interviews with children, which became The Memorandum of Good Practice. The idea here was to introduce such a Code of Practice informally by issuing an administrative direction rather than have it promulgated by statutory powers. The reason to proceed via the informal path is seen to be twofold: it is more flexible in that unworkable provisions can be amended by a circular rather than the complicated procedure used to amend statutes; and the informal manner is also a way of not giving the accused too much ammunition since the courts would readily exclude evidence because of fairly minor breaches of the Code (Spencer 1992:127).

The second stage of the Pigot Committee's proposal, namely that children undergo cross-examination in the judge's chambers before the actual trial, was obviously controversial, but the reason given by the Government for not implementing it was, as Spencer described it, "depressingly defeatist" (Spencer 1992:128). They argued that if the cross-examination was to take place at a preliminary hearing, there would have to be a supplementary hearing so that the defence could have an opportunity to put any new matters to the child, and this could give rise to a number of supplementary hearings which would be more stressful for the child than a single opportunity to be cross-examined (Spencer 1992:128). But Birch (1992:270) argues that the main fear was that the pre-recording of cross-examination may detract too greatly from the rights of the accused.

Spencer (1992:128) summarised the position as follows:

"...the Government has pressed ahead with those parts of the Pigot scheme which make it easier to prosecute and punish child molesters but ditched those parts that would make it easier for the child."

The way in which only part of the Pigot proposals were introduced has resulted in the child still having to deal with two particularly stressful things: firstly, the child still has to wait months for the case to come to court and, secondly, he will still have to undergo cross-examination when he gets there (Spencer and Flin 1993:184).

#### **2.4.5.6 Memorandum of Good Practice**

The Department of Health and the Home Office worked together to develop the Memorandum of Good Practice, which was published in 1992. The purpose of the Memorandum was to assist those professionals who have to make a video recording of an interview with a child witness for the purpose of court proceedings. The primary focus of the Memorandum is on videotaped interviews conducted for criminal proceedings and purports only to be a guide. This means that if an interview does not comply strictly with the Memorandum, it does not necessarily mean that the interview will automatically be inadmissible. According to s32 (*supra*) the video recording will be admissible unless the judge is of the opinion that it would not be in the interests of justice to allow it. The Memorandum therefore functions as a guide to ensure that a video recording will be acceptable in court (Home Office 1992:1).



The Memorandum gives guidance as to where the interview should be conducted. Police stations are not regarded as desirable locations for interviewing children, especially not suspect interview rooms. Purpose built interview suites at hospitals and family centres will probably provide the best results, although any location could be used that was "private, quiet, reasonably comfortable and adequately equipped for the interview" (Home Office 1992:7).

Part 2 and 3 of the Memorandum set out the preparation that needs to be done before the interview can take place. An assessment of the child's development is necessary in order to proceed with the interview. The interviewer will require a basic knowledge of the child's linguistic development to adjust his language usage and vocabulary to that of the child, as well as information about the child's knowledge of sexuality, concepts of time, cultural background etc (Home Office 1992:9-10). From this information, decisions will have to be made as to whether the child will be able to give a coherent account of the events. Since the child is no longer presumed to be incompetent, there is no duty on the court to examine the child's competency, but if a child does not appear to be able to give an understandable account of the event, then the child may be declared incompetent (Home Office 1992:11). From personal observation during a practical research period with the Child Protection Units in the United Kingdom during 1995 and 1996, it was noted that interviewers nevertheless questioned children as to their understanding of the concepts of truth and lies. This was done, I was told, to make it clear to the court that the child was able to give an understandable account of the event.

The Memorandum has endorsed the phased approach of interviewing. Firstly, rapport must be built up between the interviewer and the child to help the latter relax. Phase two allows the child to give a free narrative account and he is encouraged to give in his own words an account of the relevant events. During the third phase of the interview, the interviewer will be given an opportunity to pose questions to clear up any confusion or uncertainty. The interviewer should begin with open-ended questions and only then employ specific yet non-leading questions. Phase four is the closing phase and is essential in the interests of the child to ensure that the child is not distressed and is in a positive frame of mind (Home Office 1992:15-21).

All interviews should begin with the interviewer stating the date and time, the place of the recording and who is present in the room. This is very important for reasons of authenticity of the videotape (Aldridge and Lewis 1993:9). Also of importance is the switching on and off of videotapes while the interview is taking place. Again, this relates to the authenticity of the document i.e. that nobody has tampered with the recording. If a short break is to be taken, as in the case where the child is upset or wants to go the toilet, then the recording can continue. The interviewer simply announces that a break will be taken and then confirms the time and any changes that might have taken place when the interview resumes. If a long break is to be taken, the interviewer must announce this as well as the reasons. He must give the time and the tape must be stopped. When the interview resumes, the interviewer must again announce the date, time, place and presence of any person and explain that it is a continuation of the previous interview (Aldridge and Lewis 1993:10-11).

Since the video recorded interview is meant to replace the child's evidence-in-chief, the rules which govern the giving of evidence in court will have to be applied to the video recorded interview as well. The most pertinent rules of evidence applicable to the interview would be the following:

- i. Leading questions are generally inadmissible, and should therefore be avoided. The court may edit out any improper leading questions asked during the interview or disallow the whole interview (Home Office 1992:26).
- ii. The courts will not usually allow witnesses to talk about their previous statements unless certain specific requirements are complied with (Home Office 1992:27).
- iii. Hearsay is generally inadmissible in court. To this end, interviewers are cautioned not to ask the child to talk about what somebody else said (Home Office 1992:28).
- iv. It is not generally permissible to lead evidence of the accused's bad character or criminal record. The interviewer must avoid mentioning such matters and steer the child away from the accused's character (Home Office 1992:29).

The Memorandum also gives advice about the storage, custody and destruction of the video recording as well as access to the recording by other professions. It is clearly stated that the guidance provided under this section should be strictly adhered to in all cases (Home Office 1992:4). The video recording must be kept strictly confidential since it is a piece of evidence and also contains intimate details regarding the child. For this reason it must be securely stored and access must be restricted to those who are authorised to view the recording (Home Office 1992:31).

There were two important shortcomings in the Memorandum, which were highlighted by the compilers themselves. Professor Bull, one of the professionals asked to produce a working draft Memorandum, has often described the Memorandum as a guide "on how to do the easy ones". It is based on research with children who have been prepared to tell the interviewer what happened. There is very little research available on the interviewing of children who do not want to give an account of what happened (Bull and Davies 1994:9). Children who are ready to speak about their abuse are regarded as a minority, according to Davies and Wilson (1994:69), and many complainants initially provide only fragmentary accounts or minimise the degree of abuse that has occurred.

#### **2.4.5.7 Access to the Videotape**

The Memorandum of Good Practice advises that the copying of and access to the videotape should be kept to the minimum. Although the accused may be allowed to view the videotape, he may not have custody or unsupervised access to the tape. The investigating team and the Crown Prosecution Services may require a copy as will the Court. If the accused is defended, his legal representative will also require a copy. Written undertakings must be made regarding the custody of the tape by any of the above who wish to have a copy and they must confirm that the tape will be returned to the police at the end of the proceedings. All video recordings must be destroyed when they are no longer required. The master copy will have to be kept for a number of years in the event of any appeal proceedings (Home Office 1992:32-33).

In practice there has been some confusion as to who is entitled to see the videotape. For instance, in 1995 the Gloucestershire Constabulary were dealing with a case in which a videotape had been made of a child's interview where she alleged that her father had abused her. No criminal proceedings followed but a battle between the

parents as to custody did follow. Advocates for both sides wanted to see the video in advance as well as the father. The Gloucestershire Constabulary approached the County Legal Services for advice as they felt that it might be damaging to the child if her father saw the video of her interview. In personal correspondence between the County Legal Services and the Gloucestershire Constabulary, dated 15 April 1995, which I managed to acquire in my research in the United Kingdom, the legal position was described as follows: there was no legal requirement on the police to show the video to anyone before the court hearing in these circumstances. The video would only be handed over where such an order had been made by the court.

The Metropolitan Police Solicitors Department issued the following advice for police when a party in civil proceedings involving children asks to see or be supplied with copies of video recordings. The police officer concerned should firstly establish that the party has a genuine reason for requesting to see the video recording. In cases where a prosecution has started or is under consideration or investigations are still being conducted, the police officer should approach the Crown Prosecution Service. If the Crown Prosecution Service have no objection, then the person making the request must be notified that he can make an appointment to view the recording at a police station. They should not be allowed to remove a copy. the police officer will attend court and produce the recording if served with a subpoena or witness summons (Butler 1994:2).

This is in line with the decision in *D v D* The Times, Law Reports, July 29 1993, 32 where it was held that the High Court or County Court may not order police to disclose documents or tape recordings except by witness summons or subpoena. In this particular case the father had left the matrimonial home but continued to have contact with his children, a boy and two girls. The mother had applied for a residence order in her favour and for contact between the father and the children to be strictly confined. Subsequently, on a visit to the father, the son alleged that his mother had kicked him and slapped his sisters. The police were contacted and they, together with social services, investigated the matter. At a hearing on the 13 April 1993 the judge had ordered that neither the social services nor the police, who were not parties to the action, should take any further steps relating to the children without approaching the court. He ordered that all documents in possession of both the social services and the police concerning the investigations into the family should be disclosed to the court as well as the solicitors acting for the parents. The Chief Constable of North Yorkshire appealed against this decision and the Court of Appeal on 21 July 1993 held at 32 that "...that court had no general power to garner documentary evidence of its own motion, nor jurisdiction in such a case to order discovery by a non-party..".

The Appeal Court held further at 32 that if a party wished to adduce in evidence documents that were in the possession of a non-party, then the procedure was by subpoena *duces tecum* in the High Court, or by a witness summons in the County Court.

In a number of cases, judges in the Family Division have been aware of the possible dangers involved in allowing unrestricted access to such sensitive material. In *Re A* 1990 Family Law, July, 259 Judge Butler-Sloss refused to disclose social work records to a father who had been acquitted of rape. In *R v H* (1987) The Law Magazine, May 29, a diagnostic video interview was prepared. The judge in Bedford County Court decided that he had the power to limit who saw the video and ordered that a written transcript should be made available to the mother and her

solicitors but not the viewing of the video itself. Also in *B v B* Family Law, December 1991, 518, the judge refused to allow either transcripts or videos to be seen by the parents.

Another problem has arisen with the introduction of Code E of the Codes of Practice, Police & Criminal Evidence Act 1984 which came into effect on 9 April 1995 and relates to the tape recording of interviews with suspects. Paragraph 4.16 provides:

"The suspect shall be handed a notice which explains the use which will be made of the tape recording and the arrangements for access to it and that a copy of the tape shall be supplied as soon as practicable if the person is charged or informed that he will be prosecuted."

This section was introduced to protect police officers against allegations of intimidation during interviews with suspects, especially those which gave rise to admissions or confessions. However, this section created another problem for police dealing with Child Protection matters. During the course of the interview, allegations made by the child will be put to the suspect, the names and addresses of the victims are likely to be mentioned and the feelings of the child and the child's family may also be put to the suspect during the interview. The allegations will usually be described in graphic detail. It may also happen that the pertinent part of the child's video interview be played during the interview with the suspect and in this way the child's voice will be recorded on the suspect interview audiotape. The concern here is that this detail is handed to the suspect and the police have no control over what he may do with such information. Since the police are aware that paedophile networks have sold such videotapes and used such information for their own sexual purposes, there is the danger that the information given during a full interview with a suspect may also be used for these purposes by those who have a sexual interest in children (Miller 1995).

#### **2.4.5.8 An Evaluation of the Videotaping of Children's Evidence**

The Home Office commissioned a research team, based at the University of Leicester, to undertake a 27 month investigation into how effective the videotaping of children's evidence in terms of s32A of the Criminal Justice Act 1988 was proving to be in practice. The ambit of the research covered the following issues: the views of court and child protection professionals with respect to the new provisions; whether the guidelines set out in the Memorandum of Good Practice were followed when child witnesses were interviewed; and the impact of the new procedure on the courts and the children themselves (Davies et al 1995:i).

In the surveys conducted with social workers and police, both groups were favourably disposed towards the videotaped interviews, but interestingly both were not confident that the provisions of the Act would serve either the interests of justice or the child. They were asked to comment on what advantages they thought the new Act provided, and both professions felt that the primary advantage was the reduction in stress for the witness. Other advantages were believed to be the fact that witnesses did not have to see the accused; that the evidence was obtained while it was still fresh; that the witness did not have to repeat his statement; that the account produced by the interview was more comprehensive and more coherent; that it was possible to observe the witness's demeanour when he made his statement; and that more cases would lead to prosecutions (Davis et al 1995:6-9).

These findings support those of Williams (1995:2) who carried out a similar survey amongst police, barristers and circuit judges. The most popularly reported advantages of video testimony were the following: the giving of evidence would be less traumatic for witnesses; it would enable the child to be more confident, relaxed and more forthcoming; the child would not have to confront the alleged abuser and the child would be protected from an alien, intimidating courtroom.

In their evaluation of s32 *supra* police and social workers believed that the primary disadvantage of this procedure would be the fact that cross-examination still had to take place and that the witness would be unprepared to deal with it. Without first undergoing initial questioning by the party calling them, the children would be plunged straight into cross-examination. Further disadvantages forwarded were: the evidential requirements that had to be complied with for court conflicted with therapy; interviewers were not trained sufficiently; it was felt that the provisions of the act did not go far enough; and it was anticipated that problems might arise from poor interviewing techniques as well as from the restrictions imposed by the Memorandum. Both police and social workers felt that the evidence given in open court had more impact than the evidence given on the videotape, but agreed that giving evidence in open court was more stressful. When interviewed again at a later stage the following new disadvantages were reported: the Crown Prosecution Service was unwilling to prosecute cases; the courts were reluctant to use the new provisions and it was felt that barristers required special training to prosecute child abuse cases (Davies et al 1995:7-10).

"Several respondents...also commented specifically that it would have been better to implement the full Pigot proposals and that the current situation represented an unsatisfactory half way house." (Davies et al 1995:8)

Many of the social workers and prosecutors in Davies's (1995:11) study stated that their opinion of the new provisions had changed for the worse with experience. The main reason given for the negativity was that the court and the barristers were not keen to take on the new provisions.

Again, the disadvantages reported in Williams' (1995:2) survey were similar to those reported by Davies. A large number of participants were concerned that video evidence had less impact on the jury and that communication via the live link was seen as artificial which made it difficult for the jury to assess the evidence. They were also concerned that the videotaped interview did not prepare children for the ordeal of attending court and of being subjected to hostile questioning by the defence.

The majority of the judges (93%) interviewed were initially in favour of videotaped interviews as opposed to 41% of the barristers. When interviewed again at a later stage, only 88% of the judges were in favour of the videotaped interviews. Originally 53% of the judges felt that the new provisions were in the interest of justice, whereas only 17% of the barristers felt likewise. These numbers decreased dramatically by the time the second interviews were conducted eighteen months later: 40% of the judges now believed the new provisions were in the interest of justice while none of the barristers for the defence (0%) and only 18% of the barristers for the prosecution believed so (Davies et al 1995:11-13).

Both barristers and judges also agreed that the child giving evidence in open court carried much more impact, although they all accepted that it was more stressful for the child involved. The results of the surveys indicate that both the judges and the barristers have lower opinions of the new provisions than the child protection professionals (Davies et al 1995:13).

Judges and barristers listed the following as disadvantages of videotaping a child's evidence in terms of *s32 supra*: the possibility that false allegations were less likely to be detected on the videotaped interview; they were concerned about poor interviewing techniques on the part of the interviewers; and felt that the videotape had less impact than a live court appearance. In addition, barristers added that they experienced a loss of ability to influence how the account was given and found that cross-examination was difficult after a videotaped examination-in-chief. The main complaints from court personnel about the videotaped interviews was the use of leading questions, hearsay and improper comforting by the interviewer (Davies et al 1995:13-16).

The second part of the research involved an evaluation of a sample of videotaped interviews which had been conducted in terms of this section. Between October 1992 and April 1994 1199 trials involving child witnesses took place. Of these there were 640 applications to have a videotaped interview admitted into evidence and replace the evidence-in-chief. 470 applications were successful. Only 25 applications were unsuccessful with the rest rendered unnecessary because the accused pleaded guilty at a late stage. Although 470 applications were successful, only 202 were definitely shown in court. In the other cases the prosecution may have decided against using the videotape. In the latter cases the children gave evidence using the live link. One of the more interesting results discovered was that in 12% of the cases where the prosecution barrister decided to conduct the examination-in-chief himself, the case collapsed within minutes of the opening because the child was unable to follow the barrister's questioning, despite the fact that in each of these cases a successful videotaped interview had been conducted (Davies et al 1995:25-31).

In comparing the evidence that was given on videotape with the evidence given on live link, the following data emerged: the interviewer on the videotape was able to accommodate the linguistic ability of the child more frequently than the prosecution, and defence barristers were significantly less able to accommodate the linguistic style of the child than the prosecution (Davies et al 1995:31-32).

The main purpose of the interview is to find out as much detail as possible about the alleged offence. From the observations of the videotaped interviews and the leading of evidence via the videolink, it was found that both barristers and videotape interviewers used leading questions with equal frequency. Another important difference highlighted was that 83% of the questions of videotape interviewers focused on central information as opposed to 70% of the questions asked by the prosecution. The defence, on the other hand, were mainly concerned with peripheral information. 60% of the defence barristers questioned predominantly about peripheral matters. Peripheral here refers to material that is not directly related to the central allegation (Davies et al 1995:31-33).

Videotape interviewers were rated as being significantly more supportive of the child witnesses than the prosecution barristers. The children on the videotape interviews were less anxious than the children who gave evidence via the

live link. 37% of the children giving evidence on the live link were rated as being unhappy as opposed to 19% on the videotape. Half of the defence barristers were found to be unsupportive during cross-examination and more children (54%) appeared anxious during cross-examination (Davies et al 1995:32-33).

It emerged from observing the children giving evidence via the live link that defence barristers used behaviour that could only serve to intimidate the children. In two cases defence barristers were observed lining their cameras up so that when they addressed the child witness, the accused was visible in the background. Another tactic adopted by a defence barrister was to lean forward towards the camera so that only his eyes appeared on the screen that the child was watching (Davies et al 1995:43).

#### **2.4.5.9 Refreshing Memory**

In practice it happens that the initial interview conducted with the child witness takes place months before the matter comes to trial. The general rule is that a witness who does not have full recall of all the material facts may be allowed to refresh his memory from his statement. The Lord Chancellor directed that children be allowed to refresh their memory by watching the video recording of their interview when it is shown to the court (Butler 1994a).

However, a video recording does not automatically become admissible. In terms of s32A of the Criminal Justice Act 1988 the Court has to decide whether the video will be admissible or not. It also has the discretion to exclude part or parts of the recording which, in the interests of justice, should not be admitted (s32A(3)(c)).

The question then arises as to what happens if the videotape is found to be inadmissible? Is the child still allowed to refresh his memory from the video. If the child will not be allowed to refresh his memory from the video, then the child will be placed at a great disadvantage since he will be cross-examined in great detail on what is in effect his examination-in-chief which he gave months before. And since the defence has had access to the videotape and had the opportunity to watch it as often as deemed necessary, the cross-examination will in the majority of cases be very detailed.

The Crown Prosecution was of the opinion that it would depend on the circumstances under which the judge ruled the video recording to be inadmissible. If, for instance, the video is ruled inadmissible because the judge feels that the child is mature enough to give evidence in court and there are no objections to the video itself, then it would seem that the child would be allowed to refresh his memory from the video. However, if the reason for ruling the video inadmissible is because it is regarded as unreliable due to the use of leading questions, then it will substantially reduce the weight of the child's evidence to allow the child to view the video before giving evidence and to hear once again the possible suggestion (Butler 1994a).

Another aspect of refreshing memory that gives rise to problems is the question of how often a child should be allowed to view the tape. Lawyers and judges are of the opinion that children should only see the tape once when it is played at the trial. Social workers and police argue that children should be allowed to see the tape as many

times as is necessary to refamiliarise themselves with information they have given months, perhaps even a year, before (Davies and Wilson 1994:69).

Adult witnesses are allowed to refresh their memories before entering the witness box as many times as they require. It is difficult not to concede the same right to the child witness, especially in view of the fact that the defence has had access to the videotape.

#### **2.4.5.10 Videotapes of Prior Consistent Statements**

What is envisaged here, is a proposal to make the videotaped interview of a child witness, conducted by a social worker or police officer shortly after the event happened, admissible as evidence at the trial even though the child gives evidence in chief in court. The purpose of admitting the videotaped interview is to allow it to supplement the evidence given at the trial, rather than to replace the child's evidence-in-chief. In terms of the rule against prior consistent statements, this videotape will be inadmissible.

##### **2.4.5.10.1 The Law Relating to Prior Consistent Statements**

A prior consistent statement is a statement, whether oral or in writing, made by a witness on a previous occasion which confirms the evidence given in court (Hoffmann and Zeffertt 1988:117). These statements have been held to be inadmissible. The leading case is *Corke v Corke and Cook* [1958]1 All ER 224, where the Appeal Court held that prior consistent statements are inadmissible.

The reason for holding prior consistent statements inadmissible is that they are insufficiently relevant and can easily be manufactured. The fact that somebody said something on a previous occasion does not mean that it is true (Hoffmann and Zeffertt 1988:117).

A number of exceptions to this rule have been created by the common law, each exception having to comply with certain requirements before the statement can be admitted. The exceptions are as follows: complaints made in sexual cases, statements to rebut an allegation of recent fabrication, identification of the accused on a previous occasion and statements made by the accused when he is confronted with incriminating facts (Hoffmann and Zeffertt 1988:118-123).

##### **2.4.5.10.2 Criticisms of the Rule**

According to the psychology of human memory, a memory, for an event fades gradually with time and stress impairs the power of recall (Spencer and Flin 1993:268). These problems apply to both adults and children, but in the case of the latter they are so much worse. Children are more easily frightened than adults and it has been proved that they forget more quickly than adults (Spencer and Flin 1993:268). In view of the above, it would appear that a statement made by the child as soon after the event as possible would therefore be more accurate since

it would be made when the event was still fresh in the child's mind. This is one of the advantages of videotaped interviews that was mentioned by the Pigot Committee (*supra*) and also found to be so by Davies et al in the evaluation they conducted (*supra*) of videotaped interviews.

This was accepted by the Scottish Law Commission (1990:25-26) in their Report, where they pointed out the following:

"It is probably fair to say that, in many instances, a witness's recollection of events is likely to be more accurate and reliable shortly after the events in question than will be the case many months later. It appears that this may be particularly so in the case of children, and especially young children. Moreover...it may be that some children will recount their experiences not only more accurately but also more readily if they are able to do so in circumstances which are less stressful and less threatening than appearing in court."

If the prior statement of the child was admissible at the trial it could be used to supplement the evidence, especially if the child has forgotten some of the details (Spencer and Flin 1993:268). The Pigot Committee were strongly of the opinion that a court which heard the evidence of a child who was "nervous, hesitant and perhaps confused" should not be prevented from drawing conclusions about its truthfulness from a prior consistent statement (Home Office 1989:14).

The Criminal Law Revision Committee in England recommended in its 11th Report in 1972 that the rule against previous consistent statements be abolished, but this was met with vigorous opposition. It was argued that such a proposal was unnecessary since the admission of previous consistent statements would either be a repetition of the evidence already given in court and would therefore be redundant or it would be different and would then operate to cancel out what the witnesses said in court (Spencer and Flin 1993:269).

These arguments do not appear to be based on logic. Firstly, if the contents of the videotaped interview are going to be identical to what the child says in court in the course of evidence given in chief, then the prosecuting counsel will not ask for the videotaped interview to be admitted. They will obviously only do so if it is required to supplement the child's evidence. Secondly, if the original videotaped interview differs from the child's evidence in court, this would be admissible in terms of the normal rules relating to previous inconsistent statements anyway since the defence would have access to these statements.

A further argument raised against the Criminal Law Revision Committee's proposal to abolish the rule against previous consistent statements was that it was dangerous because it would be easy for a third party to allege that a witness had said certain things on a previous occasion which, in fact, the witness had not (Spencer and Flin 1993:260). Again, this is not a very good argument. Any dishonest third party can give false evidence in court to corroborate what a witness has said. This, supposedly, is the purpose of cross-examination, namely to expose any lies that a witness might be telling. If a third party were to give evidence of a prior consistent statement, the defence would have an opportunity to cross-examine him. Also, in view of the above proposal, namely that a videotape of the prior consistent statement be admissible, this problem would not occur as the court will be able to view the initial statement itself.

A further criticism raised by the Scottish Law Commission (1990:25) was the fact that prior inconsistent statements were admissible to challenge the witness's credibility. This seemed to be extremely unfair, in view of the fact that the same arguments used against allowing prior consistent statements to be admissible could be levelled at prior inconsistent statements. The effect of this law, as Spencer and Flin (1993:139) point out, is that the child's one inconsistent story may be used to destroy him as a witness, but the other consistent ones may not be put in evidence to rehabilitate him. In *R v Beattie* (1990)89 Cr App R 303 a girl made two statements. In the first she gave a toned-down account of sexual abuse by her father. Three days later she made a full and detailed account of incest. The latter statement was a prior consistent statement of the evidence she gave in court. Both statements were admitted in court. The Court of Appeal set aside the conviction because, although the first statement was admissible as a prior inconsistent statement and was correctly used to attack her credibility since it conflicted with her evidence in court, the later statement amounted to a prior consistent statement and was therefore inadmissible.

The Pigot Committee felt that, although it did not fall within the terms of their appointment, there should be a more general change relating to prior statements and that these criticisms raised wider questions about the rules of evidence than those relating particularly to children (Home Office 1989:14).

#### **2.4.5.10.3 The Position in Scotland**

In their Discussion Paper, the Scottish Law Commission (1990:25) proposed that the rule against prior consistent statements be abolished and be replaced with a rule whereby a prior statement would be admissible "not only for or against that witness's credibility but also as evidence of any facts contained in it". Although this proposal was made in relation to children, a few months later it was proposed that the matter be examined in a general context in relation to all witnesses.

The Commission's radical proposal, that all prior statements be admissible as evidence of fact where the maker of the statement also gives evidence in court, was regarded as "going too far" by many of the consultees to the Discussion Papers. They were, however, prepared to depart from the rule in a more limited way. They would consider the admission of prior statements as evidence of fact, provided two requirements were complied with, namely, the accuracy of the prior statement had to be assured in some way and the maker of the statement had to adopt its contents in the witness box (Scottish Law Commission 1990:26).

The Commission, therefore, recommended that a statutory provision be introduced whereby any witness giving evidence could introduce a prior statement if the statement was in a written form and signed by the witness or in the form of an audio or a video recording or in any other permanent form which accurately and completely records what was said. In addition, the witness must indicate by appropriate means that the statement was made by him and that the contents are true (Scottish Law Commission 1990:30).

The Commission Report summarises the position succinctly as follows:

"...we believe that the admissibility of a witnesses's prior statement or statements, as evidence

of fact, would represent a valuable reform of the law. It would enable a trial court to consider relevant evidence which might not otherwise be available; it might go some way towards relieving a witness from having to recount in court all the details of a distressing or unpleasant experience; but at the same time, since such prior statements would be admissible only where the maker of the statement gave evidence, it would ensure that the witness could be subject to cross-examination not only in respect of evidence given by him at the trial but also in respect of anything contained in the prior statement." (Scottish Law Commission 1990:30).

This proposal to admit prior statements has, however, not yet been enacted.

## **2.5 Public Hearing**

### **2.5.1 Removal of the Public**

Witnesses in criminal trials must give evidence in open court on the day of the trial. This rule applies to all witnesses, including children. Judges and magistrates do have the discretion to exclude the public when a child witness testifies, but there is no duty on them to do so. This is provided by s37 of the Children and Young Persons Act 1933 which reads:

"(1) Where in any proceedings in relation to an offence against, or any conduct contrary to, decency or morality, a person who, in the opinion of the court, is a child or young person is called as a witness, the court may direct that all or any persons, not being members or officers of the court or parties to the case, their counsel or solicitors, or persons otherwise directly concerned in the case, be excluded from the court during the taking of the evidence of that witness: Provided that nothing in this section shall authorise the exclusion of bona fide representatives of a newspaper or news agency."

In terms of s107 of the Act a "young person" refers to anyone under the age of 17. A further limitation on the discretion of the court is the fact that this section can only be used where the offence is one which is contrary to "decency or morality". As a matter of law these words limit the offences to ones of a sexual nature, according to Spencer and Flin (1990:93). They argue that there does not appear to be any sensible reason for this limitation. If a child is afraid to give evidence in the presence of a group of people, it seems immaterial whether the offence is one which is contrary to decency or morality or not.

Morgan and Plotnikoff (1990:190), who were funded by the Home Office to carry out research on how the legal system responded to child victims, found that the discretionary powers which presiding officers have to clear the court are used very infrequently. They also found that magistrates were even more reluctant than judges to use this discretion granted to them.

Spencer and Flin (1990:93) add that the reluctance of the presiding officers to clear the courtroom has been a subject of complaint by a number of organisations dating back to as early as 1925, where they have suggested that it ought to be compulsory for the public to be cleared unless the court rules otherwise.

The Scottish Law Commission (1990:5) in their report on the evidence of children dealt with the question whether this discretionary power of the judge to clear the court should be made mandatory. This question was met with a mixed response, and the Commission decided that matters like the clearing of the court should remain in the discretion of the judge. They came to this conclusion after considering the dangers involved in creating mandatory provisions. They were of the opinion that, if mandatory rules were created for children below a certain age or for those who were victims or had witnessed certain crimes, the judges would be discouraged from using these practices if children did not fall within particular categories.

Other methods are sometimes adopted which fall short of actually clearing the court. Morgan and Plotnikoff (1990:190) give examples where directions were given to the public not to enter or leave the courtroom while the child was giving evidence and instances where the front row of the gallery was roped off.

### **2.5.2 Restrictions on Publicity**

There are also restrictions which limit what the press may report about a child witness. This is governed by s39 of the Children and Young Persons Act 1933, which provides:

"In relation to any proceedings in any court, the court may direct that -

- (a) no newspaper report of the proceedings shall reveal the name, address, or school, or include any particulars calculated to lead to the identification, of any child or young person concerned in the proceedings, either as being the person by or against, or in respect of whom the proceedings are taken, or as being a witness therein;
- (b) no picture shall be published in any newspaper as being or including a picture of any child or young person so concerned in the proceedings as aforesaid; except insofar (if at all) as may be permitted by the direction of the court."

## **2.6 The Competency Requirement relating to Child Witnesses**

### **2.6.1 The Common Law Position**

As early as 1778 children in England were regarded as competent witnesses. In *R v Brasier* (1779)1 Leach 199, the accused was convicted of assaulting a child under the age of seven years with the intent to rape. The judges were unanimously of the opinion that no evidence could be received except under oath. Therefore, if a child, no matter how young, was capable of understanding the oath, he would be a competent witness. If he was incapable of understanding the nature of the oath, he would not be able to give evidence. The court explained it as follows at 202:

"...That an infant, though under age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the Court, to possess a sufficient knowledge of the nature and consequences of an oath....for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence; but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the court; but if they are found incompetent to take an oath, their testimony cannot be received..."



This competency requirement was vigorously attacked by the National Society for the Prevention of Cruelty to Children in the nineteenth century and they managed, after a strenuous campaign, to persuade Parliament to introduce a provision into the Criminal Law Amendment Act 1885 which would allow young girls to give unsworn evidence about certain sexual offences (Spencer 1990:115). This provision is now contained in s38 of the Children and Young Persons Act of 1933 which regulates the competency requirement as far as criminal matters are concerned. It provides:

- "(1) Where, in any proceedings against any person for any offence, any child of tender years called as a witness does not in the opinion of the court understand the nature of the oath, his evidence may be received, though not given upon oath, if, in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth."

s96 of the Childrens Act of 1989 which governs civil matters has a similar provision:

- "(1) Subsection (2) applies where a child who is called as a witness in any civil proceedings does not, in the opinion of the court, understand the nature of an oath.  
 (2) The child's evidence may be heard by the court if, in its opinion -  
 (a) he understands that it is his duty to speak the truth; and  
 (b) he has sufficient understanding to justify his evidence being heard."

These sections have, therefore, changed the position adopted in *Brasier's case supra*. A child can give evidence without taking the oath provided he understands the duty to speak the truth. If he does not understand the duty to speak the truth, then he would be incompetent and unable to give evidence (Temkin 1990:355).

Section 38 (*supra*) gave rise to two questions: firstly, what was meant by the phrase "understand the nature of the oath" and, secondly, who was "a child of tender years"?

### 2.6.1.1 The Nature of the Oath

In order to give sworn evidence it was not sufficient for the child to "entertain the danger and impiety of falsehood" as set out in *Brasier supra*. The child had to believe in God and damnation as well. Spencer and Flin (1993:48) set out a competency examination of a thirteen year old boy by Judge Jeffreys in *R v Braddon* (1684)9 St Tr 1127 at 1148-9 which conveys the emphasis that was placed on religious belief:

- |                  |  |
|------------------|--|
| "Judge Jeffreys: | Suppose you should tell a lie, do you know who is the father of liars?   |
| Boy:             | Yes.   |
| Judge:           | Who is it?   |
| Boy:             | The Devil.   |
| Judge:           | If you should tell a lie, do you know what will become of you?   |
| Boy:             | Yes.   |
| Judge:           | What if you should swear to a lie? If you should call God to witness to tell a lie, what would become of you then? |
| Boy:             | I should go to hellfire."  |

In order to take the oath, a child had to show that he understood what it meant in its original sense, namely "as a

conditional self-curse under which the swearer calls upon God to damn his soul for all eternity if he fails to tell the truth". During the course of the 19th century this became watered down until it was deemed sufficient if the witness believed in some kind of divine punishment. The oath then became a solemn promise to tell the truth with a reference to God (Spencer and Flin 1993:51).

In 1963 Parliament enacted s28 of the Children and Young Persons Act 1963 which provided that the form of the oath be changed from 'I swear by Almighty God' to 'I promise before Almighty God'. Then followed the case of *R v Hayes* [1977]1 WLR 234 (AC) which was accepted, according to Jerrard (1984:109), as introducing the view which represents the law in its present form. In this particular case the child witness was asked questions relating to her belief in God or the divine sanction of the oath to determine her competency. An appeal was lodged, based on the child's answers to the above questions which led to doubt about whether the child had any belief in God. The Appeal Court held that in order to be competent the witness did not have to have a belief in divine sanction. Bridge LJ set out the judgement as follows:

"It is unrealistic not to recognise that, in the present state of society, amongst the adult population the divine sanction of an oath is probably not generally recognised. The important consideration, we think, when a judge has to decide whether a child should properly be sworn, is whether the child has a sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth which is involved in taking an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct."

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. This was supported by the Court of Appeal in *R v Campbell* The Times, Law Reports, 10 December 1982 where the court found that when deciding whether a child should take the oath or not, two factors had to be considered. This involved, firstly, the question whether the child sufficiently appreciated the nature of the case and, secondly, whether the child realised that taking the oath involved more than the ordinary duty of telling the truth (Jerrard 1984:109).

These decisions meant that there was very little difference between the test that had to be applied when a child gave sworn evidence and that used when he gave unsworn evidence. In order to give unsworn evidence the child, in terms of s38 *supra*, must be of sufficient intelligence to justify the reception of his evidence and must understand the duty of speaking the truth. The distinction then would be that the child had to understand the general importance of telling the truth to give unsworn evidence, but would have to understand the particular importance of telling the truth in a court of law to give sworn evidence (Spencer and Flin 1993:52; Birch 1992:265).

### **2.6.1.2 Child of Tender Years**

There is no minimum age under which children automatically become incompetent to testify. In *Brasier's* case *supra* the court said that it was possible for a child under the age of seven years to be a competent witness. However, in practice this was very narrowly construed and resulted in the introduction of an arbitrary age below which a child was regarded as not being competent to testify, following the decision in *Wallwork* (1958) 42 Cr App R 153 where the court held that it was not proper for a child as young as five to give evidence. The accused was

charged and convicted of committing incest with his five year old daughter. At the trial the child did enter the witness box but was unable to give any evidence. As Goddard LCJ pointed out at 161: "The child had given no evidence because when the poor little thing was put into the witness-box, she said nothing and could not remember anything." However, despite this, the grandmother gave evidence regarding the complaint made to her by the child. On appeal the court found that there had been an irregularity in allowing the grandmother to give evidence regarding the complaint, but the appeal was dismissed because there had been no substantial miscarriage of justice. The Court did have the following to say regarding the calling of a 5 year old as a witness at 160-161:

"The child was called as a witness, but said nothing. The court deprecates the calling of a child of this age as a witness....and with respect to the learned judge, I am surprised that he allowed her to be called. The jury could not attach any value to the evidence of a child of five: it is ridiculous to suppose that they could...but in any circumstances to call a child of the age of five seems to us to be most undesirable, and I hope that it will not occur again."

This gave rise to the practice whereby children under the age of six were not regarded as being competent. Due to the *Wallwork* decision *supra* prosecutors did not adduce the evidence of young children nor did the courts receive such evidence unless the child had the understanding normally to be found in an eight year old (Home Office 1989:47). In *Hayes supra* the court accepted that the dividing line between children who could and could not be considered too young to give sworn evidence fell somewhere between the ages of eight and ten years (Jerrard 1984:109). In *R v Campbell* [1956]2 All ER 272 Lord Goddard CJ said that there was no definition of the phrase "child of tender years" in the Children and Young Persons Act 1933, although the word "child" was defined in s107 as a person under the age of fourteen. In the more recent case of *R v Wright and Ormerod* (1990)90 Cr App R 91, the Court of Appeal followed the *Wallwork* decision. Mr Justice Ognall said that the validity and good sense of the judgement remained "untrammelled" and that "it must require quite exceptional circumstances to justify the reception of this kind of evidence".

In the latter case, the complainant, aged six, gave evidence on charges of kidnapping and indecent assault. One of the grounds of appeal was that the judge erred in finding the complainant competent in view of the decision in *Wallwork's* case. The court held the following at 94-95:

"That was nearly 30 years ago. So far as this court is aware, the validity of, and good sense behind, that proposition has remained untrammelled in the procedure of the criminal courts. We entertain considerable misgiving whether in the present case the learned judge indeed fell into error in this regard. It must of course always be a matter for the judge who sees the intended witness and questions him or her to make up his own mind. Patently, the younger the complainant the more anxiously will the court deliberate before deciding to admit the evidence...The lesson of this trial lends especial force, in our judgement, to the observations of Lord Goddard CJ in *Wallwork*. It will, in our view, be a bold tribunal hereafter that does not heed the lesson."

It would therefore appear that when a child under the age of fourteen has to give evidence in court, the judge will have to inquire into whether the child understands the nature of the oath. This was accepted by the Court of Appeal in *R v Khan* (1981)73 Cr App R 190 which stated that as a general rule, an inquiry became necessary with a child under the age of fourteen years, although there was no direct authority on the point. The accused was charged with living on the prostitution earnings of the 11 year old daughter of the woman with whom he was living. The court

held further that where such an inquiry was held in terms of s38(1) the questions had to be recorded so that they appeared in the official transcript.

In *R v Reynolds* [1950]1 KB 606 the complainant was an 11 year old girl, who was being educated at a school for children of retarded development. The trial court found the girl to be competent to give sworn evidence and the accused took the decision on appeal. The court set out the procedure that has to be adopted as follows at 609:

"So, when a child is put into the witness box, the chairman or presiding judge must first decide whether the child in his opinion understands the nature of the oath. Then he may have to go on and consider whether, if the child does not possess sufficient intelligence to understand the nature of an oath, he is possessed of sufficient intelligence to justify the reception of his unsworn evidence on the ground that he understands the duty of speaking the truth."

It was only in 1990 that the Court of Appeal in *R v Z* [1990]3 WLR 113 held that it was wrong to have a fixed age below which a child will automatically be incompetent to give evidence. The judge will have to make a finding in each particular case by questioning the child to determine whether he is competent or not. The court at 116 held that "...the statute lays down no minimum age, and the matter accordingly remains in the discretion of the judge in each case."

### 2.6.1.3 Discretion of the Judge

How young then must a child be before he can be precluded from giving evidence? The answer to this question would appear to be in the discretion of the judge in each particular case. This was clearly set out in the *Hayes* case *supra* where the court held that the question of competency was "very much within the discretion of the trial judge". There is no procedure available whereby an expert can give evidence on the competency of the child, and the decision of the judge is final (Flin, Davies and Stevenson 1987:276).

The Court of Appeal in *Khan's* case *supra* found that it would be necessary in all cases where the witness was under the age of 14 to conduct a competency examination. The judge will have to find out if the child understands the nature of the oath and then whether the child understands what it means to tell the truth.

There are no clear rules or questions that must be asked in order to determine, firstly, whether the child understands the nature of the oath or, secondly, whether he knows what it means to tell the truth. There are no official rules, practice directions or practitioners' guidelines on the subject (Spencer and Flin 1990:53). 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. For instance, in the unreported case of *Campbell* (1982) *supra* where a girl of 10 years and four months was called to give evidence, she was asked whether she was aware that it was a serious matter to tell lies and whether she was aware that she ought to tell the truth. She was then asked the usual type of questions directed at ascertaining the extent of her knowledge of God, the content and nature of the Bible, the purpose for which people went to church etc. On the basis of these questions she was found to be competent to give evidence under oath.

Spencer and Flin (1990:53) set out the competency examination of a six year old girl, which they regard as being a fairly typical example of the kind of questions which judges normally ask. I feel it necessary to set out a few examples of the competency examinations in full here so that they can be evaluated and used to make comparisons with the procedures adopted in South Africa and the United States of America:

- "Judge: Now, first of all, tell me what your name is?  
 Child: Sally.  
 Judge: Sally what? Can you hear me?  
 Child: Yes. Sally Smith.  
 Judge: How long have you had this doll? [Indicating the doll Sally was holding]  
 Child: A long time.  
 Judge: Have you got other dolls? You play with dolls a lot, do you?  
 Child: I play with my mummy's nightdress case.  
 Judge: You tell me this, will you. Where do you live? Have you forgotten?  
 Child: Acacia Avenue.  
 Judge: Do you go to school?  
 Child: Yes.  
 Judge: Where?  
 Child: Forgotten.  
 Judge: Don't you worry about that. You tell me this. Do you know what telling a lie is? Do you know the difference between telling a lie and telling the truth?  
 Child: Yes.  
 Judge: Do you tell the truth? [The witness, Sally, did not answer, but nodded her head in the affirmative]  
 Judge: Now tell me this. Do you know what an oath is?  
 Child: No.  
 Judge: People talk about God. Do you know what that means?  
 Child: He went to heaven.  
 Judge: Would you tell the truth if I asked you to tell the truth? Would you do your best? Even though it might be a bit difficult. If I asked you a question which was difficult and you did not know the answer would you say so? Would you say so? Would you say, 'I don't know'?  
 Child: Yes. No.  
 Judge: What do you mean by that? [The witness did not answer]  
 Judge: You do not know? [The witness shook her head]  
 Judge: What do you want for Christmas?  
 Child: [Inaudible] A Care Bear.  
 Judge: Is it a lamp you have in your bedroom, something like that?  
 Child: Yes, it lights up.  
 Judge: Very good. Would you just stay there for a minute. [To prosecuting counsel] Mr Bloggins, I think I should say I am certainly not going to have this child sworn. I have come to the conclusion that she is of sufficient intelligence to tell us what she remembers. I am satisfied, having looked at her, that she understands the duty of speaking the truth."

An interesting comparison was set out in the unreported case of *R v Russell* 3 July 1992, No. 90/2468/22 where the Court of Appeal approved of the way in which a competency examination was conducted in one case and condemned the use in another case. The examination that the court approved of took place in the case of *R v Z* (1990) *supra* where the accused was convicted of committing incest with his 5 year old daughter. The accused appealed on the grounds that the judge was wrong and misdirected himself in allowing the child to give evidence within s38(1) of the Children and Young Persons Act 1933. The little girl, now aged six, gave evidence via the live link and the judge questioned her to determine whether she could give evidence. The questioning was set out at 114:

- " Q: [O], can you see and hear me?  
 A: Yes.  
 Q: How old are you now?  
 A: Six.  
 Q: How long have you been going to school? Roughly?  
 A: A year.  
 Q: A year?  
 A: Yes.  
 Q: Do you get taught about God at school, or not?  
 A: No.  
 Q: Do you know the difference between telling the truth and lies?  
 A: Yes.  
 Q: And you realise how terribly important it is that you tell the truth and no lies at all.  
 A: I do not tell lies.  
 Q: What?  
 A: I do not tell lies.  
 Q: And you are going to tell us what happened with Daddy?  
 A: Yes.  
 Q: And it must all be true.  
 A: Yes."

The judge then delivered the following ruling on the child's competence at 115C-D:

"I have had the advantage of seeing a video-film of [the child] in conversation with a woman police officer and a social worker, and I have also seen [the child] through the video-link this morning and I asked her some questions. I have come to the easy conclusion that it would not be appropriate for her to take the oath. However, she seems to me to be a perfectly intelligent girl and able to give her account of events and she seems to me to be sufficiently intelligent to justify receiving her evidence unsworn."

The examination which the court condemned in *Russell's* case (*supra*) was conducted as follows:

- "Judge: Hello Amy...  
 Child: Yeah.  
 Judge: That's better. We can see a bit more of you now. You can see me all right, can you?  
 (Child laughs.)  
 Judge: Can you hear me as well?  
 Child: Yeah.  
 Judge: In a minute, Amy, somebody is going to ask you some questions.  
 Child: Yep.  
 Judge: Will you listen very carefully?  
 Child: Yep.  
 Judge: And try and tell us the answers, and try and get the answers right. How old are you?  
 You disappear when you bob down like that. That is better. How old are you?  
 Child: Six. [In fact, she was five.]  
 Judge: When were you six? Long ago? When was your birthday? Do you know?  
 Child: My birthday is in April.  
 Judge: You are nearly seven, or are you just six?  
 Child: Just six.  
 Judge: All right. Do not keep bobbing away, we lose you. Somebody is going to ask you some questions, and I will leave it to them.  
 Child: Thanks.  
 Judge: All right. Good girl."  
 (Spencer and Flin 1993:60-61)

### **2.6.2 Distinction between Sworn and Unsworn Evidence**

The distinction between the evidence of a child given under oath and evidence given without the oath in terms of s38(1) of the Children and Young Persons Act of 1933 was very important in English law. At the time the Act was passed there was a proviso to this section which read as follows:

"Provided that where evidence has been admitted by virtue of this section is given on behalf of the prosecution the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating him."

In terms of this proviso, where a child was not competent to give sworn evidence, the accused could not be convicted of the offence unless the child's evidence was corroborated. This corroboration had to include some material evidence that implicated the accused. Therefore, where a child was considered competent to take the oath, no corroboration was required, but where the child was not competent to take the oath, corroboration implicating the accused was required.

In 1988 the Government introduced s34 of the Criminal Justice Act 1988 which effectively abolished the distinction between evidence given under oath and without the oath. An accused could now be convicted on the basis of a child's unsworn evidence alone. Corroboration was no longer required.

### **2.6.3 Dissatisfaction with the Competency Requirement**

The approach of the courts to the question of a child's competency to give evidence came under severe criticism from a number of quarters. A few of these criticisms will be mentioned here as they explain the reason why the issue of competency came to be addressed by the Pigot Committee.

It has been argued that the fact that a child is too immature to distinguish between the truth and a lie means that the evidence should be approached with caution and not rejected completely (Spencer and Flin 1990:58). The child may be able to give a very good account of an event but not be able to understand abstract concepts such as 'truth' and 'lies'. As Spencer and Flin (1993:54) point out, no sane parent or doctor would treat a child's injury without first asking the child what happened and no policeman would investigate an offence against a child without first trying to talk to the child, yet the court will not speak to the child unless the child has passed the competency test. The competency requirement further implies that although a child may be able to describe what he has seen or what he has experienced, he will nevertheless be an incompetent witness unless he can understand concepts such as 'truth' and 'falsehood'.

This view is supported by Wigmore (1940:s509), who believes that the evidence should be put before the court so that the court can determine whether there is any value in the evidence:

"Recognising on the one hand the childish disposition to weave romances and to treat imagination for verity, and on the other hand the rooted ingenuousness of children and their tendency to speak straight-forwardly what is in their minds, it must be concluded that the sensible way is to put the

child upon the stand to give testimony for what it may seem to be worth."

For these reasons it has been very strongly advocated that the competency requirement should be dispensed with. The courts should be willing to listen to any child who is old enough to talk. The age and maturity of the child, and his ability to distinguish between the truth and a lie are matters which relate to the weight that should be accorded to the evidence. As Spencer (1989:123-4) points out, the courts on the Continent do not have a competency requirement, so why is it so essential to the accusatorial system? A major criticism levelled against the competency requirement for children is that it has been devised by legal practitioners and does not bear any relation to the findings of modern psychologists. Children are now regarded as much more reliable witnesses than they were previously thought to be (Spencer and Flin 1990:237).

Children were regarded as dangerous witnesses for a number of reasons, the three most important being: the child's tendency to lie (imagine); their limited ability to store and recall information; and the fact that children are very suggestible. These dangers attributed to child witnesses are no longer supported by modern research. Witnesses of all ages may be prone to lying, and it has been shown that the maturity of adults enables them to sound more credible than children when giving evidence that contains inaccuracies. Research has also shown that children have been found to be no less accurate witnesses than adults and may even in certain cases be better witnesses. In fact, adults are far more likely to interpret information in a way that makes better sense and then "remember" the inaccurate facts. Recent research into the suggestibility of children has shown that adults and children alike are susceptible to suggestion, especially when the event is less well encoded and the suggestion comes from a person in authority (Birch 1992:264-265). The research referred to here will be discussed in greater depth when evaluating the child witness *infra*, but the conclusion is succinctly summarised by Birch (1992:265) as follows:

"...the courts' time would be better taken up in sifting the testimony of all witnesses in the light of what is now known about mendacity, faulty memory and suggestibility, rather than removing young witnesses from the courtroom altogether."

Because children are perceived in this way by the courts, the courts have inappropriate expectations of how they should behave. Pynoos and Eth (1984:100) provide an example of how inappropriate expectations can obstruct the child's ability to comply with the judicial process. In this case the defendant was charged with murdering his wife, and their daughter was the only witness to the incident:

"Four year-old Julie was not prepared for the sight of her father, the defendant, whom she had not seen in over six months, dressed in prison garb. On her way to the stand, she walked over and gave him a big hug. Without explanation to the child, the judge suddenly excused the jury who got up and left. He would not allow a trusted adult to sit with the child on the witness stand, but left her to sit in a witness chair obviously oversized for her. Once seated, she placed both hands over her mouth. The district attorney began the examination by showing her a colouring book; she shrugged silently, and the judge looked annoyed. The district attorney then asked her if she was a girl or a boy, and she fidgeted shyly. The judge interrupted by stating, "It doesn't appear to the court that she can qualify." He then abruptly dismissed her. Without her testimony, the father was acquitted and Julie was returned to his care." (Pynoos and Eth 1984:100)

Here the child's shyness and fidgeting was perceived by the court as affecting her competency, and she was

therefore not given an opportunity to tell the court what she knew which resulted in a serious miscarriage of justice.

A further criticism of the competency requirement is that its practical consequences make it very difficult, if not impossible, to prosecute offenders. In the majority of cases involving the physical and sexual abuse of children, the child is the only witness to the assault. If the child is going to be considered to be an incompetent witness by the court, this will in most cases deprive the prosecution of their only evidence (Spencer and Flin 1990:59).

Not only does the competency requirement deprive the prosecution of their case in many instances, but it can also contribute to a wrongful conviction. A very good example of this is the case of *Sparks v R* [1964] AC 964 (PC) where the accused was charged with indecently assaulting a three year old girl. The child was regarded as incompetent and, therefore, unable to give evidence. The mother gave evidence of what the little girl had told her when she questioned the latter: "Then I asked her who took her out of the car. I asked this and she said that she did not know. I then asked her what did the person look like, and she said that it was a coloured boy. She did not say anything more after that." (at 967) The accused was a 27 year old white man. At the trial the evidence as to what the child said, namely "it was a coloured boy", was held to be hearsay evidence and inadmissible. It was argued on appeal that the child's statement should have been admissible. Ironically, the defence's argument would have been exactly the opposite if the child's statement had not been in the accused's favour but, nevertheless, it does highlight the fact that very important evidence is being excluded. The Privy Council held at 965 that the mother's evidence of what her child had said to her was hearsay and since the child did not give evidence, there was no basis on which her statement could be admitted.

The purpose of the competency examination in its present form also came under fire. Spencer and Flin (1993:61) put it as follows: "Something that has never been clearly explained, however, is what such an examination is really supposed to be testing". Firstly, an objection that has often been raised is how the courts can come to a decision on whether a child can give evidence or not before they have actually heard what the child has to say. How do the courts come to the conclusion that one child should be believed whereas another should not before they have heard the children testify?

Secondly, the competency examination is designed to see if the child will undertake to tell the truth and does not ensure that the child will in fact tell the truth. It also does not assist in the question of reliability of the witness. A young child may not be able to distinguish between the abstract concepts of truth and falsehood, but may be able to give a very reliable account of what he saw or heard. The test itself does not assist in any way in determining which children can give accurate accounts and which cannot.

Flin et al (1987:278) mentions that the 11th Report of the Criminal Law Revision Committee (para. 204-208) regarded the inquiry into whether a child understands the nature of the oath to be unrealistic and farcical, and recommended that all evidence given by children who are under the age of 14 should be unsworn and all evidence given by children aged 14 and over should be given under oath.

#### 2.6.4 The Pigot Committee and its Proposals

According to the findings of the advisory group, the police were very dissatisfied with the decision in *Wallwork supra* since they felt that it was almost impossible to convict offenders who molest very young children. Social workers were also confused by the system since children who gave perfectly good accounts of offences committed against them, were unable to give evidence in court as a result of the *Wallwork* decision (Home Office 1989:47). The Pigot Committee found that *Wallwork's* interpretation of the competency requirement did lead to prosecutions being abandoned in a large number of cases where serious offences were committed against young children. They concluded "...that in view of these considerations the present requirement is only justifiable if it operates to exclude particularly unreliable evidence and therefore to prevent an unusual danger of miscarriages of justice." (Home Office 1989:48) The Pigot Committee was of the opinion that the decision in *Wallwork* was no longer in keeping with more recent research and could not be justified:

"We do not think that the influence of *Wallwork* can be justified in principle at all since its effect has been to substitute a sort of age limit for witnesses where Parliament plainly intended there to be a test of understanding in each case. It has persisted despite modern thought about the rights and psychology of children, we suggest, because the traditional courtroom experience is so obviously an inappropriate one for the very young. Legal conservatism about practices and procedures and concern about the immediate welfare of child witnesses have both helped to ensure that our courts do not hear evidence which would be heard in other jurisdictions." (Home Office 1989:48)

In *R v Z supra* the court referred to *Wallwork's* case and held that the latter decision had been overtaken by events since one of the concerns expressed by the judge was the physical environment in which the child had to give evidence, as he had cleared the court as far as it was possible to do. Since screens and the live link are now available, those concerns have been addressed to a certain extent. A further event that has overtaken the *Wallwork* decision is the fact that the proviso to s38(1) of the Children and Young Person's Act 1933 was repealed by the Act of 1988. By repealing this proviso Parliament was indicating a change of attitude to the acceptability of the evidence of children (*R v Z supra* at 117D-G).

As the Committee felt that a competency requirement was only useful if it could be used to ascertain whether a child was able to give a truthful and an accurate account, they were of the opinion that the present competency test in England did not achieve this. The present test was founded "upon the archaic belief that children below a certain age or level of understanding are either too senseless or too morally delinquent to be worth listening to at all". As far as they were concerned, a child who could not understand the meaning of the oath or concepts like truth and duty would not be sophisticated enough to invent and "consistently and successfully sustain falsehoods" (Home Office 1989:49-50).

The weight of modern research has shown that children are no less accurate than other witnesses. In fact, the Government actually accepted this argument during the passage of the Criminal Justice Act 1988 when they abolished the requirement that the unsworn evidence of children should be corroborated before it could be accepted. When this section was proposed in the Bill, the Ministers accepted the findings of available research that children

as young as five could give reliable evidence (Home Office 1989:48-49).

The Committee felt that the courts should consider any relevant understandable evidence. If a child witness could provide an understandable account, then the child's evidence should be heard by the court. Once the child has given evidence, the jury will be able to weigh up the evidence from their observations of the child's demeanour, maturity and ability to understand, his coherence and consistency. Once the jury have weighed up all the factors, they will then have to decide how much reliance can be placed upon the child's evidence (Home Office 1989:49).

As a result of their findings the Pigot Committee proposed that the competency requirement applying to children be dispensed with and that it should not be replaced with any other specific requirement. When any witness testifies in court the judge has the discretion in terms of the common law to declare that witness incompetent if it becomes clear that the witness is unable to give evidence either due to intoxication or mental defect. The Pigot Committee felt that this power which the judge has is sufficient, although they did add that "it is a power which should only be exercised after considerable thought and perseverance and that this is especially important in the case of young children" (Home Office 1989:50).

The Pigot Committee also dealt with the issue of whether the evidence of the child should be given sworn or unsworn. Since there was no longer a legal distinction between sworn or unsworn evidence, they proposed that all witnesses under the age of 14 should give evidence unsworn and that children over that age be allowed to give evidence under oath. This, they felt, would prevent the jury from making any inferences between the two, since they felt that the jury might give more weight to evidence that was given under oath. They did not believe that there should be any formal requirement, but did feel that judges could find it helpful to admonish children to give a full and truthful account of what happened (Home Office 1989:51).

### **2.6.5 Statutory Reform**

As a result of the proposals put forward by the Pigot Committee, s52 of the Criminal Justice Act 1991 was introduced by the legislature. It provides:

- "52. (1) After section 33 of the 1988 Act there shall be inserted the following section -  
Evidence given by children  
33A. (1) A child's evidence in criminal proceedings shall be given unsworn.  
(2) A deposition of a child's unsworn evidence may be taken for the purposes of criminal proceedings as if that evidence had been given on oath.  
(3) In this section 'child' means a person under fourteen years of age.  
(2) Subsection (1) of section 38 of the 1933 Act (evidence of a child of tender years to be given on oath or in certain circumstances unsworn) shall cease to have effect; and accordingly the power of the court in any criminal proceedings to determine that a particular person is not competent to give evidence shall apply to children of tender years as it applies to other persons."

This section now dispenses with the need for an inquiry into whether the child understands the oath, since all children under the age of fourteen are to give their evidence unsworn. It also repeals s38(1) of the Children and

Young Persons Act 1933, which means that the judge no longer has to be satisfied that the child has sufficient intelligence to give evidence and understands the duty to speak the truth before he can allow the child to give evidence. Children, therefore, are in the same position as adults. They no longer have to undergo a competency examination, but if at any stage the court becomes aware that the witness cannot communicate intelligibly, then a competency examination will become necessary.

The interpretation of the phrase "as it applies to other persons" in s52(2) has given rise to some debate. Spencer and Flin (1993:63) argue that the ordinary common law power of a judge to determine the competency of an adult includes an examination of the person's ability to communicate intelligibly as well as their understanding of an oath. This would, therefore, be a re-introduction of the competency requirement 'through the back door', and would defeat the whole purpose of a child having to give unsworn evidence.

Birch (1992:267-8) disagrees with this argument, pointing out that competency involves both an understanding of the oath and an ability to communicate. The examination referred to in "the power of the court...to determine that a particular person is not competent" in s52(2) does not refer to the issue of understanding the oath, since it would have no relevance to a child who gives unsworn evidence. It must therefore refer to an inquiry into the child's ability to communicate intelligibly. In support of her argument, she refers to proposals of the Pigot Committee. They proposed that the former s 38 test be dispensed with. The only difficulty they foresaw was that the child might become incoherent or fail to communicate intelligibly, in which case they said that this could be dealt with under the judge's existing common law powers to rule a witness incompetent. It is suggested that s52(2) should be interpreted in this light. The court does not have a duty to inquire into the competency of a child witness, but does have the power to declare an individual child incompetent where the latter cannot communicate effectively.

Now that the competency requirement has been abolished, the issue arises whether children can still be asked questions to determine their understanding of the duty to speak the truth, and questions to determine their intelligence. Spencer and Flin (1993:64) answer this question in the affirmative, saying that it is a matter of common sense. The questions will no longer be used to determine whether the child will be allowed to give evidence, but rather will be relevant to the weight which the court will have to attach to it.

Birch (1992:268) refers again to the Pigot Committee proposals, which recommended that, although there be no formal requirement, the child be admonished to tell the truth in age-appropriate language. This does not mean that there is a judicial duty to test whether the child understands the obligation to tell the truth before this admonition is given.

### **2.6.6 The Position in Scotland**

Up until the 19th century all witnesses had to give evidence under oath, and children under 14 were disqualified from giving evidence. This rule was abolished by the Evidence (Scotland) Act of 1840. The modern rule is that all witnesses are competent to give evidence if they can communicate intelligibly (Spencer and Flin 1993:66). Children under 12 do not have to give evidence under oath but are admonished to tell the truth. Children between

the ages of 12 and 14 will give evidence sworn or unsworn depending on their level of understanding, while children over the age of 14 are presumed to be able to give evidence under oath unless it appears that they do not understand the oath (McEwan 1988:814). These age groups are not strictly adhered to, because in each case the child's competence will depend on the ability to communicate intelligibly and to distinguish between truth and lies. Flin et al (1993:317) carried out a survey of 89 children, varying in age from 4 to 15 years, who gave evidence in criminal trials in Scotland. The results of the competency assessments indicated that children under the age of nine are not asked to give evidence under oath. The group of children aged between 9 and 13 showed the widest divergence with some giving evidence without the oath (16), others giving evidence under oath after being found competent (7) and others automatically giving evidence under oath without any competency assessment (2). The majority of children aged 14-15 gave evidence automatically under oath without having their competency tested (44), while a few were first tested before being allowed to give evidence under oath (6), and four children actually gave evidence without taking the oath.

There is therefore a competence requirement in the sense that the child will only be able to give evidence if the child can understand what it is to tell the truth, and once the child has been admonished to tell the truth. This was upheld by the court in *Rees v Lowe* High Court of Judiciary, 7 November 1989 (unreported) where a girl of three years was called as a witness in a summary trial. The accused appealed against the conviction on the ground that the sheriff had not determined whether the child understood the difference between the truth and lies, and had not admonished the child to speak the truth. The High Court allowed the appeal on the grounds that the proper procedure was for the presiding judge to satisfy himself that a child of tender years knows the difference between telling the truth and telling lies and, if he is satisfied, then he must admonish the child to tell the truth (Scottish Law Commission 1990:11).

In Scotland, unlike the position that used to be in England, there is no arbitrary age beneath which a child will automatically be incompetent. There are examples of witnesses as young as two who have given evidence in Scottish courts (Nicholson and Murray 1992:132). There is no set of prescribed questions which have to be asked. The judge has the discretion in each case to determine how the child's competency will be tested. Theoretically the requirement is the same as in England, although it would appear to Spencer and Flin (1993:68) that it has been interpreted more liberally in Scotland.

The following competency examination conducted in *P v H.M. Advocate* 1991 SCCR 933 with a five year old boy was held to have been correctly carried out:

"Judge:	Hello.
J:	Hello.
Judge:	Do you go to school?
J:	Yes.
Judge:	Which school do you go to?
J:	(Named school)
Judge:	The same as your sister, is it?
J:	Yes.
Judge:	How long have you been at school for?

J:                    Hundreds of times.  
 Judge:    Pardon?  
 J:                    Hundreds of times.  
 Judge:    Now, J, do you know what it is to tell the truth?  
 J:                    Yes.  
 Judge:    Do you know what it is to tell fibs?  
 J:                    Yes.  
 Judge:    Do you know you musn't tell fibs?  
 J:                    Yes.  
 Judge:    You know that, yes. Well, J, these gentlemen are going to be asking you some questions.  
 J:                    Right.  
 Judge:    And when you answer the questions do you promise to tell the truth?  
 J:                    Yes.  
 Judge:    And you musn't tell any fibs, all right?  
 J:                    Yes.  
 Judge:    Promise that?  
 J:                    Yes."

There is some doubt as to whether the presumption in Scotland is for or against competency. The Scottish Law Commission in their Discussion Paper in 1988 were of the opinion that judges tend to approach the competency question by assuming that the child was *prima facie* a competent witness. They would then, by holding a preliminary conversation with the child, be able to come to a conclusion whether the child is not able to give evidence intelligibly or is not able to understand the difference between the truth and lies (Spencer and Flin 1993:69).

The Scottish attitude towards the competency requirement has been much more liberal than that of the English, and reflects a more favourable approach to the reliability of children among the legal profession. As early as 1881 Lord President Inglis in *Auld v McBey* (1881)18 SLR 312 had the following to say about child witnesses:

"I have found that when the question is as to what happened on a particular occasion the best witnesses are boys and girls. Their eyes are generally open and they are not thinking of other things and they are not talking to their neighbours. Everyone who has had an experience in the criminal courts must know that when the question is as to what occurred at a particular place the best evidence is often given by boys and girls."

It is this liberal application of the competency requirement that meant it was "a virtual non-issue" in Scotland when the Scottish Law Commission examined the law. Hence they did not propose its abolition, and you now have the situation where the competency requirement still exists in Scotland, but has been abolished by the Criminal Justice Act 1991 in England (Spencer and Flin 1993:70).

## **2.7 The Cautionary Rules and Corroboration**

In law there have traditionally been specific groups of witnesses who have been regarded as untrustworthy or unreliable, and, where these witnesses have given evidence, corroboration of their evidence has been required (Spencer 1988:13). In English legal history the cautionary rule arose in three circumstances: when dealing with the evidence of accomplices, complainants in sexual matters and children. In terms of the rule, the court was obliged to warn itself of the dangers inherent in accepting the evidence of the particular witness before the court.

If the court was satisfied with the witness's evidence, it would be entitled to convict. If the court was not satisfied with the witness's evidence, it would require corroboration of the evidence.

The cautionary rule, consists of two aspects: firstly, the duty of the court to warn itself and, secondly, the requirement of corroboration. Two groups of witnesses, who have traditionally been regarded as untrustworthy and who are of specific relevance to this study, are witnesses who are children and witnesses who are complainants in sexual matters.

Originally in England there was no specific duty to warn in the case of children. In *R v Brown* (1910)6 Cr App R 24 the court, in referring to the evidence of a fifteen year old girl, said that "it was not a case in which corroboration is necessarily required" (at 25) but that the jury should have been warned that the girl was a single witness and an accomplice in a sexual offence. The warning appears to have been applicable only to children who were the victims of sexual assaults, but in the early 20th century some cases based the warning on the fact that the witness was a child rather than the fact that the matter was a sexual case. As a result of this, the practice arose within the courts of requiring that the warning be given even in complaints that were not of a sexual nature, and even where the child was not a victim, as in *R v Buck* [1981] Crim.L.R. 108 where the child gave evidence that she had seen the accused steal somebody else's watch. Here the Court of Appeal explained at 108 that "the practice was that the jury should be warned of the danger of acting on such uncorroborated evidence".

### 2.7.1 Duty to Warn

When a child or a complainant in a sexual offence gives evidence, there is a duty on the judge to warn the jury. The judge must warn the jury that it is dangerous to convict on the evidence before them unless they are very satisfied with the witness. Where the matter is presided over by magistrates, they have to warn themselves of the dangers involved in convicting on the uncorroborated evidence of the witness (Spencer and Flin 1990:171). In most cases the warning should be given when the judge gives his directions to the jury, and it will be regarded as an irregularity if he does not do so, as was demonstrated in *R v Hatton* (1925)19 Cr App R 29 the complainant was a twelve year old girl. In the summing up of the case to the jury, the judge gave the following direction at 31:

"The prisoner is charged with assaulting this little girl in a manner likely to cause her unnecessary suffering. There is, and can be no dispute, if the facts are anything like what are sworn to by that little girl, that the prisoner did assault her in a manner likely to cause her unnecessary suffering. Therefore the only question you need seriously to consider is whether the offence has been proved."

The appeal was allowed and the conviction was quashed because "this was pre-eminently a case in which a clear and unmistakable direction should have been given upon the necessity of corroboration of the evidence given by a child of this tender age" (at 32).

Although there is a duty on the judge to warn the jury (or himself in the case of a magistrate), the content of this warning remains within his discretion. In *DPP v Hester* [1973] AC 296 Lord Morris of Borth-y-Gest said at 309E that "there are no set words which must be adopted to express the warning. Rather must the good sense of the

matter be expounded with clarity and in the setting of a particular case".

In *R v Z supra* one of the grounds of appeal related to the content of the judge's warning. The judge's warning was as follows at 118G-H:

"As I have said, it is you who will decide whether the little girl you saw on video link firstly may have been a very wicked child, which she would be if she deliberately made a false allegation either at her mother's instigation or off her own bat, or secondly, she may have been living in a little child's world of make believe, believing that her allegation was true when it really was not, or believing it was true because her mother had implanted the thought in her mind when truly it was not, or thirdly, was a perfectly normal decent little child, telling us in her own way and using her own language what Daddy did to her . Those are your decisions and yours alone."

The Appeal Court was satisfied with the contents of this warning and felt that "...the judge was directing the jury quite clearly as to their decision and how it was to be reached of the little girl's reliability" (at 119A).

Originally it was sufficient that a warning be given, without any emphasis on the particular wording of the warning. In *R v Cratchley* (1913)9 Cr App R 232 Lord Chief Justice Isaacs explained it as follows at 235:

"In such case it is generally desirable, apart from any rule of law...that a warning should be given to the jury as to acting on the evidence of boys of this age - twelve and under ten - who are concerned in such an offence. It is not necessary that the judge should use the actual words "warn" or "caution", if from his conduct of the case this Court is of the opinion that the jury were in fact warned or cautioned, it would not interfere."

However, with time it became a requirement that the warning had to include the word 'dangerous' or some other word which was equally strong. It was not sufficient simply to say that the evidence had to be approached with caution (Temkin 1990:255). In *Davies v Director of Public Prosecutions* [1954] AC 378 the court at 382 summarised the position relating to the cautionary rule. Although the facts of this particular case relate to the warning given when the witness is an accomplice, the duty remains the same in the case of child witnesses and victims of sexual assaults. In terms of this case, it is the duty of the judge to warn the jury that, although they may convict on the witness's evidence, "it is dangerous to do so unless it is corroborated". At 382 it was argued that although the duty to warn is a rule of practice, it now has the force of a rule of law. Where the judge fails to warn the jury in accordance with this rule, the conviction will be set aside unless the court is convinced that no "substantial miscarriage of justice" has occurred.

### **2.7.1.1 Basis of the Duty to Warn**

The cautionary rule requires that the presiding officer warn the court of the dangers inherent in the evidence of children and complainants in sexual cases. In order to examine the rationale upon which this rule is based, the dangers involved in accepting a child's evidence will be dealt with separately from that of a victim of a sexual offence.

### 2.7.1.1.1 Dangers inherent in a Child's Evidence

There is a widespread belief among lawyers that children are unreliable witnesses, especially when they are testifying about a sexual offence. Spencer (1987c:240) refers to a quote of George Carmen QC which summarises the position succinctly.

"The experience of the courts has been, over a long period of time, that sexual allegations are very easy to make and very hard to refute and, in the case of children, there are additional dangers - of exaggeration, of outside influence, or collusion or of fantasy."

The Criminal Law Revision Committee in their Eleventh Report at para.208 felt that the warning was not necessary in all cases:

"...children are often very observant and, at least in non-sexual cases, often give very good evidence. More important, perhaps, is the fact that very young children are seldom required to give evidence except in sexual cases. We have come to the conclusion that in non-sexual cases there is no such danger in convicting on the uncorroborated evidence of children as to make it necessary to require corroboration or a warning about convicting on uncorroborated evidence."

This is supported by the decision in *DPP v Hester supra* where the cautionary rule relating to children was justified on the grounds that "[s]ometimes it may be that owing to immaturity or perhaps to lively imaginative gifts there is no true appreciation of the gulf that separates truth from falsehood" (309C). And further, at 325E, Lord Diplock added that it was because children were "so young that their comprehension of events and of questions put to them or their own powers of expression may be imperfect".

According to Hall and Martin (1993:195), children are less likely to act out of improper motives than adults, but "they are more susceptible to the influence of third persons, and may allow their imaginations to run away with them". They, therefore, believe that a child's evidence should be corroborated.

It is, as seen above, frequently alleged that children are not able to distinguish between fantasy and reality. Young children do spontaneously make up stories and, according to Glaser (1989:488), can become confused as to their actual involvement as opposed to imagined involvement. However, they do not have difficulty in distinguishing their own involvement from that of somebody else.

There is the further allegation that children are suggestible and easily influenced. The latest scientific research has shown that young children are suggestible but no more so than adults, and their suggestibility is confined to peripheral facts (Glaser 1989:488). Psychological research suggests that very young children, from the age of three or four, are capable of providing accurate and truthful accounts when questioned objectively (Cobley 1995:132). These factors will be dealt with in greater detail at a later stage when evaluating a child's ability to give evidence as a witness.

Children are also charged with providing false accounts deliberately. These motivations would obviously have to be considered in the context of the child's family relationships. Glaser (1989:489) admits that false allegations do occur in approximately 5% of cases and these are usually at the instigation of others and in the context of disturbed family relationships.

Jones and McGraw, two child psychiatrists in the United States of America, carried out studies on the extent to which allegations of child abuse are false. They studied 576 reports of suspected child abuse in Denver during the period of 1983 and found that only 2 percent of the children had made false allegations, namely five children. Of particular interest was the fact that one of these children, a four year old boy, produced the false account with the aid of his mother while the other four were disturbed female teenagers who had previously been sexually victimised by adults. A further 26 cases (6%) were classified as false, but in these cases an adult had made the complaint on behalf of the child. These adults included parents suffering from psychiatric disturbances and parents involved in custody disputes. Jones et al concluded that false allegations of child sexual abuse are rare, and those false allegations which originate from children are even rarer (Spencer and Flin 1989:1601-2).

A detailed evaluation of the relevant research conducted on children will be analysed once the procedures in various countries have been studied.

Davies and Flin (1988:22) argue that the basis for discriminating against children has been based on anecdote and case law. With increased research into applied experimental psychology there is now an opportunity to evaluate the reasons which have over the years been forwarded by lawyers.

#### **2.7.1.1.2 Dangers inherent in the Evidence of Complainants in Sexual Matters**

The evidence of a complainant in a sexual offence must be treated with caution. This was enunciated as early as the seventeenth century by Lord Chief Justice Matthew Hale, who wrote:

"Rape is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho' never so innocent." (Brownmiller 1975:369)

This he justified by referring to the famous example of a woman who accused a man of rape. The latter, when undergoing a medical examination, was found to have a hernia "full as big as the crown of a hat" which had made him incapable of having sexual intercourse for seven years (Spencer 1988:13).

In a number of cases judges have elucidated the reasons for caution when dealing with complainants in sexual cases. In *R v Graham* (1910)4 Cr App R 218 the reason was given at 221 that women will lie in defence of their character:

"If she had connection with the prisoner she was not an entirely truthful girl, but her untruthfulness was in defence of her own character, and women will lie on that point often when the rest of their story is true."

This position was further explained by Lord Justice Salmon in *R v Henry* (1969) 53 Cr App R at 150:

"What the judge has to do is to use clear and simple language that will without any doubt convey to the jury that in cases of alleged sexual offences it is really dangerous to convict on the evidence of the woman or girl alone. This is dangerous because human experience has shown that in these courts girls and women do sometimes tell an entirely false story which is very easy to fabricate and very difficult to refute. Such stories are fabricated for all sorts of reasons, which I need not now enumerate, and sometimes for no reason at all."

These specific dangers were identified in the Eleventh Report of the Criminal Law Revision Committee:

"...the complainant may have made a false accusation owing to sexual neurosis, jealousy, fantasy, spite or a girl's refusal to admit that she consented to an act of which she is now ashamed." (Home Office 1989:52)

These dangers are reiterated by Glanville Williams (1962:662) who justifies the cautionary rule on the following grounds:

"Sexual cases are peculiarly subject to the danger of deliberately laying false charges resulting from sexual neurosis, fantasy, jealousy, spite or simply a girl's refusal to admit that she consented to an act of which she is now ashamed."

In *DPP v Hester supra* the cautionary rule was justified at 309 C-D as follows:

"There are some suggestions which can readily be made but which are only with more difficulty rebutted. There may in some cases be motives of self-interest, or of self-exculpation, or of vindictiveness. In some situations the straight line of truth is diverted by the influences of emotion or of hysteria or of alarm or of remorse."

It would appear then that the cautionary rule is based upon the belief that women tell lies about sexual assaults for a wide variety of reasons ranging from spite to shame; that complaints are based on fantasy and that charges are falsely laid. The accuracy of these beliefs will be addressed later when the various systems are evaluated.

### **2.7.1.2 Criticisms of the Duty to Warn**

According to Spencer and Flin (1990:172), such a warning might be regarded as sensible where the evidence of the prosecution is based solely on the evidence of a single child. But, where the prosecution has presented a great deal of corroboration in addition to the child's evidence, the warning seems unnecessary. It may confuse the jury who might think that the judge knows more than they do and is giving them a hint that they should acquit.

The Report of the Advisory Group on Video Evidence found that the warning was either disregarded in practice or that it actually led to the acquittal of an accused, who may very well have been convicted if the evidence had been approached, adopting the ordinary procedures (Home Office 1989:55).

Williams (1963:152) picks up the argument by declaring the warning to be self-defeating. If it is given where there really is no danger, as in the case where there is sufficient corroboration, then it can cause a miscarriage of justice

by making the jury aware that it is "dangerous" to convict. On the other hand, where there really is a danger, a warning to the jury would seem to be insufficient. The jury are warned that it is dangerous to proceed in a particular way, but that they may do so if they are satisfied.

"What [the judge] is entitled to tell them, according to the standard formulation, is that it is dangerous to convict on uncorroborated evidence, but that the jury are entitled to convict on uncorroborated evidence if they think fit. As it stands, a direction of this kind seems self-defeating; it appears to tell the jury that they are entitled to do what experience of generations shows to be dangerous." (Williams 1963:152-3).

The Advisory Group questioned the rationale behind the rule to warn. They acknowledged that complainants in sexual cases do sometimes lie, but that this was to be found in other cases as well and that there was no evidence to show that false complaints were made more frequently in sexual matters than in other cases. Instead, the evidence that is available seems to suggest that the stress, trauma and public humiliation experienced by complainants in sexual cases deters them from testifying at all. The Group found that the rule was not only "highly questionable in itself" but it was also "sexually discriminatory" (Home Office 1989:55-56).

As far as the warning against evidence of children is concerned, it does not accord with modern scientific thinking on this matter (Spencer 1987c:241).

### **2.7.1.3 The Present Position in England**

As a result of the criticisms which were levelled against the duty to warn, these warnings were either modified or completely abandoned in other jurisdictions. The rules relating to corroboration were abolished in the U.S.A. in the 1970s and Australia abolished them in the 1980s. New Zealand has prohibited judges from giving warnings, as has the state of Victoria in Australia. In 1987 the Canadian Criminal Code abolished the corroboration requirement relating to children and forbade any warning to be given (Spencer and Flin 1993:214).

In the course of its passage through Parliament the Criminal Justice Bill (1988) contained a proposal that the corroboration rules relating to child witnesses be amended. The Home Secretary ordered that a review be made of recent psychological research to determine whether children could be reliable witnesses. The outcome of this review was that the corroboration requirement was unnecessary, at least for children over the age of five (Spencer and Flin 1993:215). The Advisory Group in their Report also recommended that the corroboration requirement and the warning be abolished since "[e]xisting safeguards which apply in all criminal cases are...sufficient". They felt that any additional rules relating to this particular class of persons were "neither necessary nor desirable" (Home Office 1989:57).

On the basis of these recommendations, s34 of the Criminal Justice Act 1988 was introduced. It abolished the common law rule that a judge must warn about the danger of acting on the evidence of children, whether sworn or unsworn. s34(2) of the Criminal Justice Act 1988 provides:

"Any requirement whereby at a trial on indictment it is obligatory for the court to give the jury

a warning about convicting the accused on the uncorroborated evidence of a child is abrogated in relation to cases where such a warning is required by reason only that the evidence is the evidence of a child."

However, a major problem with the abolishment of the judicial warning insofar as children were concerned, has that the change was mainly cosmetic. Although the presiding officer no longer had a duty to warn against the evidence of children, there was still a duty on him to warn against the evidence of a complainant in a sexual matter. Since the majority of children giving evidence were victims of sexual offences, the judge would nevertheless have to give the warning that it was dangerous to convict on the evidence of a complainant in a sexual matter (Spencer and Flin 1993:215). As a result the Advisory Group on Video Evidence recommended that the warning in sexual offences be abolished. This has now been enacted in s32 of the Criminal Justice and Public Order Act of 1994 which came into force on 3 February 1995.

## 2.7.2 Corroboration

### 2.7.2.1 Background

An important distinction was drawn between children who gave sworn evidence and those who were permitted in terms of s38 of the Children and Young Persons Act 1933 to give unsworn evidence. Where the child gave sworn evidence the accused could be convicted on the uncorroborated evidence of the child, but the judge first had to warn the jury of the dangers inherent in doing so and magistrates had to administer the warning to themselves. Where the child gave unsworn evidence, the accused could not be convicted unless the evidence of the child was corroborated (Spencer 1988:13). This requirement originally made its appearance in the Criminal Law Amendment Act 1885 which enabled children for the first time to give unsworn evidence in a trial, but insisted that the evidence had to be corroborated.

This section changed the ordinary common law interpretation of the concept of corroboration. According to the common law, corroboration was simply confirmation that the witness was telling the truth. But, according to Lord Diplock in *DPP v Hester supra* at 325G-H, s38 *supra* differed from the common law in two respects. Firstly, at common law the jury were entitled to convict upon the uncorroborated evidence of witnesses once they were given adequate warning, but s38 imposed an absolute prohibition upon convicting on the uncorroborated evidence of an unsworn child. Secondly, the evidence of any other unsworn child is expressly excluded as corroboration.

This was accepted by the Appeal Court in as early as 1915 in the case of *R v Davies* (1915)11 Cr App R 272 where two little boys had witnessed the rape of their mother. One of the boys was 8 years old and he gave unsworn evidence. Lord Reading CJ had the following to say regarding the necessity of the corroboration requirement at 274:

"Where evidence is given by a child not on oath...it is necessary that the judge should direct the jury not to convict the prisoner on that evidence unless it is corroborated by some other material evidence in support thereof implicating the accused."

The provision became even more restrictive in that the courts interpreted it in such a way that the evidence of one unsworn child could not be used to corroborate another. This was decided in the case of *R v Manser* (1934)25 Cr App R 18 where the accused was charged with having carnal knowledge with a twelve year old girl, Barbara. Although Barbara's evidence was given under oath, the Crown used the unsworn evidence of her nine year old sister as corroboration. Lord Hewart CJ at 20 held that "the evidence of the little child who had not been sworn was not to be accepted as evidence at all, unless it was corroborated". In *R v E* [1964]1 WLR 671 Brabin J also refused to allow the unsworn evidence of a child to be treated as corroboration of the sworn evidence of another child.

In *DPP v Hester supra* the accused was convicted of indecent assault on a twelve year old girl. The complainant gave evidence under oath. Her nine year old sister gave unsworn evidence. The jury was directed that the unsworn evidence of the younger child could be used to corroborate the complainant's sworn evidence. On appeal the court held that the unsworn evidence of the nine year old could only amount to corroboration provided that the unsworn evidence was itself corroborated.

The restrictive interpretation of these requirements had very serious implications for children in that an offender could abuse a number of young children and they would not be able to corroborate each other if they were giving unsworn evidence (Spencer and Flin 1993:212).

With the introduction of s34 of the Criminal Justice Act 1988, the statutory rule which said that a court could not convict on the unsworn evidence of children if there was no corroboration was repealed. Section 34 enables one child giving unsworn evidence to corroborate another. This section was in all likelihood influenced by the Home Office's review of children's evidence in 1987. The review came to the conclusion that, in view of modern research, a requirement that children's evidence be corroborated did not appear to be necessary (Cobley 1995:135). This section came into effect on 12 October 1988 and provides:

- "(1) The proviso to subsection (1) of section 38 of the Children and Young Persons Act 1933 (under which, where the unsworn evidence of a child of tender years admitted by virtue of that section is given on behalf of the prosecution, the accused is not liable to be convicted unless that evidence is corroborated by some other material evidence in support thereof implicating him) shall cease to have effect.
- (2) ...
- (3) Unsworn evidence admitted by virtue of s38 of the Children and Young Persons Act 1933 may corroborate evidence (sworn or unsworn) given by any other person."

This section now makes it possible for the court to convict on the unsworn evidence of children, and for one unsworn child to corroborate another. Spencer and Flin (1993:215) describe this section as "a major step in the direction of rationality", although they do express reservations about its application.

"Indeed, it is now in theory possible for an English court to convict an adult on the word of one unsworn child and nothing else besides - although it is perhaps difficult to imagine one doing so." (Spencer and Flin 1990:174)

### 2.7.2.2 Present Position

Although the law requiring a child's evidence to be corroborated was repealed by the introduction of s34 *supra*, there was still a parallel rule that a judge had to warn the jury of the danger of accepting the evidence of a complainant in a sexual matter without corroboration. If the court was not satisfied with the evidence of such a complainant, then corroboration was necessary before a conviction (Spencer 1990:119). If the court is satisfied with the complainant's evidence despite the warning, then they may convict without corroboration. This was accepted by the court in *R v Graham supra* where the judge explained at 221 that "strictly speaking the law did not require that her evidence should be corroborated, and that if they believed the girl's evidence they could act upon it". In this way, the law relating to corroboration was still applicable to child witnesses since children were very often the complainants in sexual cases.

The term 'corroboration' is simply used in the sense of 'confirmation', according to Lord Diplock in *DPP v Hester supra* at 325C:

"What is looked for under the common law rule is confirmation from some other source that the suspect witness is telling the truth in some part of his story which goes to show that the accused committed the offence with which he is charged."

Where corroboration is necessary, it must implicate the accused and come from a source other than the complainant. In *R v Christie* 1914 AC 545 (HL) the accused was alleged to have indecently assaulted a five year old boy. The boy gave unsworn evidence. His mother gave evidence and mentioned a statement made by the boy where he identified the accused shortly after the assault. In directing the jury, the judge explained that the statement made by the boy to his mother regarding the identity of his assailant could supply the material evidence implicating the accused that was necessary to corroborate the boy's evidence. The conviction was quashed on appeal on the ground that the corroboration had to come from a source *aliunde* and the boy "could not be his own corroborator" (at 557).

Although the common law position appears at face value to be fairly simple, there are a number of technicalities which have given rise to problems. The first, which became known as the 'Baskerville test', was set out in the case *R v Baskerville* [1916]2 KB 658. In terms of this test, in order to amount to corroboration evidence must come from a source independent of the witness who needs to be corroborated, and must confirm the truth of that part of evidence which implicates the accused. This means that potentially strong evidence would not be able to amount to corroboration. For instance, if there was medical evidence that the child had been sexually assaulted in the way described, this would not be able to amount to corroboration as it does not comply with the Baskerville test i.e. it does not implicate the accused (Spencer 1987c:243). Spencer argues that the rule is "absurdly rigid and causes cases which ought to succeed to fail" (Spencer 1988:15).

Even more restrictive than this was the so-called rule against cumulative corroboration which was interpreted in

*Thomas v Jones* [1921]1 KB 22 to mean that corroboration had to consist of one single piece of evidence. This meant that corroboration could not consist of two different pieces of evidence, one confirming the complainant's evidence and the other confirming the accused's implication in the offence (Spencer and Flin 1993:216). In 1987 the court moved away from this approach in *R v Hills* (1987)86 Cr App R 26, where the court found that it was possible to find corroboration in different pieces of evidence. Lord Lane CJ explained it as follows at 26:

"Corroboration is not infrequently provided by a combination of pieces of circumstantial evidence, each innocuous on its own, which together tend to show that the defendant committed the crime. For example, in a rape case, where the defendant denies he ever had sexual intercourse with the complainant, it may be possible to prove (1) by medical evidence that she had had sexual intercourse within an hour or so prior to the medical examination, (2) by other independent evidence that the defendant and no other man had been with her during that time, (3) that her underclothing was torn and that she had injuries to her private parts. None of those items of evidence on their own would be sufficient to provide the necessary corroboration, but the judge would be entitled to direct the jury that if they were satisfied so as to feel sure that each of those three items had been proved, the combined effect of the three items would be capable of corroborating the girl's evidence."

This decision was reaffirmed by the Appeal Court in *R v McInnes* (1990)90 Cr App R 99.

The rules relating to corroboration are over-restrictive and, as Spencer argues, "too inflexible to enable justice to be done" (Spencer 1987c:242). This has resulted in a number of the technical rules being abolished, and in practice judges also attempted to limit the situations where the warning had to be given by contriving not to classify complaints as 'sexual complaints'. For instance, in the case of *R v Simmons* [1987] Crim LR 630 the complainant alleged that the accused had locked her in her flat with the intention of raping her or indecently assaulting her. The Court of Appeal found that the complainant was not a complainant in a sexual case and, therefore, she was not subject to the corroboration warning.

A further limitation was introduced in *R v Chance* (1988) 87 Cr App R 398 where the Court of Appeal found that the warning in the case of sexual complainants was only necessary where the disputed issue was whether an offence took place at all. There was no need to give the warning where someone had in fact committed the offence, and the only issue was whether that person was the defendant. However, the Court of Appeal added the qualification that there is still a need to give the 'sexual complainant' warning even where there is no dispute as to whether the offence took place, if the victim is a child. This is further supported by the decision in *R v Willoughby* (1989)88 Cr App R 91 where a nine year old girl was indecently assaulted. There was no question that the assault had taken place, the only issue was the identity of the assailant. The court decided that the usual corroboration warning had to be given.

There is some uncertainty as to the position now in relation to children who are complainants in sexual matters. It has been argued that the judge's insistence in *Chance's* case *supra* that the warning be given where the complainant is a child may only have been because the general duty at that time to give a corroboration warning whenever there was a child witness was still in existence. And if this is so, since s34 of the Criminal Justice Act 1988 has abolished this duty, this part of the *Chance* decision should no longer apply (Spencer and Flin 1993:217).

A further limitation relating to the warning itself was introduced by the Court of Appeal in *R v Feltrin*, The Times, Law Report, 5 December 1991. The court held that it was not necessary for the judge to mention the "supposed tendency of women and children to make false allegations of sexual assault" but that it was sufficient simply to mention the dangers inherent in accepting one person's word against another's when giving his warning (Spencer and Flin 1993:217).

However, as Spencer and Flin (1993:217) point out, judges are still likely "to err on the side of safety" and give the corroboration warning in any case involving a sexual assault where the complainant is a child, even where the only issue is identity. To support this, they refer to some decisions of the Appeal Court. In *Selby* (unreported, 24 May 1991) the Court of Appeal held that medical evidence of assault, fibres from the defendant's clothes found on the child's clothes as well as evidence that the defendant had been with the child did not corroborate the evidence of a four year old (Spencer and Flin 1993:218). And in *R v Izard* (1993)157 JP 58 the Court of Appeal held that a trial judge had to mention the specific risk of fabrication when giving the corroboration warning in a sex case, even though this appears to be inconsistent with the decision in *Feltrin supra*.

### 2.7.2.3 Criticisms of the Corroboration Rules

The Pigot Committee in their Report came to the conclusion that the elaborate technical approach to corroboration is confusing, counterproductive and leads to injustice. A crucial function of the law was to protect the community and it had to be noted that there was a substantial rise in the number of sexual crimes which were being committed against women and children. The Advisory Group therefore felt that any rules or practices which deflect the course of justice in these cases should be abandoned. They were of the opinion that the position in Canada should be followed where the corroboration warning in cases involving sexual offences has been abolished. As far as they were concerned the existing safeguards which apply in all criminal cases would be sufficient to deal with sexual offences (Home Office 1989:55-7).

Spencer also argues that the rules relating to corroboration are "over-restrictive and wildly irrational" (Spencer 1987c:242). They are so fraught with technicalities that it is very difficult, if not impossible, to know exactly what amounts to corroboration in each case. Spencer and Flin (1993:234) support the suggestion of Glanville Williams that all rules relating to corroboration should be scrapped and replaced with a rule that requires the trial judge to review all the evidence at the close of the defence case and direct an acquittal if he believes a conviction would be unsafe. This proposal is not without precedent since this approach has already been suggested by the Court of Appeal when dealing with identification evidence (*Turnbull* [1977] QB 224). It also often happens in practice when "strong-minded judges do sometimes stop a case where they think no reasonable jury would convict on the evidence heard" as in *Shippey* [1988] Crim LR 767.

### 2.7.3 Conclusion

The cautionary rule against the evidence of children has been abolished with the introduction of s34 of the Criminal

Justice Act 1988 and so too the need for mandatory corroboration. For a time the cautionary rule was still applicable to children insofar as they were complainants in sexual offences, but the recommendations of the Advisory Group on Video Evidence that the corroboration warning in sexual offences be abolished has now been enacted in s32 of the Criminal Justice and Public Order Act of 1994 which came into force on 3 February 1995.

In effect this means that the cautionary rule against the evidence of children and complainants in sexual cases has now been abolished. There is no longer a duty on the presiding officer to warn himself or the jury of the dangers of convicting on the above evidence. But, as Cobley (1995:136) points out, a judge has always had the discretion to point out to the jury that certain evidence from a particular source has previously been shown to be unreliable. Since judges have for many years regarded children as unreliable, Cobley feels that "old habits die hard" and that judges will probably continue to use their discretion to emphasise that children's evidence is unreliable.

## **2.8 The Rule against Hearsay and Child Witnesses**

### **2.8.1 Introduction**

Hearsay is defined as oral or written statements made by a person not called as a witness with the purpose of introducing these statements at the trial to prove the truth of their contents. The general rule is that hearsay evidence is inadmissible in terms of English common law (Carter 1990:282).

The principle reason for excluding hearsay evidence is that it is unreliable. It is regarded as untrustworthy because it cannot be tested by cross-examination. There is the danger that the maker of the statement may be lying, or may have made a mistake or may even have been misunderstood (Hoffmann and Zeffertt 1988:125). There is also the danger that hearsay evidence may confuse the jury and they may accord too much weight to this type of evidence. The reasons for excluding hearsay evidence were explained as follows by the court in *R v Sharp* [1988]86 Cr App R 274 at 278:

"The rule is so firmly entrenched that the reasons for its adoption are of little more than historical interest but I suspect that the principal reason that led the judges to adopt it many years ago was the fear that juries may give undue weight to evidence the truth of which could not be tested by cross-examination, and possibly also the risk of an account becoming distorted as it was passed from one person to another."

Critics have frequently argued that hearsay ought not to affect the admissibility of the evidence, but should rather be taken into account when determining the weight to be attributed to that evidence. The rule against hearsay evidence is rigid. If the hearsay statement does not fall within a clearly defined exception, then it must be excluded, irrespective of how reliable the evidence may be (Hoffmann and Zeffertt 1988:126). For this reason a number of exceptions have been created in criminal law and the Civil Evidence Act 1968 enables a lot of hearsay evidence to be admitted in civil proceedings in England. In Scotland the Civil Evidence (Scotland) Act 1988 has abolished the rule completely in civil proceedings. In effect, the hearsay rule is now largely confined to criminal proceedings (Spencer and Flin 1993:127).

## 2.8.2 Exceptions to the Hearsay Rule in Criminal Proceedings

Only those exceptions which would be most relevant to the evidence of children will be discussed here.

### *Statements admitted by Consent*

Section 9 of the Criminal Justice Act 1967 allows a written statement to be read in lieu of live evidence. If a party wishes to make use of the provision, advance notice of the intention to do so must be given and neither the opposing party nor the court must have any objections to this. The section further provides that the statement must be signed by the maker who declares that he believes the contents to be true. Where the maker is over the age of 14 he must also state that he is aware that he can be prosecuted if the statement is false. If he is under the age of 14 he only has to state that he understands that it is important to tell the truth (Spencer and Flin 1993:130). Although this provision does enable children to avoid appearing in court, it can only be used when the opposing party does not object. Since this occurs very rarely in practice, this provision does not assist child witnesses in particular.

### *Res Gestae*

Also sometimes referred to as 'excited utterances', statements made in response to a startling event are admissible as an exception to the hearsay rule. Originally to be admissible these statements had to be made at the time when the crime was being committed, as decided by the court in *R v Bedingfield* (1879)14 Cox CC 341. This interpretation was later extended to include statements made soon after the event, provided that the speaker was still under the stress of the event as in the case of *R v Andrews* [1987] AC 281 where a statement made by a man a few minutes after he was attacked was held to be admissible. Lord Ackner explained here that "[i]n order for the statement to be sufficiently 'spontaneous' it must be so closely associated with the event which has excited the statement, that it can fairly be stated that the mind of the declarant was still dominated by the event". If a child made a statement while under the influence of a startling event, the statement would be admissible in terms of this exception if the child was unable to give evidence at the trial.

Although certain states in the United States of America have extended this exception to admit statements which have been made several hours after the event, the British courts have limited this exception to the actual event or to immediately thereafter (Myers 1987:329).

### *Statements regarding a Person's Physical or Mental Condition*

A statement made by a person describing what he is experiencing either physically or emotionally is admissible as an exception to the hearsay rule to prove that he was experiencing that sensation at that time. It cannot be used to prove the cause of the sensation (Wilkinson 1986:41). An example of such a case is *R v Conde* (1868)10 Cox CC 546 where the statement 'I am hungry' by a boy was held to be admissible to prove that he was feeling hungry. The boy died as a result of starvation and neglect and his parents were charged with manslaughter.

### *Dying Declarations*

In order for a statement to be admissible in terms of this exception, the maker of the statement must have died and the statement must have been made under a settled, hopeless expectation of death (Carter 1990:312). This exception very rarely becomes applicable in the case of children since, as Spencer and Flin (1993:133) point out, "[a]s child deaths are fortunately rare these days, and dying children are not usually told they are dying even if they are, no more need be said here about dying declarations".

### *Statutory Exceptions*

In England there are two statutory exceptions which enable the statements of certain witnesses, who are unavailable for reasons other than death, to be admitted. In the first instance, s13 of the Criminal Justice Act 1925 admits the deposition of a person who, in terms of the section, "is proved at the trial by the oath of a credible witness to be dead or insane, or so ill as not to be able to travel, or to be kept out of the way by means of the procurement of the accused or on his behalf". This deposition, in terms of the Criminal Justice Act 1967, includes witness statements. Witness statements are the statements made to the police in the course of an investigation, and are therefore not made under oath and the defence is not afforded an opportunity to cross-examine the maker of the statement (Spencer and Flin 1993:134).

The courts approach these provisions very warily and in *R v Blithing* (1983)77 Cr App R 86 the Court of Appeal urged judges to use their discretion to reject any statements tendered under these provisions except where they contained evidence that was formal and non-controversial.

The second statutory exception, more commonly known as the documentary hearsay provision, is found in ss23-26 of the Criminal Justice Act 1988. Originally, these provisions were introduced as an exception to the hearsay rule in order to make it easier to admit company records, letters etc. as evidence in fraud trials. However, in formulating the section, the Home Office included provisions which made it possible to admit the statements which witnesses, unable to appear trials, had made to the police. This did not meet with the approval of the Bar and the section had to be redesigned making "the saw-marks of hasty Parliamentary carpentry...all too obvious" (Spencer and Flin 1993:134).

In order for hearsay to be admitted in terms of these provisions, the statement must be in the form of a document. If the statement is first-hand hearsay, then the court can proceed in terms of s23 provided certain requirements are complied with. The maker must have been a competent witness when the statement was made but is unable to attend the trial because he is dead, very ill, mentally unfit, outside the United Kingdom and it is impracticable to make him available at the trial or he is untraceable. Included here as well is the situation where a witness has made a statement to a police officer or an investigator and the witness does not give evidence because he is afraid or because he is being kept out of the way.

If the above requirements are complied with, the next question is whether the statement was made before the crime was committed. If so, the statement will be admissible subject to the discretion which a judge has to exclude in terms of s25. If the statement was made after the crime was committed and for the purpose of the proceedings, then it will be admissible if the judge gives permission in terms of s26 that the statement be admitted in the interests of justice.

The other route by which statements can be introduced is via s24. Section 24 refers to statements contained in documents "created or received by a person in the course of a trade, business, profession or other occupation, or as the holder of a paid or unpaid office". Although this section is primarily concerned with business documents, it would also include a document recording a child's description of a criminal offence to a policeman or a social worker (Spencer and Flin 1993:135).

The important question regarding these statutory exceptions is whether they could be used in the case of a child who was too scared to give evidence in court. According to Spencer and Flin (1993:135-6) the answer is 'yes, in principle'. Section 23 (as discussed *supra*) can be invoked where the witness has made a statement to a police officer but is afraid to give evidence. Therefore, a child who is too frightened to come to court or to give evidence would be covered by this provision. Further s23 can be invoked where the witness is very ill or mentally unfit to testify and can be used in the case of a child witness where the court appearance would involve real danger to his mental health. Spencer and Flin (1993:136) suggest that this would cover the case of a child who suffers from severe communication problems as a result of which he is unable to testify. The reason this section is said to apply to children 'in principle' is that, even when all the requirements have been complied with, the admissibility of the statement is still subject to the judge's discretion. To date the case law relating to this section has not involved children, but there have been several cases involving witnesses who have been considered fragile on the basis of old age rather than youth.

### **2.8.3 Exceptions to the Hearsay Rule in Civil Proceedings**

Generally speaking, any civil court concerned with the welfare of a child may admit hearsay evidence. The fact that the evidence is hearsay will only be relevant to its weight and not its admissibility (Spencer and Flin 1993:146).

#### ***Cases concerned with Wardship Proceedings***

Hearsay evidence has always been admissible in wardship proceedings, as was confirmed in the decision *Re K* [1965] AC 201. In this particular case two children had been made wards of court in a dispute between their separated parents regarding custody. The Official Solicitor, who had been appointed as the children's guardian *ad litem*, handed in a report to the court which contained evidence that appeared to cast doubt on the mother's fitness to take care of the children. The mother appealed against this decision on the grounds that the report, which contained hearsay, had been admitted into evidence and had been taken into account by the judge when making his decision. The House of Lords accepted that the report contained hearsay, even going so far as to say that the entire

report was hearsay since the Official Solicitor had written his findings in the report instead of giving evidence and being cross-examined. The House of Lords, however, held that the report and its contents had rightly been admitted, since in wardship cases the court has a duty to act in the child's best interests and these can only be discovered by listening to all the evidence available, including hearsay.

### *Cases concerned with the upbringing, maintenance or welfare of children*

Civil courts dealing with the upbringing, maintenance and welfare of children followed the lead of wardship proceedings, and began to admit hearsay evidence (Spencer 1990:120). However, the Court of Appeal in *H v H; K v K* [1990] Fam 86 held that the right to admit hearsay was the exclusive prerogative of the High Court in wardship cases. On these grounds the Court of Appeal reversed decisions denying fathers access to their children, because they were based on hearsay evidence from social workers, who reported allegations of sexual abuse made to them by the children. As a result of the criticisms levelled against these decisions, s96 was introduced into the Children Act 1989. In terms of this section the Lord Chancellor was given the authority to make orders allowing hearsay evidence to be admitted in civil proceedings concerned with the upbringing, maintenance or welfare of children (Spencer and Flin 1993:147).

The Lord Chancellor then made an order, the Children (Admissibility of Hearsay) Order 1990 (SI 1990 No.143), which allowed hearsay evidence to be admissible in some proceedings but not others. This resulted in a number of inconsistencies, for instance hearsay was admissible in juvenile court when dealing with care proceedings but not in the domestic court where the same allegations would be heard in the context of a dispute over custody or access. This order caused difficulty in the courts and attracted a great deal of criticism. As a result the Lord Chancellor issued another order, the Children (Admissibility of Hearsay Evidence) Order 1991 (SI 1991 No.1115). This order revoked the earlier one and permitted hearsay evidence to be admissible in all family proceedings in a Magistrates' Court (Spencer and Flin 1993:147).

This order was replaced by an even wider provision in 1993, the Children (Admissibility of Hearsay Evidence) Order 1993 which provides:

"In (a) civil proceedings before the High Court or a county court; and (b)(i) in family proceedings, and (ii) civil proceedings under the Child Support Act 1991 in a magistrates' court, evidence given in connection with the upbringing, maintenance or welfare of a child shall be admissible notwithstanding any rule of law relating to hearsay."

The effect of this Order is to make hearsay evidence admissible in nearly all civil cases involving children.

### *Other Statutory Exceptions*

There are a few other statutory provisions which enable hearsay evidence to be admitted in certain specific circumstances in civil proceedings.

Section 7(4) of the Children Act 1988 makes hearsay evidence in a court welfare officer's report admissible. Sections 41(11) and 42(2) of the Children Act 1988 deal with the report compiled and submitted by a guardian *ad litem* and make any hearsay contained in this report admissible. Section 45 of the Children Act 1988 gives the court the power to receive and act on any kind of evidence when dealing with an emergency protection order (Spencer and Flin 1993:148). These specific provisions are much narrower than the Lord Chancellor's 1993 Order, and are therefore no longer of major significance since hearsay is in principle admissible in civil cases involving children.

The general exception in terms of which hearsay evidence is admissible is contained in s2(1) of the Civil Evidence Act 1968, which provides:

"In any civil proceedings a statement made, whether orally or in a document or otherwise, by any person, whether called as a witness in those proceedings or not, shall, subject to this section and to rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible."

This would cover a child's hearsay evidence in circumstances other than those covered by the above provisions, for instance personal injury claims. There are certain requirements that would have to be complied with to admit a hearsay statement in terms of this section. The witness would have to be competent. Admissibility is limited to first-hand hearsay only, and section 2(1) is subject to s8 of the Act which requires that the section operate subject to the rules of court. The relevant rules require that a party who wishes to introduce hearsay in terms of this section must give advance notice to the other party who then has the right to insist on calling the original maker of the statement, unless the latter is dead, out of the country, bodily or mentally unfit, cannot be identified or cannot be expected to remember the relevant details. This would presumably, according to Spencer and Flin (1993:151-2), include a child who has been seriously traumatised by the event or who can no longer remember the details. These provisions, however, are very rarely resorted to in practice.

#### **2.8.4 Weight to be accorded to Hearsay Evidence**

Since hearsay evidence is in principle admissible in civil proceedings, it is important to address the issue of what weight is to be attached to the evidence. In *Re K supra* the court was of the opinion that in practice judges would be reluctant to act on hearsay evidence alone if serious misbehaviour was alleged. This view has, however, given rise to a dilemma, since the more serious the allegations in civil proceedings, the greater the risk to the child if the court refuses to act upon it (Spencer and Flin 1993:149).

This dilemma has been highlighted by Waite J in *Re W (Minors)* [1987]1 FLR 297 which dealt with allegations of child abuse:

"[These] are all cases of exceptional difficulty, because they bring into stark contrast two principles that everyone would acknowledge as fundamental to our society. One is the basic requirement of justice that nobody should have to face a finding by any court of serious parental misconduct without the opportunity of having the allegations against him clearly specified and cogently proved. The other is the public interest in the detection and prevention of parental child

abuse as conduct which is liable, if persisted in, to do serious damage to the emotional development of the victim and to his or her capacity to form stable and satisfying relationships in adult life."

The court could, and has, therefore come to the conclusion that a finding, based on hearsay evidence, can be made that a particular person has abused a child. This was explained by Neil LJ in *Re W (Minors)*[1990] FCR 286:

"...the court will be very slow indeed to make a finding of fact adverse to a parent if the only material before it has been untested by cross-examination. Moreover, it will examine with particular care the evidence of the person who communicates the hearsay material to it. But as the welfare of the child is the paramount consideration I see no escape from the conclusion that in some cases a court, in assessing the risks to which a child may be exposed, may be obliged to reach conclusions of fact which in other circumstances and in other proceedings it would not be free to do."

Despite this, the courts are very cautious about acting on hearsay evidence, because it gives rise to two difficulties, according to Spencer and Flin (1993:150). Firstly, the question arises whether the child really did say that and whether there are any errors of transmission, and whether the child actually meant it. These problems arise because the child is not available to be cross-examined. In deciding whether to act on hearsay evidence, the courts take a number of factors into account: the age of the child, the length of time that has elapsed between the event and the making of the statement, if the statement was made under pressure or as a result of suggestive questioning. All these factors are taken into account when determining the weight that has to be attributed to the hearsay evidence. This perhaps explains why judges are prepared to give more weight to a hearsay statement that has been tape-recorded or video-recorded by a trained interviewer. In *Re M (Minors)* [1993]1 FCR 253 a judge found that a father had sexually abused his daughters. This decision was based partly on what one of the children, a four year old, had told a psychiatrist in an interview which took place six months after the incident. There was also evidence that the child had already been exposed to questioning and the possibility of coaching. Despite this, the Court of Appeal upheld the trial judge's decision. Although the above factors had weakened the evidence, the Appeal Court was satisfied that the interview of the child had been competently conducted and video-recorded. There was also other circumstantial evidence which corroborated the child's statement.

An interesting point that should perhaps be mentioned here is the fact that in civil proceedings the courts are reluctant for children to give direct evidence in court. This attitude can be seen in the judgement of Ward J in *Nottinghamshire County Council v P* [1993]1 FCR 180 at 188:

"When this trial began an indication was given to me that M wished to give evidence. I confess to showing my anxiety about that course of conduct to be adopted by the local authority. I took the view that I had no real power to prevent them calling evidence in support of their case, this evidence being tendered by a girl nearly 17, suffering though she may be from the disability of her learning difficulties, but I did not like the course proposed...In this Division or elsewhere one has both to grapple with the necessary process of ascertainment of truth, but here one is always mindful of the consequences that flow from the findings that are made and from the manner and the conduct of the forensic process of examination, cross-examination and re-examination...In the ordinary course, their voice is usually heard properly and sufficiently through their guardian and if there is a real need to see the judge, he can agree to see them in his room if that is necessary."

### 2.8.5 Position in Scotland

Until 1988 the position in Scotland regarding the admissibility of hearsay evidence was the same as in England. In 1986 the Scottish Law Commission in its 100th report recommended that the hearsay rule should be abolished in civil proceedings, which resulted in s2(1) of the Civil Evidence (Scotland) Act 1988 (Spencer and Flin 1993:156). This section simply abolishes the hearsay rule in civil proceedings, and provides as follows:

"In civil proceedings -

- (a) evidence shall not be excluded solely on the ground that it is hearsay;
- (b) a statement made by a person otherwise than in the course of proof shall be admissible as evidence of any matter contained in the statement of which direct oral evidence by that person would be admissible;
- (c) the court, or as the case may be the jury, if satisfied that any fact has been established by evidence in those proceedings, shall be entitled to find that fact proved by the evidence notwithstanding that the evidence is hearsay."

In Scotland the rule against hearsay has been completely abolished in civil proceedings except for referrals to children's hearings where it is alleged that the child has committed an offence. This would then in practice have the effect, according to Spencer and Flin (1993:157), that evidence from a social worker about what a mother told her as to what the child said will be capable of being regarded as evidence as to the truth of what the child is alleged to have said. In practice this Act has enabled the courts in Scotland to receive as evidence accounts of interviews that police officers and social workers have had with children or to see and hear tapes, where the interviews have been recorded.

The only problem is that this section, like its English counterpart, requires that the hearsay statement be one that would be admissible in direct oral evidence by that person i.e. that the maker of the statement be a competent witness. In the case of a statement made by a young child, the court would then need to know whether the child was in fact competent. This would necessitate the calling of the child even if it was only for the purpose of a competency examination. This question arose in *F v Kennedy* [1992] SCLR 139. In this case a six year old boy gave a social worker certain details of indecent assaults he had been forced to submit to. When the boy appeared before the sheriff he refused to talk and it was therefore not possible to carry out a competency examination. On appeal the court held that the sheriff was not allowed to treat the child's hearsay as evidence under the Act.

The decision of *M and M v Kennedy* [1993] SCLR 69 followed and dealt with the hearsay statements of a twelve year old girl who, although physically able to speak, refused to do so as a result of a psychological disturbance. The girl made an oral statement to a psychiatrist that she had been sexually abused, but communicated very little to the sheriff and used only signs and drawings. The sheriff found the girl to be competent and on appeal the court upheld the sheriff's decision, based on his rudimentary communication with the girl. Of interest is a further

statement by the court that the child could have been found competent on the basis of what the psychiatrists had told the sheriff and if they could furnish reasons why the child herself could not communicate with the sheriff. This decision would therefore allow a sheriff's decision of competency to be based on a psychiatrist's opinion.

As far as criminal proceedings are concerned, the Scottish Law Commission (1990:15) were of the opinion that no general hearsay exception in relation to statements by children should be introduced. They did, however, suggest that any existing exceptions to the hearsay rule, such as dying declarations for instance, should be retained. This question should not, however, be regarded as being closed forever, because the Commission is at present engaged in a general study of the hearsay rule in criminal cases.

### **2.8.6 Criticisms of the Hearsay Rule**

The rules regarding hearsay are very complicated. In civil proceedings there are different rules for different courts and different types of proceedings. In criminal proceedings there are a number of exceptions to the rule, and each exception has particular requirements that need to be complied with before a statement can be admitted in terms of that exception. Spencer and Flin (1993:160) explain it as follows:

"In criminal proceedings the hearsay rule has a mass of complicated exceptions, and the complications are often pointless, because they conflict with both the rules of human psychology, and the reasons why the exceptions were originally created: the tiresome minutiae of dying declarations, and of 'recent complaint', are good examples."

Spencer and Flin (1993:160) argue further that the rules are complicated because they lack a coherent unifying principle. Some exceptions, such as dying declarations, have been created because there is a belief that that particular type of hearsay is reliable. The rationale for this exception was set out in *R v Woodcock* (1789) 168 ER 352:

"The principle upon which this species of evidence is admitted is, that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world has gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so awful is considered by law as a creating an obligation equal to that which is imposed by a positive oath administered in a court of justice."

On the other hand, other exceptions, such as spontaneous exclamations, were created because in the circumstances in which that particular exception applies, the witness is unavailable and highly relevant evidence would as a result be lost to the court.

A further criticism levelled against the hearsay rule is that it does not make logical sense. For instance, Spencer and Flin (1993:160) argue that it is obviously sensible for the law to insist on hearing a story from a first-hand source when such is available, but it is not sensible then to take the next step and say that if there is no first-hand source available then in principle the story cannot be told at all.

One of the reasons (*supra*) why hearsay evidence has traditionally been excluded was that there was the danger that

a jury would place undue weight on the evidence. This rationale falls away when a matter is being heard by a qualified judge, as was pointed out by Devlin LJ in *Bearmans Ltd v Metropolitan Police District Receiver* [1961]1 ALL ER 384 at 392:

"It is extremely difficult for a jury to give the same attention to considerations of weight that a judge does. It comes easily to a judge to say - 'I must be careful about accepting this because after all the witness is not speaking on oath; he has not been cross-examined; I do not know the circumstances in which the statement was taken' and so forth. Those considerations do not come easily to a jury, and because of the difficulty that a jury has in distinguishing between various grades of weight, the common law thought it wiser to exclude much evidence, such as hearsay, altogether. I cannot see why these considerations should any longer apply to matters that are being determined by a judge alone."

When used in combination with other rules of criminal procedure and evidence, the hearsay rule can be very restrictive, especially in the case of children. The competency requirements often prevent children from giving evidence in court personally, and the hearsay rule then makes it impossible for other people to repeat what the child has said (Spencer 1990:121). To illustrate this point, Spencer and Flin (1993:145) refer to the unreported case of *R v Maine and McRobb*, Press and Journal (Aberdeen), 27 June 1979 where a three year old torture victim was found to be incompetent as a witness. The hearsay rule therefore prevented her father from telling the court what she had said had been done to her.

Not only can the exclusion of hearsay evidence result in an improper acquittal, it can also have the opposite effect as happened in *Sparks v R supra* where a white man was charged with indecently assaulting a three year old. The child had earlier made a hearsay statement to her mother that the attacker had been black.

Spencer and Flin (1993:162-3) propose that the approach to the hearsay evidence of children should depend on the nature of the proceedings. In civil proceedings relating to the child's future, the main consideration is the welfare of the child, and the accused's rights to confrontation and cross-examination will be of secondary importance. In criminal cases, on the other hand, the procedure is based on the belief that it is unfair to allow a person to be convicted without giving him the opportunity to put his side of the case to his accuser. For this reason Spencer and Flin (1993:163) suggest that abolishing the hearsay rule in criminal cases is not the solution, but rather hearsay should be dealt with in conjunction with other matters. For instance, it is suggested that the competency requirement be altered and the adversarial nature of proceedings be modified, which would then enable more children to give evidence and thereby remove the need to admit hearsay. Hearsay, they suggest, should be admitted whenever the original maker is genuinely unavailable, but in these instances the convictions should not be based on the hearsay evidence alone.

### 3. PROCEDURES ADOPTED IN OTHER ACCUSATORIAL SYSTEMS WITH RESPECT TO CHILD WITNESSES: UNITED STATES OF AMERICA

#### 3.1 Introduction

It is necessary at the onset to include a very brief introduction to the legal system in the United States of America, hereafter simply referred to as the USA, since the system differs in certain respects from the legal systems in the United Kingdom and South Africa. Such an introduction is also important for the purpose of understanding the provisions that relate to child witnesses.

The legal system in the USA, like that of the UK, is based on the accusatorial system with each side presenting evidence and a neutral judge, often assisted by a jury, analysing the evidence and making a decision. The courts themselves are divided into federal courts and state courts. The common thread underlying the two is the United States Constitution with the final arbiter being the United States Supreme Court (Whitcomb 1990:133). The federal courts include the US Magistrates Courts, the US District Courts, the US Circuit Courts of Appeal with the US Supreme Court being the appellate court of last resort in the federal court system. The state courts include Courts of Limited Jurisdiction, Trial Courts of General Jurisdiction, Intermediate Courts of Appeal and the State Supreme Courts (Myers 1992:5).

Although the US Supreme Court is the highest appeal court in the federal court system, its authority is not limited to federal courts. The US Supreme Court has the final say on the interpretation of the US Constitution and would therefore have the power to review any State Supreme Court decisions interpreting the US Constitution (Myers 1992:4-5). This is what happened in the case *Maryland v Craig*, 110 S.Ct. 3157 (1990), which will be discussed in greater detail when evaluating the constitutionality of certain provisions relating to child witnesses. The *Craig* case *supra* went from the Maryland Court of Appeal to the State Supreme Court and was then reviewed by the US Supreme Court since the matter was one that dealt with the interpretation of certain sections of the Constitution.

The criminal justice system is not 'monolithic' across the various states. Laws vary in detail from state to state and, as Whitcomb (1990:133) explains, what goes on in a trial courtroom tends to reflect the "local legal culture". Since judges have a great deal of discretion, practices even vary across courts in the same state.

Generally, there are a number of ways in which a prosecution can be initiated. Once an accused has been arrested, a preliminary hearing is scheduled. The preliminary hearing usually takes place shortly after the defendant has been arrested due to certain statutory time limitations that are applicable (Whitcomb 1990:135). The function of the preliminary hearing is to see whether there is sufficient evidence to go to trial. Although the procedure is less formal at the preliminary hearing, the proceedings are still adversarial in nature. At the hearing the prosecutor has to persuade the court that there is sufficient evidence that the accused probably committed the crime. If the magistrate finds that there is sufficient evidence, he will then bind the case over for trial. There are no juries at

such a preliminary hearing. In theory, the child witness could be called to give evidence at both the preliminary hearing and at the trial, although the prosecutor does have the discretion to spare the child where possible by calling other witnesses instead (Myers 1992:12-13).

In certain states prosecutions are initiated via grand jury indictment. The latter are private citizens who review cases and decide whether a charge should be filed. They have both accusatory and investigative functions. Their function is very similar to that of the magistrate in the preliminary hearing. They also have to decide whether there is sufficient evidence to proceed. A grand jury indictment differs from a preliminary hearing in that the proceedings are secret, not adversarial in nature, and the defendant and his counsel are not present. The grand jury meets behind closed doors and the prosecutor presents the evidence. If the majority of the grand jury are happy that there is sufficient evidence to go to trial, they will issue an indictment. If not, the charges will be dismissed (Myers 1992:14). Proceeding via the grand jury allows more time for investigation since the defendant has not yet been arrested. Usually the child will testify before the grand jury but the defendant is rarely allowed to testify on his own behalf. There is no cross-examination of the child witness at these proceedings (Whitcomb 1990:135).

The advantage of proceeding via a preliminary hearing is perceived to be the opportunity of testing the child in a less threatening environment than the actual trial. If the child performs well at the preliminary hearing, then there is a good chance that the child will be able to cope with the trial. There is also the hope that the accused may plead guilty if he sees the child performing well at the hearing. The disadvantage of proceeding via this route is that preliminary hearings occur at very short notice and as a result there is very little time to prepare the child. Using the route of the grand jury allows more time for investigation and preparation (Whitcomb 1990:135-6).

The preliminary hearing can in certain circumstances be waived, in which case the prosecutor will file the case directly. In these cases the prosecution will have to make all the information at their disposal available to the defence. For instance, in Florida the child will have to testify and be cross-examined at a formal deposition before the trial, whereas in Minnesota it will only be the files that are exchanged (Whitcomb 1990:136).

The cornerstone of the criminal justice system is the US Constitution, which is the fundamental source of law in the United States. Amendments to the original Constitution are contained in the Bill of Rights. Each state has its own constitution and bill of rights. However, federal constitutional and statutory law is supreme and will take precedence over any conflicting state laws, so if a state legislature passes a law which is inconsistent with the US Constitution or a federal statute, the US Constitution and the federal statute will prevail (Myers 1992:26-7).

## 3.2 The Constitutional Position

### 3.2.1 Introduction

Discussion here will be limited to those aspects of the constitution which have specific relevance to matters relating to child witnesses. The two amendments of the US Constitution which are of particular importance to child witnesses will be analysed, namely the confrontation clause and the due process clause.

Firstly, the Sixth Amendment of the US Constitution provides as follows:

"In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him."

This clause, generally referred to as the Confrontation Clause, includes a number of rights. In *Coy v Iowa*, 487 U.S. 1012 (1987) at 1015 the Supreme Court explained that the Confrontation Clause requires that:

- i. the defendant be allowed to face his accuser;
- ii. witnesses testify under oath;
- iii. the defendant be allowed to cross-examine witnesses called against him; and
- iv. the jury be allowed to observe the witnesses while they give evidence to determine their credibility.

Gordon (1992:60) argues that this clause would also include the further requirement that hearsay statements be excluded, although it could be argued that this requirement would fall within the element of face-to-face confrontation. If the defendant is entitled to face his accuser, this would automatically exclude hearsay.

The primary purpose of the confrontation right is, according to *Tennessee v Street*, 471 U.S. 409 (1985) at 415, the need to ensure accuracy in criminal trials by requiring that all evidence admitted be reliable. In *Lee v Illinois*, 106 S.Ct. 2056 (1986) the court explained at 2062 that "[t]he right to confront and cross-examine witnesses is primarily a functional right that promotes reliability in criminal trials". And in *Ohio v Roberts*, 448 U.S. 56 (1980) the U.S. Supreme Court at 65, in discussing to the Confrontational Clause, stated that "its underlying purpose [is] to augment accuracy in the fact-finding process by ensuring the defendant an effective means to test adverse evidence". Another school of thought sees the Confrontation Clause as a rule which lays down a minimum standard of admissibility designed to prevent evidence which may reflect inaccuracies in perception, memory or narration (Myers 1987:300).

The Sixth Amendment right to confront witnesses has been held in *Pointer v Texas*, 380 U.S. 400 (1965) by the U.S. Supreme court to be applicable to the individual states through the Fourteenth Amendment, which provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law...". The constitutions of individual states also contain confrontation provisions which are based on the Sixth Amendment.

For instance, the Minnesota Constitution also incorporates the right to confrontation. Article 1, paragraph 6 provides that "[t]he accused shall enjoy the right... to be confronted with the witnesses against him" (Oseid 1985:1385-6).

Secondly, the Fifth Amendment of the U.S. Constitution, which also has application to child witnesses, provides: "No person shall... be deprived of life, liberty or property, without due process of law...". This is referred to as the due process clause and has the purpose of ensuring fundamental fairness to every accused. In *Betts v Easley*, 161 Kan. 459, 169 P.2d 831 (1946) the Kansas Supreme Court stated at 843:

"The rule is firmly embedded in American law that the guaranty of due process - whether under the fifth amendment, as a limitation upon the power of the federal government, or under the fourteenth amendment, as a limitation upon the power of the states - is to be liberally construed to effectuate its purpose of protecting the citizen against arbitrary invasion of his rights of life, liberty and property".

In *State v Howard*, 57 Ohio App. 2d 1, 385 N.E. 2d 308 (1978) the court explained at 312 that "the supreme court has recognized that the right [to confrontation] may exist as a matter of due process of law". In *Snyder v Massachusetts*, 291 U.S. 97 (1934) the U.S. Supreme Court held at 105-6 that due process allows a defendant to "be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge".

In summary, therefore, the confrontation clause gives the criminal defendant the right to confront witnesses in court who give evidence against him under oath in the presence of the judge or jury and entitles him to subject such evidence to cross-examination (Myers 1987:299).

### **3.2.2 Proceedings to which the Confrontation Clause applies**

The Sixth Amendment itself uses the phrase "criminal prosecutions" and therefore applies to criminal trials. These rights are also extended to certain preliminary hearings, although the latter instances the right may be more limited (Myers 1987:324).

The confrontation rights are also applicable in juvenile court proceedings according to the case of *In re Dwayne M*, 287 S.C. 413, 339 S.E. 2d 130 (1986) where the appellant was adjudged a juvenile delinquent for committing a lewd act on a minor and for indecent exposure. The judge ordered the appellant to leave the room during the course of the hearing while a six year old witness gave evidence. The South Carolina Supreme Court held that it was wrong to exclude the appellant and stated that the "right to be present and to confront witnesses applies in juvenile court proceedings in the same manner as in criminal court proceedings". Myers (1987:324) argues that juvenile delinquency proceedings are nominally civil and are therefore not based on the Sixth Amendment, which is limited to criminal prosecutions. He believes that in such an instance the confrontation rights are based on the principles of due process. Several states, however, have statutes which specifically confer a right to confrontation in delinquency proceedings.

Child abuse and neglect proceedings in juvenile court are civil in nature, and therefore the rights of confrontation in terms of the Sixth Amendment do not apply. This was supported by the decision in *In re M.W.*, 374 N.W. 2d 889 (S.D. 1985) where the court at 893 explained that the "constitutional implications of the confrontation clause... are not present in a civil action... We recently held that dependency and neglect proceedings are civil in nature". The rights of confrontation do apply to these proceedings, however, but in terms of the due process clause of the Fourteenth Amendment. In civil and administrative proceedings the rights of confrontation apply through the principles of fundamental fairness and due process of law (Myers 1987:326).

### 3.3 Cross-Examination

The opportunity to cross-examine is a right and not a privilege because it is regarded as an essential safeguard of the accuracy and completeness of evidence (Cleary 1984:47). In *Stevens v Bordenkircher*, 746 F.2d 342 (6th Circ. 1984) the court at 346 remarked that "cross-examination is itself considered to be a fundamental right possessed by criminal defendants".

#### 3.3.1 Right to Cross-examination

The right to cross-examine a witness is encompassed in the Confrontation Clause of the Sixth Amendment as the right to cross-examine the witness who gives evidence against you. This has been accepted by the courts as the most important component of the confrontation right (Myers 1987:300). In *Pointer v Texas supra* the U.S. Supreme Court explained at 406-7 that "a major reason underlying the constitutional confrontation rule is to give a defendant charged with crime an opportunity to cross-examine the witnesses against him". Also in *Douglas v Alabama*, 380 U.S. 415 (1965) the Supreme Court found the right to cross-examine a witness as being more important than the right to confront the witness when they wrote at 418 that in construing the Confrontation Clause "a primary interest secured by it is the right of cross-examination; an adequate opportunity for cross-examination may satisfy the clause even in the absence of physical confrontation". In *Davis v Alaska*, 415 U.S. 308 (1974) the Supreme Court explained at 315-6 that "[t]he main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination".

Wigmore (1974:150) explains that confrontation is "merely another term for the test of cross-examination". In fact, he regards confrontation as simply being the preliminary step to ensuring an opportunity for cross-examination. He explains his view as follows:

"The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination. The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers".

This approach has been endorsed by the Supreme Court in a number of decisions. In *People v Johnson*, 146 Ill.App.3d 640, 497 N.E.2d 308 (1986) the court explained at 312-13 that "[o]ur supreme court, quoting Dean

Wigmore, has stated that cross-examination is the rule's 'main and essential purpose' and that the advantage obtained by the personal appearance of the witness at trial is 'secondary', a result 'accidentally' associated with the process of confrontation". In *United States v Quick*, 22 M.J. 722 (A.C.M.R. 1986) the court explained at 725 that "[t]his 'opportunity' for cross-examination... may be adequate to satisfy the requirements of the confrontation clause". Other writers believe that Wigmore took too narrow a view of the Confrontation Clause, and that it is much broader than he assumed it to be (Myers 1987:301).

The right to cross-examine is also regarded as an essential element of due process. The due process clause as found in the Fourteenth Amendment requires that all judicial proceedings comply with the principles of fundamental fairness. This was explained by the U.S. Supreme Court in *Chambers v Mississippi*, 410 U.S. 284 (1973) at 291:

"The rights to confront and cross-examine witnesses and to call witnesses on one's own behalf have long been recognised as essential to due process... It is indeed 'an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal'".

Cross-examination is lauded as being the best available safeguard against the risks of ambiguity, lack of memory and misperception (Myers 1987:296). Further, Myers (1987:299) explains that cross-examination is designed to reveal any "deficiencies in the witness's ability to observe, remember, and relate, and to disclose lack of sincerity or outright fabrication". 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" (Gembala and Serritella 1992:16). In *Chambers v Mississippi supra* the court explained at 291 that cross-examination "helps assure the 'accuracy of the truth-determining process'".

### **3.3.2 Limitations on the right to Cross-examination**

Although cross-examination is regarded as the most important of the confrontation rights, it is not absolute. In terms of Federal Rule of Evidence 611 the trial court has a discretion to control the way in which witnesses are questioned. Rule 611(a) provides:

"The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment".

The presiding officer can use this discretion with which he is vested to place reasonable limits on the cross-examination of witnesses. In *Delaware v Van Arsdall*, 106 S.Ct. 1431 (1986) the Supreme Court confirmed this approach at 1435:

"[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on ... cross-examination based on concerns about, among other others, harassment [sic], prejudice, confusion of the issues, the witness's safety, or interrogation that is repetitive or marginally relevant".

A balance has to be struck between the accused's right to cross-examination and the court's power to limit cross-examination. In *Stevens v Bordenkircher supra* at 346 the court said that "a balance must be struck between permitting a trial court to exercise its sound discretion and affording a criminal defendant the opportunity to expose bias and prejudice".

The accused's right to cross-examination, however, can only be overcome where there are compelling reasons (Westen 1978:581). In *Davis v Alaska supra* the state called a juvenile as a witness. The latter had previously been declared a juvenile delinquent and was on probation. The defence wanted to question him about this to show that there was possible bias on the part of the juvenile to please the prosecution. The trial judge did not allow the defence to put these questions to the witness because Alaska had a statutory privilege which allowed such information to be withheld in order to protect juvenile delinquents. The U.S. Supreme Court reversed the decision on the ground that the defendant's right of confrontation outweighed the state's interest.

The court has the power to limit cross-examination in the following instances:

### *Embarrassing questions*

The court does have the power to limit questions which may be very embarrassing for the child. In *State v John C.*, 503 A.2d 1296 (Me. 1986) the court held that it was proper to exclude embarrassing questions. Where a charge of sexual abuse is involved, the child may be asked questions which are very intimate and which the child may find very embarrassing. Since the questions here would be very relevant due to the nature of the case, the accused would be entitled to cross-examine on these aspects (Myers 1987:194).

### *Irrelevant questions*

The court can limit questions which are irrelevant or marginally so (Myers 1987:194).

### *Undue consumption of time*

Federal Rule of Evidence 611(a) expressly provides that the court has the power to curtail cross-examination "to avoid needless consumption of time" or to limit the use of repetitive questioning (Myers 1987:194).

### *Confusing or ambiguous questions*

The court can limit questions which are ambiguous or confusing. The court may ask counsel to rephrase questions in a manner which would be understandable to the child. This power is especially important in the case of children who are easily confused by very long or ambiguous questions (Myers 1987:194-5). The California Evidence Code 5765(b) (West 1987 Supp.) provides specifically for this problem:

"With a witness under the age of 14, the court shall take special care to protect him or her from undue harassment or embarrassment, and to restrict the unnecessary repetition of questions. The court shall also take special care to insure that questions are stated in a form which is appropriate to the age of the witness. The court may in the interests of justice, on objection by a party, forbid the asking of a question which is in a form that is not reasonably likely to be understood by a person of the age of the witness".

### *Questions aimed at harassing witnesses*

The court has the inherent power to limit questions which are designed to harass or annoy a witness (Myers 1987:195).

### *Prejudicial questions*

Questions which are prejudicial to a witness's interests may be excluded by the court (Myers 1987:195).

### *Questions which elicit inadmissible evidence*

The court may exclude questions, the answers to which would include inadmissible evidence (Myers 1987:195).

### *Rape shield laws*

It is traumatic for a victim to have to undergo a rape or sexual assault trial and humiliating to reveal the intimate details of what was done to a room filled with strangers. In addition to this, evidence could be led about the victim's previous sexual history which has the result of placing the victim on trial with the accused. As a result of this, certain states enacted statutes which are known as rape shield laws and which function to limit questions about the complainant's prior sexual behaviour (Myers 1987:218).

Rule 412 of the Federal Rules of Evidence is a rape shield statute and provides that reputation or opinion evidence about the complainant's prior sexual life will be inadmissible. Rule 412(a) provides:

"Notwithstanding any other provision of law, in a criminal case in which a person is accused of rape or of assault with intent to commit rape, reputation or opinion evidence of the past sexual behaviour of an alleged victim of such rape or assault is not admissible."

However, in *State v Johns*, 615 P.2d 1260 (Utah 1980) the court accepted at 1263-4 that "there are some cases in which the reputation of the prosecutrix and... specific prior sexual activity may become relevant and its probative value outweigh the detrimental impact of its introduction".

The rule provides three exceptions to the introduction of evidence of specific instances of prior sexual conduct. Firstly, this evidence may be introduced to the extent required by the constitution. Secondly, it will become admissible where the evidence relates to the issue of whether the defendant was the source of semen or injury. The

purpose here is simply to give the defendant an opportunity to explain that somebody else could be responsible for the semen or injury sustained by the complainant (Myers 1987:218-9). This question came before the court in *People v Mikula*, 84 Mich.App. 108, 269 N.W.2d 195 (1978) the state introduced the evidence of a doctor who had examined the child complainant and who gave evidence that the complainant did not have an intact hymen and that her vaginal opening was unusually large for a child of her age (at 197). The accused wanted to introduce evidence of the complainant's prior sexual experience to show that he had not caused the broken hymen. On appeal the court held that the accused's evidence ought to have been admitted, and explained at 198 that:

"It is well settled that where the prosecution substantiates its case by demonstrating a physical condition of the complainant from which the jury might infer the occurrence of a sexual act, the defendant must be permitted to meet that evidence with proof of the complainant's prior sexual activity tending to show that another person might have been responsible for her condition."

The third exception to the rule against introducing evidence of a victim's prior sexual activity, as set out in Rule 412(b)(2)(B), is where the accused wishes to lead evidence that there was previous sexual contact between the complainant and himself, and the question of consent is at issue in the present case (Myers 1987:218). This section will seldom be applicable where children are concerned, since they do not have the capacity to consent.

### *Principles of Fairness*

Despite the existence of Rule 412, there are circumstances in which certain prior conduct should be introduced. Myers (1987:221) gives the example of a child complainant who gives evidence that she had no sexual experience before the alleged assault. The accused should, in fairness, be entitled to introduce evidence that contradicts this. Here the court will have to balance the interests of the child with that of the accused.

In *People v Rice*, 709 P.2d 67 (Colo.Ct.App. 1985) the accused argued that the state was trying to portray the complainant, a twelve year old girl, as young and unsophisticated. The defence wanted to cross-examine the child about prior sexual conduct to show that she was not, in fact, so sexually unsophisticated. The trial court refused to allow the defence to cross-examine on this point, and the appeal court upheld the decision, explaining their reasoning at 68 as follows:

"Defendant asserts that his constitutional right to confrontation was violated because he was unable to cross-examine the victim concerning any prior sexual experience she might have had, thus refuting the prosecution's implication that she was young and sexually unsophisticated. ... the basic purpose of the [rape shield] statute is 'to protect rape and sexual assault victims from humiliating public fishing expeditions into their past sexual conduct without a showing that such evidence would be relevant to some issue in the pending case'..."

In order to be admissible, the evidence would have to be relevant, and in order to determine this, the court would have to weigh up the protection afforded the witness against the interests of the defendant.

### 3.4 Confrontation

#### 3.4.1 Introduction

Although the rights entrenched in the Sixth Amendment are generally referred to as the Confrontation Clause, confrontation is only one aspect of these rights. This right derives from both the Sixth Amendment and the due process clause contained in the Fifth Amendment (Oseid 1985:1386). The state must, in terms of this right, present its evidence against the accused in what is traditionally regarded as the most reliable form, namely direct evidence in an open court. Westen (1978:578) argues that this may be viewed as a form of the 'best evidence' rule. This duty to ensure the presence of witnesses in court is based on two elements: the witness must appear in court so that the presiding officer or the jury can observe and evaluate his demeanour and credibility, and the defendant must be afforded an opportunity to face the person accusing him (Myers 1987:302).

These two elements of the Confrontation Clause are clearly described in *Mattes v Gagnon*, 700 F.2d 1096 (7th Circ.1983) where it was stated at 1101 that the "Confrontation Clause reflects a preference for face-to-face confrontation at trial, enabling the trier of fact to directly observe the demeanour of the witness in evaluating his credibility and rendering less likely false accusations by the witness due to the presence of the accused". In *Mattox v United States*, 156 U.S. 237 (1895) the Supreme Court emphasised that it was important for witnesses to appear before the jury "in order that [the jury] may look at him, and judge by his demeanour upon the stand and the manner in which he gives his testimony whether he is worthy of belief" (at 242-3).

From the above *dicta*, it becomes clear that the framers of the Confrontation Clause contemplated that confrontation at the trial be face-to-face. This was expressly stated by the U.S. Supreme Court as early as 1899 in *Kirby v United States*, 174 U.S. 47 (1899) at 55 where a witness in terms of the Confrontation Clause was described as someone "upon whom [the defendant] can look while being tried".

This practice of confrontation developed in response to the practice in England, since abandoned, of convicting an accused on the basis of affidavits. The U.S. Supreme Court explained the historical justification in *California v Green*, 399 U.S. 149 (1970) as follows at 156:

"the particular vice that gave impetus to the confrontation claim was the practice of trying defendants on 'evidence' which consisted solely of ex parte affidavits or depositions secured by the examining magistrates, thus denying the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact."

The purpose, therefore, of insisting on face-to-face confrontation is the belief that it is difficult to lie about someone in their presence. In *Ohio v Roberts supra* the Supreme Court explained at 63 that insisting on the presence of a witness at a trial "undoubtedly makes it more difficult to lie against someone, particularly if that person is an accused and present at trial." And in *United States v Benfield supra* at 821 the purpose was explained as being the belief that "in some undefined but real way recollection, veracity, and communication are influenced by face-to-face challenge".

According to Hill and Hill (1987:826) this argument does not pertain to children who have to testify in court:

"Since children did not testify in the eighteenth century in the United States, the draftsmen may have envisioned two men facing one another in court. In this scenario the intuitive belief that facing the accused would make the accuser more honest may have had some truth to it. However, psychological pressures are different when the witness is a child who does not understand why she must again face her attacker. By requiring a child to testify in court as to incidents surrounding sexual abuse or another traumatising event, the criminal justice system treats children like adult men."

### 3.4.2 Limitations on the Right to Confrontation

Although it is preferable for a witness giving evidence against an accused to be present in court so that the latter may confront him face-to-face, this right is also not absolute. There are, for instance, a number of common law exceptions where the statements of a witness are admissible although the witness does not face the accused in court, such as dying declarations or where the defendant waives the right to confront (Myers 1987:304). In *Illinois v Allen*, 397 U.S. 337 (1970) the U.S. Supreme Court explained that an accused could forfeit his right to be present at a trial if, after he has been warned by the judge, the accused continues to behave in a disruptive fashion, obstructs the dignity of the court, and interferes with the proper administration of courtroom procedure. Also in *United States v Carlson*, 547 F.2d 1346 (8th Cir. 1976), cert. denied, 431 U.S. 914 (1977) the court held that an accused may waive his right to confrontation where he intimidates or threatens a witness.

The right to confrontation will, therefore, yield to competing interests that outweigh the rights of the accused. In *Ohio v Roberts supra* the Supreme Court accepted that competing interests could give rise to the confrontation right being dispensed with at the trial. In *Mattox v United States supra* the court at 243 said that "general rules of law of this kind, however, beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case".

The manner in which children are treated in court is a consideration which over recent years has received a great deal of public attention. There is ample evidence that many children experience trauma when confronting the accused in a courtroom. In fact, many psychologists believe that "confrontation with the legal system is a second and separate trauma, a process of revictimization" (Dziech and Schudson 1989:12). This is even more so in the case of child victims of sexual abuse where Myers (1987:383) alleges "the court process can be as difficult as the sexual abuse itself". In *State v Boodry*, 96 Ariz. 259, 394 P.2d 196, cert. denied, 379 U.S. 949 (1964) the Arizona Supreme Court, in determining the admissibility of hearsay statements of a young child, expressed the view that "a five year old girl should be spared the necessity of testifying against her father in a rape case if at all possible... We do not agree... that five year old girls should be dragged into court to testify and to re-live the horrifying experience of being raped."

A further competing interest accepted by the courts in *Ohio v Roberts supra* is the interest of the state in implementing "effective law enforcement". This is also an interest which would be relevant to litigation involving children, since the state is seen as carrying out the role of a *paterfamilias* insofar as the protection of children is

concerned (Myers 1987:307). The policy here is regarded as an important one since child sex abuse is viewed as a steadily increasing problem with only a small percentage of the cases ever getting to trial (Bjerregaard 1989:167). The state, therefore, has an interest in protecting children who give evidence in court, and this interest will compete with the rights which the defendant has to confrontation. This is supported by the *Mattox v United State's* decision *supra* where the court at 243 explained that the Confrontation Clause will in certain instances yield "to consideration of public policy and the necessities of the case".

Since it has been accepted that the right of confrontation may in certain circumstances yield to other competing interests, the question is whether there is 'a minimum substantive standard' that has to be fulfilled before the right to confrontation is waived. Myers (1987:305) in his discussion of this "minimum standard argues that there is doubt regarding whether there is such a standard since the Supreme Court decisions have used the word 'may'. However, the lower courts have interpreted the Supreme Court decisions as meaning that there is such a minimum standard which has to be satisfied.

Since the purpose of confrontation is to ensure that evidence is accurate, the standard will focus on the reliability of the evidence. The evidence must be reliable in order to be admissible (Myers 1987:305). This standard has been referred to in a number of cases. In *Ohio v Roberts (supra)* the court explained the standard as follows at 65:

"Reflecting its underlying purpose to augment accuracy in the fact finding process by ensuring the defendant an effective means to test adverse evidence, the Clause countenances only hearsay marked with such trustworthiness that 'there is no material departure from the reason of the general rule'."

Also in *Mancusi v Stubbs*, 408 U.S. 204 (1972) the court, in discussing the standard, stated at 213 that "[t]he focus of the court's concern has been to insure that there are 'indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant'".

In evaluating whether the accused's rights to confrontation should yield to a competing interest, the primary consideration is reliability. This is, however, not the only consideration. Another factor is the importance of the evidence. The more crucial the evidence is for the state's case, the greater the need for the evidence to be reliable, in the case, for instance, where the principal witness is unavailable or his statement is the only evidence against the defendant (Myers 1987:306).

In *Dutton v Evans*, 400 U.S. 74 (1970) the court was of the opinion that when hearsay evidence is crucial to the state's case and potentially devastating to the accused, the burden on the prosecution to produce the witness increases. A further factor to be considered is whether there are any alternatives to infringing the accused's rights. Any infringement must intrude as minimally as possible (Bjerregaard 1989:167).

### 3.4.2.1 Unavailability of a Witness

Since it has been accepted that the accused's right to confrontation is not absolute, and can give way to competing interests, the next question that arises is how these interests are to be balanced. The balancing of these interests arises where the witness is not available to confront the defendant at the trial or is not available for cross-examination. The term 'available' was discussed in *State v Doe*, 105 Wash. 2d 889, 719 P.2d 554 (1986) at 557 as denoting "a witness who can be confronted and cross-examined".

The competing interests have to be balanced once the witness is found to be unavailable. The following is a summarised version of the instances when a witness is considered to be unavailable, as listed by Myers (1985:308-314):

- i. Where a witness has a privilege available, the witness will be considered to be legally unavailable, for example where privilege against self-incrimination is claimed. This will very rarely be applicable to cases involving child witnesses.
- ii. A witness who refuses to answer questions is considered to be unavailable. This is particularly applicable to children who sometimes "clam up" when they are on the stand and refuse to testify.
- iii. Where a witness has forgotten an event, the witness may be regarded as unavailable. This will depend on the amount of detail that has been forgotten. The constitution grants the accused an opportunity for effective cross-examination, not necessarily perfect cross-examination. This was held by the court in *Delaware v Fensterer*, 106 S.Ct. 292 (1985) where they explained at 295 that "the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way and to whatever extent the defense may wish." Children, especially those who are young, very often forget the details of an event. If the lack of memory is so great, the child may be considered to be unavailable.
- iv. A witness may be regarded as unavailable if the witness is physically ill or incapacitated. Here the court will have to consider whether the person will recover and when, and whether there will be any prejudice caused to the accused by the delay.
- v. If a witness suffers from a mental illness, is mentally retarded, or has a brain injury, the witness may be considered to be unavailable. This will depend on whether the condition is permanent or whether the witness will be able to overcome the impairment. In *Walden v Sears, Roebuck & Co*, 654 F.2d 443 (5th Cir. 1981) a six year old boy fell off a bicycle and suffered a head injury. A civil case followed and the boy gave a deposition nineteen months after the incident in which he described the accident in detail. The trial took place nine years after the accident by which stage the child had forgotten the details of the event due to injuries sustained in the accident. The trial court excluded the deposition, but the Fifth Circuit Court reversed this decision on the basis that the loss of memory rendered the child unavailable.

- vi. Witnesses who experience psychological trauma when testifying may be considered psychologically unavailable. This is especially applicable in the case of children, who find testifying in court traumatic and sometimes even terrifying. To support this, Myers (1987:310) quotes Parkers who says that "[c]riminal procedures that operate solely to vindicate a societal interest often fail to take into account the psychological damage that can be done to a young child in the role of witness".

Some commentators argue that in order to be psychologically unavailable, the court must determine that it would be psychologically impossible for the witness to give evidence in court. McCormick argues that impossibility is an unrealistic and an unnecessarily high standard. Rather the court should evaluate all the circumstances of the case in balancing the interests (Cleary 1984:754). In *People v Gomez*, 26 Cal.App. 3d 225, 103 Cal.Rptr. 80 (1972) the witness was a rape victim. Two psychiatrists gave evidence that she was very vulnerable to stress, had a tendency to seizures which were difficult to diagnose and treat and that her mental health would be affected if she had to give evidence. The court held at 83-84 that in order to be psychologically unavailable, the witness must have an illness or infirmity which is severe and should "render the witness's attendance, or his testifying, relatively impossible and not merely inconvenient" In *Warren v United States*, 43 A.2d 821 (D.C. 1981) the court accepted evidence by a psychiatrist that the victim would experience far greater mental anguish than normally accompanies a court appearance, and that if she were forced to appear in court she would suffer severe psychosis and perhaps even suicide, and found the witness unavailable (at 828).

The problem that arises in relation to children is determining when a child's fear of giving evidence reaches the stage of psychological unavailability. The fear experienced by the child must be "substantially greater" than the fear the child normally experiences when giving evidence. (Myers 1987:311). In determining whether a child is psychologically unavailable, the court will take into account the following factors: the psychological history of the child, the nature of the crime, the degree of violence involved, any psychological harm that might arise if the child has to give evidence in court and the importance of the evidence for the prosecution.

The court has to decide as a preliminary question whether somebody is psychologically unavailable. In coming to this decision the judge is often assisted by the evidence of psychiatrists or psychologists. Evidence given by lay persons or by parents will not be sufficient to establish unavailability. In *State v Gollon*, 115 Wis.2d 592, 340 N.W.2d 912 (Ct.App 1983) a mother testified that her six year old child was too frightened to testify. The court stated the following at 916:

"Testimony by a parent as to the existence of the constitutional fact of unavailability does not, *ipso facto*, establish the fact. J.L's mother's testimony that she was too afraid to testify is insufficient to satisfy the unavailability requirement. If a child is physically available, whether the child is able to testify should be judicially determined."

There is some authority that if the child is physically available, she should appear in court so that the judge can determine unavailability. However, in *United States v Inadi*, 106 S.Ct. 1121 (1986) the court held

that any rule which requires the prosecution to call a witness to establish unavailability would be "indefensible".

A number of states have recognised that testifying in court can give rise to trauma, and have enacted statutes which authorise the courts to declare a witness psychologically unavailable. The Californian Evidence Code 240(c) provides that a witness can be declared unavailable if "[e]xpert testimony... establishes that... mental trauma resulting from an alleged crime has caused harm to a witness of sufficient severity that the witness... is unable to testify without suffering substantial trauma". The Indiana Code declares a child to be unavailable if a psychiatrist has certified that the child would experience trauma if the child participated in the trial. These statutes simply confirm the common law position, that the courts have to consider all the circumstances of the case in the light of the accused's right to confrontation.

- vii. Recantation could lead to a finding of unavailability. This often occurs in child abuse litigation where a child is able to tell his story to the police or a psychologist but at the trial recants and denies that the abuse ever took place. In such a situation the state may decide to hand in the child's previous statement. If the child cannot be cross-examined about the details of the crime, then he will be unavailable. But if he can be cross-examined about the event and his reasons for recanting, then he will be available.
- viii If a child is incompetent to testify as a witness, then he will be unavailable since he will be unable to be cross-examined. In *State v Ryan*, 103 Wash. 2d 165, 691 P.2d 197 (1984) Justice Dolliver explained at 207 that "if... a finding of incompetency is made by the trial court, this then may be considered the legal equivalent of unavailability". In *State v Doe*, *supra* the court explained it as follows at 557:

"While the concepts of availability and competency do not overlap entirely, it is quite clear that an incompetent child is not available. The term 'available' denotes a witness who can be confronted and cross-examined... A child unable to take the stand obviously cannot respond to opposing counsel's questions".

If the state argues that a child is incompetent to give evidence, does the state have to produce the child so that the court can decide on the competency? This question came before the court in *State v Campbell*, 299 Or. 633, 705 P.2d 694 (1985) where both the state and defence decided that the three year old child witness was incompetent. The Oregon Supreme Court disapproved of this and held at 706 that "before any out-of-court declaration may be offered against a defendant in a criminal trial, the witness must be produced and declared incompetent by the court". *State v Gollon supra* also found that if a child is physically available, the child should appear in court to determine psychological unavailability. However, as mentioned *supra* in *United States v Inadi*, the Supreme Court regarded this procedure as "indefensible".

### 3.4.2.2 Duty to demonstrate unavailability

There is an obligation on the state to produce a witness or to demonstrate that the witness is not available. The purpose of this is to ensure accuracy in criminal trials by maximising face-to-face confrontation at the trial (Myers 1987:315).

The two leading cases on this point are *Ohio v Roberts supra* and *United States v Inadi supra*. In the *Roberts* case the admissibility of evidence which had been given at a preliminary hearing was at issue since the witness was not available at the trial. At 65 the court held that the prosecution must either produce the witness or show that the witness is unavailable before the court can admit the evidence of a witness from a prior court proceeding in lieu of the witness giving evidence personally at the trial. In the *Inadi* case, on the other hand, the court held that in the particular case of co-conspirators, the Confrontation Clause did not require the prosecution to show that the witness was unavailable, since this was an exception catered for by the federal rules.

These two cases have caused some confusion since in the *Roberts* decision the Supreme Court imposed the unavailability requirements for the admissibility of previous statements whereas in the *Inadi* case they held it did not apply in the case of co-conspirators (Myers 1987:316). The Supreme Court explained the reason for the difference between the two decisions in the *Inadi* case at 1126:

"There are good reasons why the availability rule developed in cases involving former testimony is not applicable to co-conspirator's out-of-court statements. Unlike some other exceptions to the hearsay rules, or the exemption from the hearsay definition involved in this case, former testimony often is only a weaker substitute for live testimony. It seldom has independent evidentiary significance of its own, but is intended to replace live testimony. If the declarant is available and the same information can be presented to the trier of fact in the form of live testimony, with full cross-examination and the opportunity to view the demeanour of the declarant, there is little justification for relying on the weaker version. When two versions of the same evidence are available, longstanding principles of the law of hearsay, applicable as well to Confrontation Clause analysis, favour the better evidence... But if the declarant is unavailable, no "better" version of the evidence exists, and the former testimony may be admitted as a substitute for live testimony on the same point. The same principles do not apply to co-conspirator statements. Because they are made while the conspiracy is in progress, such statements provide evidence of the conspiracy's context that cannot be replicated, even if the declarant testifies to the same matters in court... Even when the declarant takes the stand, his in-court testimony seldom will reproduce a significant portion of the evidentiary value of his statements during the course of the conspiracy... co-conspirator statements derive much of their value from the fact that they are made in a context very different from trial, and therefore are usually irreplaceable as substantive evidence".

The difference, therefore, would seem to be based on the strength of the evidence. Prior out-of-court statements are a 'weaker version' of the evidence given at a trial, whereas the prior statements of co-conspirators are a 'better version' of the evidence given at a trial.

Myers (1987:318-322) argues that in the case of hearsay exceptions relating to child witnesses, the availability rule as set out in the *Roberts* case should be applied. Rules of evidence, as well as the Confrontation Clause, favour the better evidence, which would be personal evidence in court subject to cross-examination. If the state wishes

to use the weaker evidence, then the burden will be on the state to establish the unavailability of the witness. However, as *Roberts* itself acknowledged in a note at 65, a "demonstration of unavailability ... is not always required". The wisest course, Myers argues, is to steer away from dogmatic rigidity. Rather, judges should consider the facts of each case, looking at the importance and reliability of the hearsay as opposed to the witness giving evidence personally at the trial.

Dziech and Schudson (1989:137) argue that judges have prevented the prosecution of offences against children by misinterpreting the standards set out in the *Roberts* case *supra*. Firstly, judges do not distinguish between a child being physically unavailable and being psychologically unavailable. Judges frequently refuse to hear out-of-court statements made by children to adults because the child is 'available' to testify. Judges, therefore, seem to concentrate on the physical availability of the child. In 1988 the Kansas Supreme Court admitted the out-of-court statement of a child witness and distinguished between physical and testimonial unavailability in *State v Kuone*, Kan.Sup.Ct., no.60, 446, 6/3/88. The court found that testimonial unavailability may be based on potential psychological trauma when there is expert evidence that psychological injury will probably ensue from further testimony; that the degree of probable injury is substantial; that the injury will continue for a substantial duration; and that the injury will be greater than normally experienced by the average witness giving evidence. Secondly, judges do not understand that "indicia of reliability" do not have to be absolute. The judge does not have to be certain that the out-of-court statement is true, all that is required is that it must be sufficiently reliable for the jury to be able to assess whether it is true.

Dziech and Schudson (1989:137) use the decision in the *Inadi* case to support their argument. In this case the court did not use the question of 'availability' as a prerequisite for admitting out-of-court statements and, in fact, explained that judges were misinterpreting the *Roberts* decision and excluding evidence that should have been placed before the jury. The real basis for the admission of out-of-court statements was dependent on the value of the statement. The court in *Inadi* challenged the proposition that statements made on an earlier occasion and out-of-court are less trustworthy than those made before the court. As mentioned above, the court was of the opinion that some statements become more valuable because of the context in which they are made. At 399 the court said that some "statements derive much of their value from the fact they are made in a context very different from trial, and therefore are usually irreplaceable as substantive evidence".

According to Dziech and Schudson (1989:138) this decision has enormous implications for cases involving child witnesses since out-of-court statements may carry greater weight because they were spoken at a time closer to the incident and would therefore be less affected by memory loss or suggestion. Although the *Inadi* decision does not deal with child witnesses specifically, Dziech and Schudson feel that it does establish "a solid basis for admission of children's statements".

In fact, the principles expounded in the *Inadi* case were applied to child witnesses in a number of subsequent cases. In *State v Robinson*, 735 P.2d 801 (Ariz.1987) the Arizona Supreme Court admitted the statement which a ten year old made to a psychologist and said at 814:

"An additional factor of great weight in this case is the unlikelihood that more trustworthy or probative evidence could have been produced by [the child's] in-court testimony. A young child's spontaneous statements about so unusual a personal experience, made soon after the event, are at least as reliable as the child's in-court testimony, given months later, after innumerable interviews and interrogations may have distorted the child's memory. Indeed, [her] statements are valuable and trustworthy in part because they exude the naïveté and curiosity of a small child, and were made in circumstances very different from interrogation or a criminal trial".

On the other hand, the court did not admit the out-of-court statements of a child witness in *State v Allen*, Ariz.Sup.Ct., no.CR-87-0087-PR, 6/2/88 because they did not have the "ring of truth". The court distinguished this case from the facts in *Robinson supra* because it was not convinced of the reliability of the statements. The child's knowledge of sexual matters, possible motives to lie, taken together with the lack of spontaneity at disclosure caused the court to come to the conclusion that the child's evidence had to be tested by cross-examination to ensure a fair trial.

### 3.4.2.3 Waiver and Forfeiture of Confrontation Rights

The right to confrontation is a personal right which belongs to the accused himself, and he is therefore entitled to waive the right if he so chooses. This is in line with the United States Supreme Court decision in *United States v Carlson supra* where the court had the following to say at 1357-8:

"The Sixth Amendment right of confrontation is, by its language and historical underpinnings, a personal right of the accused and is intended for his benefit. As such, this right, like other federally guaranteed constitutional rights, can be waived by the accused. To constitute a valid waiver there must be 'an intentional relinquishment or abandonment of a known right or privilege' by the accused."

To amount to a valid waiver of the right to confrontation, the waiver must be "voluntary, knowing and intelligent" (Myers 1987:322). The accused could agree, for instance, to accept hearsay evidence or decide not to cross-examine a witness. An accused can also forfeit his rights to confrontation through his own misconduct (Myers 1987:323). An accused who continues to be disruptive or insulting after he has been warned to refrain from his behaviour, can be removed from the courtroom and would thus lose his right to confrontation. In *State v Black*, 291 N.W.2d 208 (Minn. 1980) the defendant intimidated an adult witness into silence and forfeited his right to confront. Similarly in *United States v Carlson supra* the Eighth Circuit Court of Appeals held that a defendant cannot be protected by his own misconduct when they explained at 1359 that he "cannot be heard to complain that he was denied the right of cross-examination and confrontation when he himself was the instrument of the denial".

### 3.4.3 Child Witnesses and the Right to Confrontation

A number of professionals believe that the trauma induced by appearing in court can be reduced for children by allowing them to testify by means of audiovisual equipment. Added to this is the further argument that the use of such equipment may in fact increase the accuracy of the evidence (Myers 1987:385). These are the two major concerns about children as witnesses, according to Berliner (1985:169): the "additional psychological trauma" which accompanies participation in a criminal trial and the issue whether children can be effective witnesses in adversarial

proceedings. This was discussed in the case of *State v Sheppard*, 197 N.J. Super. 411, 484 A.2d 1330 (1984) where a ten year old victim was too scared of her stepfather to give evidence because he had threatened to kill her if she told anybody what he had done. The court summarised the evidence of a psychiatrist, who had been called as an expert, as follows at 1332:

"It was [the doctor's] opinion, however, that avoidance of an in-court appearance through the use of video equipment would improve the accuracy of her testimony. He provided reasons: An adult witness, testifying in court, surrounded by the usual court atmosphere, aware of the black-robed judge, a jury, attorneys, members of the public, uniformed attendants, a flag, and religious overtones, is more likely to testify truthfully. The opposite is true of a child, particularly when the setting involves a relative accused by her of sexual abuse. She becomes fearful, guilty, anxious, and traumatised. In most cases, she will have been exposed to both pleasant and abusive associations with the accused. As a consequence, she has ambivalent feelings. Anger against the relative is opposed by feelings of care, not only for him but also for other family members who may be harmed by a conviction. There is guilt as well as satisfaction in the prospect of sending the abuser to prison. These mixed feelings, accompanied by the fear, guilt, and anxiety, mitigate the truth, producing inaccurate testimony. The video arrangement, because it avoids courtroom stress, relieves these feelings, thereby improving the accuracy of the testimony."

Ordway (1981:137) argues that the natural disabilities which children have, for instance a limited ability to communicate in court and difficulty in explaining concepts of time, are intensified when the child is afraid or under emotional stress. Incest victims, in particular, find courtroom procedures especially traumatic. According to Meyers (1980:54) incest cases are so difficult to prosecute that "prosecutors interested in a good conviction rate won't touch them".

There are a number of states which authorise alternative methods of giving evidence where child witnesses are concerned. The following alternatives will be discussed: The rearrangement of the courtroom, videotaped depositions, preliminary hearing testimony, closed-circuit television, and videotaped interviews.

### 3.4.3.1 Rearranging the Courtroom

From as early as 1899 the courts were using *ad hoc* methods to protect child witnesses against confrontation. In *State v Mannion*, 57. Pac. Rpt. 542 (1899) the accused was charged with sexually assaulting his six year old daughter. After the child had taken the oath, she said "I am afraid to tell, because I am afraid of my papa" (at 544). The accused was sitting with his legal representative in front of the child. The court then ordered the accused to sit in a corner of the court room while the child gave evidence. He was unable to see the child, nor could he hear her evidence as she was seated with her back to him.

On appeal to the Utah Supreme Court the principle was supported and the court explained at 545 that "where the witness is young, the court should have considerable latitude in protecting the witness" with the proviso that the defendant's constitutional rights must be protected. The court acknowledged that the constitutional provision could be complied with "even though the prisoner be not permitted to sit immediately in front of the witness, when such position would cause intimidation, and prevent the eliciting of testimony" (at 545). However, the court found on the facts in this particular case that the arrangement did abridge the accused's right of confrontation. In *Herbert*

*v Superior Court*, 117 Cal.App.3d 661, 172 Cal.Rptr. 850 (1981) the court found that the defendant's right to confrontation was abridged when he was seated so that he could hear but not see a five year old girl in a sexual assault prosecution. In *State v Strable*, 313 N.W.2d 497 (Iowa 1981) the witness testified behind a blackboard and the court held that, at most, it was a harmless error under the circumstances of the case.

Whitcomb et al (1985:55) explain that in practice many prosecutors use unobtrusive ways to shield the child from the accused, for instance, by using their own bodies to block the child's view of the accused while the child's evidence is being led. Others tell the child to look elsewhere when they give evidence.

### 3.4.3.2 Videotaped Depositions

A deposition, as defined by Myers (1987:388), is an out-of-court statement which is admitted at the trial to prove the truth of its contents. The use of depositions at criminal trials is authorised by Federal Rule of Criminal Procedure 15 which provides:

- "(a) When Taken. Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition...
- (b) Use. At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used as substantive evidence if the witness is unavailable, as unavailability is defined in Rule 804(a) of the Federal Rules of Evidence, or the witness gives testimony at the trial or hearing inconsistent with his deposition."

A growing number of states have enacted provisions which enable judges to authorise the video depositions of child witnesses. Usually the videotaping occurs in the judge's chambers or a similar environment and the accused is given the opportunity to cross-examine the child. When these procedures are followed the videotape will be admitted in lieu of the child testifying at the trial. The majority of the statutes require that the child must be unavailable (Hill and Hill 1987:819). However, the statutes vary from state to state. Some provide that when a video deposition has been made, the child may not be called to give evidence at the trial, even though the child may be available. Other statutes only permit depositions when giving evidence personally in court is likely to harm the child psychologically. In Florida and Wisconsin the court will allow the use of the videotape if there is substantial likelihood that the child will suffer 'severe emotional or mental' strain if the child has to give evidence in court. The Arkansas and New Mexico statutes require the court to show 'good cause' before allowing the videotape. Not all the states have an unavailability requirement. The Montana statute states "the victim need not be physically present in the courtroom when the videotape is admitted into evidence" (Hill and Hill 1987:819). The Alaskan Code provides that the deposition takes the place of the child's evidence at the trial unless the trial judge finds that the absence of personal evidence will prejudice the accused. In Colorado the relevant statute provides that the court may admit a videotaped deposition of a victim's evidence if the court finds at the trial that the giving of evidence would cause the victim emotional trauma so that the latter will be medically unavailable (Myers 1987:387-8).

Thus the deposition is admitted at the trial in lieu of the child's evidence and is regarded as "the functional equivalent of testimony at trial" (Myers 1987:388). In *McGuire v State*, 706 S.W.2d 360 (Ark.1986) the accused was charged with raping an eleven year old girl. The prosecutor applied to court that a videotaped deposition be used instead of in-court testimony. Evidence was presented at court that the child was under the care of a psychologist, that she refused to go anywhere, was easily upset and would feel humiliated if she had to appear before the jury. The judge granted the application, basing his decision on an Arkansas statute which authorised the use of videotaped depositions where good cause was shown. This decision was affirmed on appeal and the Arkansas Supreme Court concluded that, although the general rule is that evidence must be given personally at the trial, the videotaped deposition provides "the best substitute" in child abuse cases (at 362).

In *United States v Binder*, 769 F.2d 595 (9th Circ. 1985) the majority of the court described videotaped depositions as "unique". At 601 Judge Skopil explained that "[v]ideotaped evidence is unique. It enables the jury to observe the demeanour and to hear the testimony of the witness. It serves as the functional equivalent of a live witness..." This case indicates the confusion that may arise in deciding whether it is in fact "the equivalent of live testimony". Here a child gave evidence by means of a videotaped deposition. After the trial the jury requested to replay the videotape and the request was granted. The accused appealed on the ground that the request should not have been granted. The Federal Court of Appeals reversed the conviction in a two-to-one decision, basing their decision on the fact that the videotaped deposition was equivalent to a live witness and, therefore, the replaying of the videotape gave an unfair emphasis to the child's evidence.

If the videotaped deposition was considered to be evidence in the sense of weapons or exhibits which are introduced in the course of the trial, then it would be available to the jury for further scrutiny during their deliberations. Dziech and Schudson (1989:152) argue that the videotape is not the same as in-court testimony. They argue that it 'may reduce or enhance a jury's focus on demeanour... [since]... it presents a child in an atmosphere different from that of a courtroom' and should therefore be allowed to be replayed by the jury if they so wish. Nevertheless, other courts have reversed convictions because juries were allowed to replay videotaped depositions during their deliberations, following the decision in *Binder supra*.

There are two approaches to videotaped depositions. Some states treat the videotape as former testimony e.g. South Dakota, Colorado and California. Section 1346(d) of the California Penal Code provides:

"...court may admit the videotape of the victim's testimony at the preliminary hearing as former testimony under section 1291 of the Evidence Code."

As discussed *supra*, these states allow videotapes when "fairness allows" and require that cross-examination must take place during the making of the deposition (Hill and Hill 1987:822) The second approach admits the videotaped evidence at the trial in lieu of the child's direct evidence, for instance, Kentucky, New Mexico, Arkansas and Wisconsin. The Arkansas state has the following proviso, as quoted by Whitcomb et al (1985:63):

"AR 43-2036...neither the presentation nor the preparation of such videotaped deposition shall preclude the prosecutor's calling the minor victim to testify at trial if that is necessary to serve the interests of justice."

This procedure enables the defendant to cross-examine the child on two occasions, once when the videotape is made and again in court. Here the child is actually in a worse position than he would have been if he just gave evidence in court. Kentucky and Texas have a different approach. The videotaped statement of the child will be admissible and the accused will then have an opportunity to cross-examine the child at the trial. Cross-examination will not take place when the videotape is made (Hill and Hill 1987:823). The New Mexico statute dealing with the videotaped deposition, provides as follows:

"In any prosecution for criminal sexual penetration or criminal sexual contact of a minor, upon motion of the district attorney and after notice to the opposing counsel, the district court may, for a good cause shown, order the taking of a videotaped deposition of any alleged victim under the age of sixteen years. The videotaped deposition shall be taken before the judge in chambers in the presence of the district attorney, the defendant and his attorneys. Examination and cross-examination of the alleged victim shall proceed...in the same manner as permitted at trial...Any videotaped deposition taken under the provision of this act...shall be viewed and heard at the trial and entered into the record in lieu of the direct testimony of the alleged victim."

Since the videotaped deposition is prepared specifically for trials, the accused is allowed to be present at the taping and his counsel is permitted to cross-examine the child. In terms of the Arizona statute, the accused's presence is required at the videotaping of a deposition. The relevant provision, as quoted by Hill and Hill (1987:819), provides:

"Upon request of either party, the court may order all questioning of a minor witness to be videotaped in the judge's chambers in the presence of the defendant, defendant's counsel, the prosecuting attorney or plaintiff and plaintiff's counsel as the case may be and the court may for presentation to the jury as evidence at such time as the court determines is proper."

The procedures differ from state to state with laws in Kentucky, Oklahoma and Texas specifying that the child be placed in such a position that the child does not see or hear the defendant during the making of the deposition (Dziech and Schudson 1989:151). According to Whitcomb (1985:63) twelve states require the accused to be present at the trial while seven states insist that the accused be given an opportunity to cross-examine the child. Wisconsin expressly provides that where the accused is not present at the videotaping, the child must testify at the trial.

#### **3.4.3.2.1 Problems Encountered with Videotaped Depositions**

Whitcomb et al (1985:65) conducted research in terms of which they visited a number of jurisdictions, interviewing prosecutors and victim advocates. Many of the professionals interviewed were of the opinion that a videotaped deposition can be more harrowing for a child than actually given evidence in court. Since the deposition is usually done in the judge's chambers or in a room where everyone can be seated around a conference table, the child is then in effect brought into closer proximity with the accused. Confronting the accused across a table is likely to be more stressful than confronting him across a courtroom. In fact, prosecutors believe that a videotaped deposition simply substitutes one formal procedure for another, and a child who is able to perform well at such a deposition will in all likelihood perform well at the trial. Since cross-examination is a harrowing experience for children, allowing the defence to cross-examine a child witness in a room where they are closer to each other and the child has no support person, actually removes the benefit of using the smaller room (Hill and Hill 1987:822).

For this reason, the use of videotaped depositions has lost support, especially in those states where the child is not separated from the accused while the deposition is being made. In *State v Twist*, 528 A.2d 1250 Me. 1987), a Maine Supreme Court case, and *State v Cooper*, 353 S.E. 2d 441 (S.C. 1986), a South Carolina Supreme Court case, children gave evidence by means of videotaped depositions. The accused were present but they were separated from the children by one-way mirrors. The accused had contact with their counsel and could see the children, but the latter could not see them. The respective Supreme Courts upheld the convictions and approved the use of the videotaped depositions even though screens had been used.

A further problem arises where a particular statute requires that the child must be physically or testimonially unavailable. The child then has to endure a battery of medical and psychiatric tests to determine whether he is physically or testimonially capable of giving evidence. And, as mentioned above, if the child is able to cope with a videotaped deposition, he will in all likelihood be able to cope with the trial (Whitcomb et al 1985:65). This raises the dilemma of showing that a child who was available to testify on videotape is unavailable to testify at the trial. This can create the problem of having to prove that the child is psychologically unavailable to testify when the child has in fact testified successfully at the preliminary hearing. To avoid this problem the deposition may only be made after the trial has started and the child is found to be unavailable (Whitcomb et al 1985:64).

The advantage of recording the deposition at such a late stage is that it removes the possibility of the defence asserting that new information has come to light between the making of the videotape and the trial which necessitates calling the child to undergo further cross-examination. However, if the deposition is made at such a late stage, it removes one of the benefits of the deposition in that the child is not permitted to exit the system as early as possible (Whitcomb et al 1985:64).

Prosecutors are also concerned about the reaction which the jury may have towards the videotaped evidence. As Whitcomb et al (1985:66) explain, the preferred tendency is to allow the jury to see the child, and they refer to an interview where a prosecutor told them that "she much preferred 'to let the jury see the little angel'". Prosecutors prefer a child to give evidence personally at the trial unless they are convinced that the child will be harmed by the experience or that the case will collapse without the videotaped evidence, since they believe that "a child's testimony on tape is rarely as convincing as the real thing" (MacFarlane 1985:150).

#### **3.4.3.3 Preliminary Hearing Testimony**

A few states provide that the evidence given by young children during preliminary hearings and grand jury proceedings may be videotaped. One of the main purposes of videotaping this evidence is the potential that it may have to replace the child's evidence at the trial if the latter is unable to testify again (MacFarlane 1985:149).

Myers (1987:389) quotes from the Californian Penal Code which provides that "[i]f at the time of the trial the court finds that further testimony would cause the victim emotional trauma so that the victim is medically unavailable or otherwise unavailable... the court may admit the videotape of the victim's testimony at the preliminary hearing as former testimony". In terms of the Californian Penal Code a request to videotape the child's evidence at the

preliminary hearing must by law be granted by the court. It is irrelevant whether it will be admissible later at the trial or not.

The child will have to be physically or testimonially unavailable before the videotape of the preliminary hearing can be admitted at the trial. MacFarlane (1985:50) explains that children often become so traumatised by the intense questioning that takes place at the preliminary hearing or at the idea of having to face the accused again, that they become distraught or even physically ill when they hear that they have to appear in court again. Sometimes the child is physically available at the time of the trial, but the child's therapist is of the opinion that the child may experience psychological damage if the child has to appear in court again. This could be based on the child's reaction to the first appearance in court, or to any regression experienced after the initial appearance. In these cases the prosecution would then apply for the videotape of the child's evidence given at the preliminary hearing to be admitted at the trial.

#### **3.4.3.4 Closed-circuit Television**

More than half of the states in the USA have statutory provisions which authorise the use of one-way or two-way closed-circuit television in the case of child victims who have to give evidence in sexual offence cases (Bjerregaard 1989:168). An example of such a statute is 5910.14 of the Iowa Code which provides:

"A court may, upon its own motion or upon motion of any party, order that the testimony of a child as defined in section 702.5, be taken in a room other than the courtroom and be televised by closed-circuit equipment in the courtroom to be viewed by the court. Only the judge, parties, counsel, persons necessary to operate the equipment, and any person whose presence, in the opinions of the court, would contribute to the welfare and well-being of the child may be present in the room with the child during the child's testimony. The court may require a party to be confined to an adjacent room or behind a screen or mirror that permits the party to see and hear the child during the child's testimony, but does not allow the child to see or hear the party. However, if a party is so confined, the court shall take measure to ensure that the party and counsel can confer during the testimony and shall inform the child that the party can see and hear the child during testimony."

In terms of this procedure the child will testify at the trial from a special room outside the courtroom. The child's image and voice are then transmitted to the courtroom where the jury is able to observe and hear the child while the latter is testifying (Myers 1989:395). Statutes providing for closed-circuit television vary from state to state. Some allow only the prosecution and defence counsel to be present with the child in the room, others require the accused to be present as well, while others make provision for the presence of a support person. Some states provide for one-way closed-circuit television while others insist on two-way closed-circuit television. In the former, the child can be seen by the judge and jury while in the latter the child can, in addition, see the judge, jury and defendant (Whitcomb et al 1985:50; Myers 1987:395). For instance, s9-102(a)(1)(ii) of the Maryland Courts and Judicial Proceedings Code provides that a child may give evidence by closed-circuit television where testifying in court will result in the child suffering serious emotional distress such that the child cannot reasonably communicate. The section further provides that only the prosecuting attorney, counsel for defence, the operators of the equipment and a support person may be present in the room with the child. The judge and the accused will remain in the

courtroom and communicate with the parties by electronic means (Persikow 1991:936)

Another version of this system, referred to as the 'isolated child' model, allows the child to be isolated from the other participants at the trial. She is sometimes allowed to be accompanied by a support person. The child's image is projected onto monitors in the courtroom and is viewed by those present in court. The child would have either one monitor so she could see the prosecutor or defence counsel, or she could have a number of monitors in front of her so that she is able to view the judge, defendant etc. as well. The number of monitors before the child depends, to a great extent, on whether there are any specific legislative provisions stipulating that the child must see the accused on the monitor (MacFarlane 1985:147). Courts in other states have also made use of these techniques even though they do not have statutes authorising such procedures (Dziech and Schudson 1989:154).

#### **3.4.3.4.1 Advantages of Closed-circuit Television**

**Confrontation:** One of the major obstructions to the giving of effective evidence by a child witness is the fact that the child has to face the accused, as explained by MacFarlane (1985:149):

"The physical presence of a defendant who is a threatening figure in a child's life, or even a non-threatening defendant about whom a child feels badly for having disclosed sexual secrets, along with the stigmatizing and guilt-provoking presence of the general public, often constitute the primary impediments to a child's ability to testify about sexual abuse."

The advantage of giving evidence via closed-circuit television is that the child is less likely to be intimidated by the presence of the accused close by. As far as the interests of the accused are concerned, the use of two-way closed-circuit television would be the most desirable option since it is the nearest to physical confrontation. The accused would have an opportunity to cross-examine the child as well as be able to be in constant communication with his legal representative. The accused (and the jury) will also be able to observe the demeanour of the witness as the latter gives evidence (Bjerregaard 1989:172-3).

**Court atmosphere:** Since the child will give evidence outside of the courtroom, he is less likely to be frightened by the strangers in court as well as the general atmosphere (MacFarlane 1985:147). The child will also be protected from facing an open courtroom and having to reveal, often embarrassing, details.

**Court objections:** A further advantage is that the child can be spared the confusion of objections, arguments and motions by counsel by simply having the monitor switched off during interruptions (MacFarlane 1985:147).

#### **3.4.3.4.2 Disadvantages of Closed-circuit Television**

**Isolation:** The child may feel isolated by being separated from the courtroom and from the person with whom the child is communicating (MacFarlane 1985:147).

**Electronic equipment:** The child may be intimidated by the presence of the video camera and the electronic equipment (MacFarlane 1985:148).

**Concentration:** The child may find it difficult to concentrate on a voice and face that he views on a monitor (MacFarlane 1985:148).

**Demeanour:** Some commentators argue that the medium of televised or videotaped evidence distorts images and makes it difficult to observe demeanour.

"...inherent properties of a televised (or videotaped) trial - its limited perspective, distortion of images, and similarity to television as an entertainment medium - detract seriously from the viewer's ability to grasp a complete and accurate picture of the witness's demeanour, thereby threatening the defendant's right to a fair trial." (Whitcomb 1992:155).

Bjerregaard (1989:174-5) refers to a number of research studies that have been conducted to determine whether televised evidence is the functional equivalent of live testimony. A study conducted by Purdy concluded that jurors viewing televised or videotaped evidence did not react differently from those viewing a live trial and they found no significant differences between the two versions in assessing credibility. Other studies carried out by Miller and Fontes also found no significant differences in jurors' reactions to televised evidence as opposed to live evidence. Research, on the other hand, suggests that videotaped evidence improves the jurors' retention of trial-related information and enhances witness credibility. In *State v Hewitt*, 545 P.2d 1201 (Wash.App. 1976) and *Hutchins v State*, 286 S.2d 244 (D.Ct.App.Fa. 1973) the courts themselves acknowledged the superiority of using video-technology over other methods to present a witness's evidence.

### **3.4.3.5 Videotaped Interviews**

Many professionals who work with children have adopted the procedure of videotaping the interviews which they conduct with these children. The procedure of videotaping an interview is used mainly by the police, social workers and psychologists (Whitcomb et al 1985:59).

#### **3.4.3.5.1 Advantages of Videotaping Interviews**

**Reduction in number of interviews:** One of the purposes of videotaping an interview is to reduce the number of interviews children have to undergo. Children have to undergo a number of interviews by a wide variety of professionals when they enter the criminal justice system as a witness. Each interview, whether it is conducted by the police, doctor, psychologist or prosecutor, requires the child to retell what has happened. In many cases the details of these statements are embarrassing, frightening and even anxiety-producing (MacFarlane 1985:136). If a videotape is made of the original interview, the psychologist, police and prosecutors can then review and evaluate the tape without having to put the child through so many interviews.

Another disadvantage of multiple interviews is that it eventually makes the evidence look so well-rehearsed that it

loses credibility (Whitcomb et al 1985:60). As MacFarlane (1985:136) explains, each time a child is forced to repeat a story, the less spontaneous it becomes. Also, as a defence to having to repeat sensitive information again and again, children often mask their emotions and this results in the situation "where they relate their experiences without any emotion which results in statements about abuse that may appear slick and rehearsed".

A further disadvantage of multiple interviews is the danger of suggestion and contamination. The child's evidence may become contaminated by the questions or input of the interviewers. For instance, the child may begin to use terminology which the child did not previously possess, and which has been picked up from the interviewers where, for example, he says that he was indecently assaulted or molested rather than touched (MacFarlane 1985:137).

Children also do not understand the reason why they have to repeat the same story over and over again to different people. This can lead to the children becoming frustrated and angry and often results in them refusing to answer further questions or retracting their statements in order to escape the harassment they experience (MacFarlane 1985:137).

**Best evidence available:** A major advantage of videotaping an initial interview is that the child's statement is captured as early as possible when it is still fresh in the child's mind. The child's memory may fade with time, and the best evidence of what happened is then lost (Whitcomb et al 1985:60). Not only does the videotaped interview preserve the child's initial statement, but it also preserves the child's demeanour at the time when the statement is made (Dziech and Schudson 1989:148). This is especially important in cases of sexual abuse, where it is difficult for children to discuss what has happened to them. It is therefore advantageous to be able to see the child's physical reaction at the time the statement is made, the body language, fear, anger and avoidance. As MacFarlane (1985:136) explains, these are "visual reactions that might otherwise never find their way into words".

**Pressure to retract:** Pressure is often exerted upon children to retract their stories, especially when the case is one dealing with intrafamilial abuse. This often results in the weakening of evidence as the case progresses. The videotaping of the initial interview is made before pressure is placed on the child and could, therefore, be used to boost the child's evidence (Whitcomb et al 1985:60).

Children also retract their disclosures of abuse because of the disruptions that follow their disclosures, namely the intervention of the police and protection services (MacFarlane 1985:141). Retraction is also consistent with both the battered child syndrome and the child sexual abuse accommodation syndrome where the intimidating environment of the courtroom and confrontation with the accused cause some children to retract their original statement by the time of the trial (Dziech and Schudson 1989:150).

Because the rate of retraction by child victims of sexual abuse is so high, the videotaped interviews are used to refute later retractions made by the child in court. Although, as MacFarlane (1985:141) points out, impeaching their own witness is not a step that most prosecutors enjoy, it can assist the judge and jury in determining which statement is true. This is explained by Steve Chaney, the district attorney of Tarrant County, Texas, as quoted by Dziech and Schudson (1989:150):

"Recanting is a major problem for the legal system. Recanting is an expected reaction of an abused child who has reported the abuse, although this is not well understood or accepted by the legal community. Only an enlightened legal system, when confronted with a recanting child, asks the next question, 'Why is the child recanting,' and seeks an answer to that question. Most prosecutors believe that the videotape has a major benefit in this area. If the child later recants, even at the time of trial, the case can still be prosecuted by using a good tape and psychological experts to explain the recanting symptoms."

*Guilty pleas:* A further benefit of videotaping the initial statement observed by prosecutors is that there is an increase in guilty pleas. Dziech and Schudson (1989:149) quote Chaney as saying that "[a] tape of a communicative child professionally interviewed will convince most defendants and their [attorneys] that a trial might not be in their best interests". It would seem that the defence reason that a child who performs well on videotape will perform well in court, although this assumption has not yet been tested empirically (Whitcomb et al 1985:60).

### 3.4.3.5.2 Disadvantages of Videotaping Interviews

*Conflicting statements:* In the same way that a videotape of an initial interview may cause an accused to plead guilty, it can also be used to an accused's advantage, as illustrated by Whitcomb et al (1985:61-2) in the following extract:

"Second, children's interviews are seldom straightforward, and the child may volunteer information that is detrimental to the case and cannot be excised. For example, we viewed a videotape of a three year-old who wavered on the question of whether she had a dog. An astute defense attorney could exploit the child's uncertainty on this apparently simple matter to discredit her entire statement."

This problem arises especially in the case of sexual abuse where children often deny that abuse took place in their initial statements. This could also be used by the defence to discredit the child, by suggesting that the latter has made conflicting statements or has lied. This happened in the case *People v Buckley*, No.A753005 (Los Angeles County Mun.Ct. May 1985) where a number of children, all victims in the case, had taken part in videotaped interviews. Parts of these videotapes showing the children's initial denials of abuse were played back to the children on the witness stand to discredit them.

*Confidentiality:* When a child becomes involved in a criminal case as a witness, the accused and his counsel have the right to see, and sometimes obtain copies of, the videotaped evidence (MacFarlane 1985:150). Confidentiality of videotapes can then become a problem and Whitcomb et al (1985:62) argues that their "mere existence may pose a threat to the victim's privacy" since confidentiality cannot be guaranteed. She mentions in support of her argument that excerpts from videotapes have allegedly been broadcast on the media, as a result of which a number of professionals have abandoned the idea of videotaping initial statements. When there is a highly publicised trial, it is possible (and has happened) that tapes can fall into the hands of the media. A further consequence of having a videotaped interview is that when these tapes are played in an open courtroom during the trial, the identity of the

child is fully visible and the child and the interviewer's comments may be quoted. This, according to MacFarlane (1985:152), can have a devastating effect on the child and the family because of the very personal nature of these disclosures.

MacFarlane (1985:137-8) regards the number and diversity of systems which have an interest in a case as being a very obvious disadvantage. Child protection services, police, the courts and the prosecution are agencies involved in a case. This list could also include doctors and therapists. Although these different agencies may have a common goal of protecting children, they do not agree as to what information is required and how it is to be obtained. They do not have authority or jurisdiction over each other and can therefore not co-ordinate their activities officially. Although the idea of having a single videotaped interview which can be used by a number of agencies would be very useful, the logistics of who will conduct the interview, who may have access to it and what information will be gathered is very difficult to co-ordinate between the various agencies.

A further difficulty that arises as a result of so many agencies being involved, is the different kinds of information required. Information required by the police differs substantially from that sought by social workers or therapists. MacFarlane (1985:138-9) suggests that this problem could be resolved if the various agencies planned interviews with the purpose of developing a method that would be able to access all the necessary information from a single interview. She agrees that many professionals would probably regard this as impossible since the different systems "appear to be mutually incompatible", and this is especially obvious when one looks at the difference between (police) investigative interviews and psychodiagnostic evaluations. But, she is nevertheless of the opinion that an investigative interview can be conducted in a manner which is sensitive to clinical considerations, and that it is in the interests of the child to do so.

*Interviewing methods:* A critical aspect of videotaped interviews that often manifests itself as a disadvantage is the expertise of the interviewer. It is often difficult, especially in cases of sexual abuse, to obtain full disclosure from a child without some degree of prompting. The manner in which the questions are phrased is of crucial importance since they can result in videotapes being held inadmissible (Whitcomb et al 1985:62). According to Berliner (1985:174), "[t]aped interviewing by mental health professionals, although often legitimate by mental health standards, frequently appears to be leading or suggestive and might be used to discredit the child". The use of leading questions or any hint of suggestion can give the defence sufficient fuel to argue that the child's evidence has been tainted and is therefore unreliable.

"Asking children to share forbidden secrets (for which they feel responsible) is not comparable to asking them what they had for lunch. They need to know that the interviewer is comfortable and familiar with this subject and that they won't be blamed or rejected for talking about it. Interviewers who remain neutral, non-probing and detached, and who conduct evaluations as though they were in a courtroom or other legal arena, rarely succeed in breaking through to small, frightened children." (MacFarlane 1985:153)

If interviewers do use non-traditional interviewing methods, their techniques and professionalism will be challenged by the defence who will try to show that the interviewer led, coached or played upon the suggestibility of the child (MacFarlane 1985:153).

*Confrontation*: The most obvious disadvantage of the videotaped interview is that it does not protect the child from the trauma of having to appear in court face-to-face with the accused and having to undergo cross-examination (Whitcomb et al 1985:61).

### 3.4.3.5.3 The Investigative Videotape in Court

Since the accused and his counsel are not present when the investigative videotaping is done, they do not have the opportunity to face the child witness nor to cross-examine him. These videotapes can therefore not be used in lieu of the child's evidence at the trial (MacFarlane 1985:143).

A number of states have introduced statutes which allow that these videotaped interviews of a child witness may be admitted as evidence at the trial, provided that the child is available to testify at the trial (Myers 1987:389). For instance, in the states of Texas, Kentucky and Louisiana the relevant statute provides that the videotaped interview of a child's statement may be admissible at the trial if the videotape was made at the child's first statement, the child was interviewed by a non-attorney, and both the person who conducted the interview and the child are available for cross-examination (Whitcomb et al 1985:60). Of interest is the fact that the interview must be conducted by a non-attorney. The legislative view seems to be that "questioning by non-lawyers enhances the reliability of the interview" (Dziech and Schudson 1989:149).

Although these videotape statutes in Texas, Kentucky and Louisiana require that a child be available to testify, it does not necessarily require that the child has to testify (Dziech and Schudson 1989:150). Although the child must be available at the trial to testify, the state is not required to produce the child when it leads its evidence and it is usually left to the defence to call the child for cross-examination. In practice, what has happened is that the defence does not actually call the child to give evidence. According to interviews conducted with prosecutors by Whitcomb (1992:158) the reason for this appears to be that the defence is afraid that the members of the jury will regard this action as being unnecessarily harmful for the child, or that the child will tell the same story as on the videotape and this will simply serve to bolster the evidence against the accused. Although the U.S. Supreme Court has not ruled directly on this issue of videotaped evidence, the decision in *Idaho v Wright*, 110 S.Ct.3139 (1990) seems to suggest that these videotaped statements will be inadmissible unless the child gives evidence and is cross-examined.

In *Idaho v Wright supra* the question to be decided by the U.S. Supreme Court was whether certain types of hearsay were admissible despite the Confrontation Clause. The trial court allowed a paediatrician to give evidence about certain statements which had been made to him by a two and a half year old complainant during the course of an interview (at 3141). The Supreme Court, in a 5-4 decision, found the evidence to be inadmissible and set out a two part test to determine when hearsay would be admissible in a sexual abuse case:

- i. it will be admissible if it falls under a "firmly rooted" exception to the hearsay rule (at 3147);
- ii. it will be admissible if it does not fall under a "firmly rooted" exception but where it is supported by particularized guarantees of trustworthiness (at 3147).

In view of this test, it would appear that videotaped statements will rarely, if ever, be admissible. The reasons for this are explained by Graham (1985:57) as follows:

"It is extremely doubtful that a child's statement to a police officer, social worker, or someone specially trained to interview children will be found to possess equivalent circumstantial guarantees of trustworthiness, whether or not the statement was videotaped or otherwise recorded. The normal timing of such an interview, its investigative function, the frequent use of suggestive questions by a person in authority, and the fact that the child will usually have made several earlier statements, relating to the alleged sexual contact all mitigate against admissibility."

In the two part test referred to above, the second exception requires that there must be 'particularised guarantees of trustworthiness'. The Idaho Supreme Court suggested a number of guidelines which could provide these guarantees, such as videotaping the interview with the child (other suggestions were that the interviewer have no prior knowledge of the matter and that no leading questions be asked). The U.S. Supreme Court held at 3148 that although these procedural safeguards may enhance the reliability of the child's hearsay statement, they rejected this approach and refused to lay down a 'preconceived and artificial litmus test for the procedural propriety of professional interviews in which children make hearsay statements against a defendant' (at 3148).

In states which do not have legislation governing the admissibility of videotaped interviews, the latter have been introduced under existing rules of evidence. In Minnesota, for instance, where there is no videotape legislation, a videotape of a child's statement has been introduced as a prior consistent statement to rebut charges of recent fabrication in *Hennepin Co v Sullivan*, Min.Court of Appeals, Cx-84-807, January 8, 1985 (Whitcomb et al 1985:61). The videotape of the initial interview has also been used as corroboration for expert opinions that are challenged in court. If the defence were to challenge the opinion of the expert or the evidence of the initial interviewer, the prosecution could introduce the videotape to support the expert or the interviewer. As MacFarlane (1985:144) explains, "the tape serves as a vehicle for dispute resolution by providing an objective way to counter the alleged bias or inaccuracy of the expert's opinion of the witness". It may be necessary in certain circumstances to obtain the consent of both attorneys to admit the videotape and to ensure that the defence has access to it before it is introduced in court.

#### **3.4.3.5.4 Admissibility of Videotaped Evidence**

The majority of the statutes which endorse the use of videotapes provide that the videotapes will only be admissible where giving evidence in court will be traumatic for the child. If the child is capable of giving evidence in court, there is no need for the videotape to be admitted (Myers 1987:390).

In *State v Warford*, 223 Neb.368, 389 N.W.2d 575 (1986) the court held at 581 that unless there was evidence of "a compelling need to protect the child from further harm", the videotape would infringe the defendant's constitutional rights and could not be admitted. An attempt was made to lead the child's evidence in open court, but the four year old refused to co-operate. She was then permitted to give evidence by means of closed-circuit television. The Nebraska Supreme Court reversed the conviction because the trial proceedings had not shown that "the child would be further traumatised or was intimidated by testifying in the courtroom in front of the defendant"

(581-2). So, although the court acknowledged the constitutionality of giving evidence by closed-circuit television, even where there was no statutory authority to do, the court was of the opinion that there had to be a compelling need before use could be made of such technology.

How then must the court evaluate whether there is such a "compelling need". Some of the statutes set out the factors which the court should take into consideration when coming to such a decision. Others are vaguer, an example being the video statute in Arkansas which simply says there must be a showing "of good cause" before the videotape can be admitted (Myers 1985:390). Generally, in the absence of any statutory criteria, the courts simply evaluate all the circumstances of the particular case.

Myers (1987:391-2) sets out a summary of the type of factors which the courts take into account when determining whether there will be any potential harm to the child in giving evidence in court:

- i. The courts look at the age of the child. The younger the child, the more likely it will be for the child to be traumatised by the proceedings. Admittedly these factors are broad generalisations, but the court will take them into account in the light of each case.
- ii. The child's level of development is considered as a factor.
- iii. The court will look at the child's ability to understand the significance of what is happening and to discuss it.
- iv. The fact that the child is afraid of the accused will be a consideration that the court will take into account. In *People v Henderson*, 132 Misc.2d 51, 503 N.Y.S. 2d 238 (County Ct. 1986) the six and seven year old victims of the accused had been threatened by him and were afraid of him. They feared that he would send monsters after them and there was evidence that the children were having nightmares involving monsters. In *People v Johnson supra* the child victim had been seriously injured by the accused and was too scared to give evidence in his presence at the trial. In the course of making the video deposition, the accused was asked to leave the room and the child was then able to testify. The court noted at 315 that "the five-year-old's reticence in defendant's presence and the improvement in her testimony upon his removal better demonstrates the necessity of the procedure than could the opinion of any expert".
- v. The court takes into account whether the child suffers from a handicap or disability.
- vi. If the child is particularly susceptible to psychological harm as a result of giving evidence, this will be taken into account by the court in their determination.
- vii. The fact that the child's reaction to the abuse is beyond what is normally encountered in such cases is an important factor to be considered.
- viii. Another consideration is whether the child blames himself for the abuse.
- ix. The court will also look at the number of times the child has had to testify or the number of interviews the child has undergone, and how the child responded in these instances.
- x. Related to the factor of the child's fear, is the consideration whether any threats have been made to the child or the child's family. These threats would include anything from threats of bodily harm, incarceration, and removal of the child to the dissolution of the family.
- xi. The court will look at the nature of the offence committed, whether any dangerous weapon was used, how

had the acts were and whether any physical injury was inflicted on the child. A further factor is whether the offence was one of an ongoing nature over an extended period of time.

- xii. The accused's behaviour at the trial may be a factor which makes it difficult for the child to give evidence at the trial.
- xiii. The court will look at the relationship between the accused and the child and whether the accused holds any position of authority over the child. In *State v Daniels*, 484 So.2d 941 (La.Ct.App. 1986) the court held at 944 that the fact that the accused is a child witness's parent may increase the need for giving evidence on videotape. In *Commonwealth v Ludwig*, Sup.Ct.Pa, no.02883 (Philadelphia, 1987) a five year old had to give evidence against her father in an alleged case of sexual assault. The child froze and was unable to give evidence in her father's presence. She was allowed to give evidence via closed-circuit television and the accused was subsequently convicted. On appeal the Pennsylvania Superior Court held at 13 that the "right to confront does not confer upon an accused the right to intimidate. The reliability of an abused child's testimony does not depend upon his or her ability to withstand the psychological trauma of testifying in a courtroom under the unwavering gaze of a parent who, although a possible abuser, has also been provider, protector and parent".
- xiv. The attitude of other members of the family towards the offence or towards the child is also a consideration that the court will take into account.
- xv. Further factors that are of importance are whether the accused was living in the same house as the child when the offence was committed, whether he has access to the child and whether he financially supports the child.
- xvi. If the child has been abused before, the court will take this into account.
- xvii. The court will take into consideration whether the child has shown any symptoms of post-traumatic stress disorder or any other mental disorder. The following are some of the more usual symptoms that are presented to court: withdrawal, regression, guilt, anxiety, stress, nightmares, lack of self-esteem, mood changes, compulsive behaviours, phobias, problems at school, anti-social behaviour and enuresis. In *Chappel v State*, 18 Ark.App. 26, 710 S.W. 2d 214 (1986) evidence was led that the child was suffering from enuresis due to the latter's fear of testifying.

The most important consideration is going to be whether the child will experience any psychological harm from testifying, and the extent of this harm. In many cases an expert witness will be called to give evidence as to the above factors, but it is not essential that an expert has to be called to give evidence.

#### **3.4.4 Videotaped Evidence and the Confrontation Clause**

As discussed earlier, the Sixth Amendment of the U.S. Constitution provides that the accused is entitled to be confronted with witnesses who give evidence against him. The question that has to be addressed is to what extent the use of technology interferes with the accused's rights.

Some of the video statutes impose severe restrictions on the defendant's right to face-to-face confrontation in the case of child witnesses. The Arizona, Kentucky and Texas statutes provide that while the child's evidence is being

videotaped "the court shall permit the defendant to observe and hear the testimony of the minor in person but shall ensure that the minor cannot hear or see the defendant". In terms of these statutes confrontation is eliminated in every case where videotaped evidence is used (Myers 1985:393). The Kentucky statute authorising videotapes came under attack in *Commonwealth v Willis*, 716 S.W. 2d 224 (Ky. 1986) on the grounds that it was unconstitutional since it eliminated confrontation. The majority of the court held that the statute was not unconstitutional. However, three judges strongly dissented that the statute was unconstitutional as it did deprive the accused of this right to confront witnesses.

Other statutes show a preference for face-to-face confrontation and they give the trial court the authority to modify this confrontation in appropriate cases or dispense with it, if necessary. This approach is to be found in the New York Criminal Procedure Law 565.20 (12) which provides:

"When the court has determined that [video testimony in a room outside the courtroom is needed because] a child witness is a vulnerable child witness, it shall make a specific finding as to whether placing the defendant and the child witness in the same room during the testimony of the child witness will contribute to the likelihood that the child witness will suffer severe mental or emotional harm. If the court finds that placing the defendant and the child witness in the same room during the testimony of the child witness will contribute to the likelihood that the child witness will suffer severe mental or emotional harm, the [court shall order] that the defendant remain in the courtroom during the testimony of the vulnerable child witness".

The Vermont Rule of Evidence 807 (f) provides:

"During the recording of testimony... the defendant shall be situated in such a way that the child can hear and see the defendant unless the court finds that requiring the child to hear and see the defendant presents a substantial risk of trauma to the child which would substantially impair the ability of the child to testify, in which case the court may order that the defendant be situated in such a way that the child cannot hear or see the defendant".

The relevant Florida Statute provides that "[t]he defendant and the defendant's counsel shall be present at the videotaping, unless the defendant has waived this right. The court may require the defendant to view the testimony from outside the presence of the child by means of a two-way mirror or another similar method that will ensure that the defendant can observe and hear the testimony of the child in person, but that the child cannot hear or see the defendant". Myers (1987:394) argues that statutes which preserve confrontation where possible are to be preferred to those which automatically eliminate confrontation.

A number of statutes authorising videotaped evidence provide that a support person may be present to accompany the child during the taping (Myers 1987:394).

In evaluating the use of videotaped evidence in terms of the confrontation clause, it will have to be determined whether the elements of confrontation are infringed at all. The three elements of confrontation, as discussed *supra*, are: cross-examination; the jury must be able to observe the demeanour of the witness; and there must be face-to-face confrontation between the witness and the defendant (Myers 1987:395).

In some instances videotaped evidence will comply with all the requirements of confrontation. An example of this

is where a child gives evidence via closed-circuit television. The child will give evidence from a room outside the court, but the child's image will be transmitted to the courtroom as he gives evidence so the jury will be able to observe his demeanour as he testifies. The accused will be able to see the child on the monitor and the child will be able to see the accused, thus satisfying the requirement of face-to-face confrontation. Cross-examination takes place as usual, thereby complying with the requisites of the confrontation clause (Myers 1987:395). In *State v Sheppard supra* the New Jersey Superior Court held that, even though there was no eye contact between the child and the defendant, there was no denial of the right to confrontation where the court could see and hear the child clearly on the videotape and the accused was given an opportunity to cross-examine the child. As far as the demeanour of the witness is concerned, the court in *California v Green supra* held that the purpose of observing witnesses is to assess their credibility. In *People v Moran*, 39 Cal.App.3d 398, 114 Cal.Rptr. 413 (1974) the court held at 420: "Videotape is sufficiently similar to live testimony to permit the jury to properly perform its function."

Some critics have argued that the confrontation clause actually contemplated that the face-to-face confrontation should take place in the same room. Myers (1987:396) discards this as "a hollow argument", saying that simply because the present technology was not foreseen by the legislators at the time that they enacted the applicable legislation is not a good reason for excluding video evidence. This particular argument was raised by the court in *Commonwealth v Willis supra* at 230-31:

"In the Eighteenth and Nineteenth Centuries, live testimony was the only way that a jury could observe the demeanour of a witness. The use of videotapes does not represent a significant departure from that tradition because the goal of providing a view of the witness's demeanour to the jury is still achieved. A witness has never been disqualified by mere refusal or inability to look at the defendant. The testimony of a blind victim would not be invalid. The same is true for the testimony of a witness who refuses to look on the accused. By analogy a defendant would not be denied the right of confrontation when a young victim is so intimidated by his mere presence that she cannot testify unless she is unable to see or hear him.

The strength of the State and Federal Constitutions lies in the fact that they are flexible documents which are able to grow and develop as our society progresses. The purpose of a criminal or civil proceeding is to determine the truth. [The new law] provides such a statutory plan while protecting the fundamental interests of the accused as well as the victim".

However, certain forms of video evidence do not comply with all three elements of the confrontation clause. In some, although the accused can see the child, the child is not able to see the defendant, thereby eliminating face-to-face confrontation. In others, accused's counsel is not present in the room with the child when the latter gives evidence, or accused's counsel is present in the room but as the accused is not present counsel is not able to be in the same room as his client. Where evidence is taken by means of video deposition, the jury is not given an opportunity to observe the demeanour of the child at the time that the latter gives evidence (Myers 1987:396). In the majority of instances where use is made of videotaped evidence, there will be some infringement of the confrontation clause. The question that arises is how great must the infringement be before it oversteps the constitutional limits.

### 3.4.5 Videotaped Evidence and face-to-face Confrontation

In most cases of videotaped evidence the infringement relates to lack of face-to-face confrontation between the witness and the accused. This question arose in *United States v Benfield supra* where the accused was charged with abducting an adult female. The trial court authorised the use of a pre-trial videotaped deposition because the victim suffered from psychiatric problems related to her abduction and her therapist testified that she should not be allowed to face the accused. The trial court then adopted a procedure whereby the accused was excluded from the room in which the deposition took place. The accused was allowed to see what was happening in the room via a monitor, and he was linked to his counsel, who was present in the room where the deposition was being taken, by means of a buzzer. Counsel was allowed to cross-examine the victim, although the latter was unaware that the accused was in the building. The Court of Appeal held that this procedure had violated the accused's right to confront witnesses who gave evidence against him. At 821 the court held that:

"the right to confrontation includes a face-to-face meeting at trial at which time cross-examination takes place... Most believe that in some undefined but real way recollection, veracity, and communication are influenced by face-to-face challenge. This feature is part of the sixth amendment right additional to the right of cold, logical cross-examination by one's counsel."

This decision implies that the use of videotaped evidence of child witnesses will be severely limited since the accused has a right to face-to-face confrontation. There are a number of decisions which explicitly state that the confrontation must be face-to-face in person. In *Ohio v Roberts supra* it was referred to at 63 as "[t]he requirement of personal presence" and in *California v Green supra* confrontation was defined at 146 as an "opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact". In the early decision of *Kirby v United States supra* the right was described as being the right to look upon the witness while he was being tried (at 55), and in *Mattox v United States supra* it was referred to at 244 as the advantage "of seeing the witness face-to-face".

Two Californian decisions have followed the strict requirements for confrontation as set out in *Benfield's case supra*. In *Hochheiser v Superior Court supra* the trial court authorised that the evidence of two child witnesses be videotaped with the children giving evidence from outside the courtroom, although they could observe the defendant on a monitor. The California Court of Appeals held that the trial court did not have the authority to allow the videotaped evidence since the Sixth Amendment guaranteed a right to "physical confrontation" at 278. After this decision the California legislature enacted California Penal Code S1347 (West 1986) in 1985 which authorised the use of videotaped evidence in certain instances (Myers 1987:398).

In *Herbert v Superior Court supra* the presiding officer directed that the accused be seated in such a way that he could hear but not see the witness, who was a five year old girl against whom the accused was alleged to have committed certain sexual offences. The accused appealed against the decision on the grounds that his right to confrontation had indeed been violated. The California Court of Appeal found that his right to confrontation had been violated and at 855 explained the basis of their decision as follows:

"The historical concept of the right of confrontation has included the right to see one's accusers face-to-face, thereby giving the fact-finder the opportunity of weighing the demeanour of the witness when forced to make his or her accusation before the one person who knows if the witness is truthful. A witness's reluctance to face the accused may be a product of fabrication rather than fear or embarrassment."

There are two ways in which a move could be made away from the strict interpretation in *Benfield supra*. Firstly, the language used in the *Benfield* decision *supra* does allow certain exceptions to the rule that there must be face-to-face confrontation. The court held that this right to face-to-face confrontation could be limited in certain circumstances although these exceptions "should be narrow in scope and based on necessity or waiver" (at 821). According to Myers (1987:398-9), cases dealing with child abuse litigation would fall within these exceptions. Many children find the process of facing somebody who has hurt them as being both intimidating and traumatic. A child differs from an adult in size, dependence, powerlessness and vulnerability, and this renders a child far more susceptible to threats and intimidation. In cases like these the standard of necessity as set out in *Benfield's* case would be satisfied.

The other line of argument alleges that the *Benfield* decision simply over-emphasized the importance of the accused's right to face-to-face confrontation. Myers (1987:399) argues that the rights to confrontation include three elements and the most important of these, as accepted by court decisions, is the right to cross-examination. Second in order of importance is the requirement that the jury be able to observe the witness as the latter gives evidence to evaluate his demeanour. The least important element from a constitutional perspective is the right of the accused to confront the witness face-to-face.

In *People v Tennant*, 431 U.S. 918 (1977) the trial court admitted the preliminary hearing evidence of a state witness who had died before the trial. The U.S. Supreme court held that the confrontation clause had not been violated, and endorsed the observation of Wigmore that "the advantage obtained by the personal appearance of the witness at trial is secondary, however, and is as a result accidentally associated with the process of confrontation".

The basis of the belief in confrontation, as mentioned earlier, is assumed to be that it is more difficult to lie about someone who is in the same room. There is, however, little empirical evidence to support this assumption. The Supreme Court has admitted that the right of confrontation can yield to competing interests in certain circumstances. The right of the accused to confrontation must be balanced against the need for accurate evidence and the trauma experienced by the child in facing the accused. The basis of the Confrontation Clause is to ensure the accuracy of the truth-determining process, and "[d]ispensing with face-to-face confrontation in selected cases does not frustrate that objective" (Myers 1987:400).

The accused's right to confrontation is not absolute and will, in certain circumstances, yield to competing interests. In *Mattox v United States supra* the Court first recognised an exception to the accused's right to full face-to-face confrontation, admitting at 243 that the confrontation rights "must occasionally give way to considerations of public policy and the necessities of the case". More recently this was accepted by the U.S. Supreme Court in *Ohio v Roberts supra* where at 64 it was stated that "[t]he Court, however, has recognized that competing interests, if

'closely examined', may warrant dispensing with confrontation at trial". In *State v Jarzbek*, 529 A.2d 1245 (Conn. 1987) the Connecticut Supreme Court held that an accused may be removed from a complainant's presence during videotaping when "the state has demonstrated a compelling need... The state must show that the minor victim would be so intimidated or otherwise inhibited, by the physical presence for the defendant that the trustworthiness of the victim's testimony would be seriously called into question" (at 1255).

The State as *parens patriae* has a compelling interest to protect children, especially in the context of abuse (Myers 1987:401). This interest has been endorsed by the U.S. Supreme Court in *New York v Ferber*, 458 U.S. 747 (1982) at 757 where the court explained that "[t]he prevention of sexual exploitation and abuse of children constitutes a governmental objective of surpassing importance". Since videotaped evidence assists vulnerable children by removing the trauma of in-court testimony and enables children, who would not be able to give evidence in court, to do so, the legal system is being made available to this minority group which the state has an interest in protecting (Myers 1987:401). In *Maryland v Craig*, 76 Md.App. 250, 544 A.2d 784 (1988), 316 Md. 551, 560 A.2d 1120 (1989), 110 S.Ct. 3157 (1990) the Court at 3167 explained that "a State's interest in the physical and psychosocial well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court".

A further compelling interest which the state, as *parens patriae* has, is to ensure that there is effective law enforcement, as explained by the court in *Ohio v Roberts supra* at 64. Videotaped evidence is one way of ensuring this interest as it enables children, who would normally not be able to give evidence in court, to do so and thereby enables more children to give evidence, especially in cases where other evidence is rarely available (Myers 1987:401).

The argument is, therefore, that any infringement of the accused's rights is not automatically unconstitutional. Rather, the court has to balance the state's interest in protecting children and ensuring effective law enforcement against any infringements of the accused's constitutional rights. According to Myers (1987:401-2) when the court attempts to balance these conflicting interests, it must determine which right is being infringed and to what extent, taking into account the scale of importance namely that cross-examination is more important than the jury being allowed to observe the witness's demeanour which in turn is more important than the right of the accused to face-to-face confrontation with the witness.

These specific questions have come before the U.S. Supreme Court recently. In *Coy v Iowa, supra* the issue before the court was whether a screen, used to shield a child complainant from the accused, had infringed the latter's right to confrontation. The accused was charged with sexually assaulting two thirteen year old girls who had been camping in the backyard of a house adjacent to his. At the onset of the trial, the state applied for the girls to give evidence via closed-circuit television or from behind a screen in terms of a recently enacted section of the Iowa Code, which created a presumption that courtroom testimony of sexual abuse victims in the presence of the accused was traumatic for these children and allowed the court to invoke procedures to shield the child from directly viewing the accused (Gordon 1992:62). The application was successful and the girls gave evidence from behind a screen which was set up in such a way that the jury could observe them as they testified. The judge allowed the use of

the screen without first determining whether the two girls did in fact need the screen. The accused could dimly see the girls and was able to hear their evidence, but the girls could not see him.

The accused was convicted and subsequently appealed to the Supreme Court of Iowa on the ground that his right to confrontation had been violated. This court confirmed the trial court's decision, finding that the accused's right had not been violated since he had fully cross-examined the girls who had given evidence under oath in open court. The appeal went to the U.S. Supreme Court where the main issue was whether the accused's right to confrontation had been violated by the fact that the girls had not been able to view him while they gave evidence. He further argued that any infringement of his rights could only be justified where there was a 'compelling' state interest and could not be justified by a blanket presumption of trauma. The Supreme Court, in overturning the decision, emphasized that the Sixth Amendment right to confrontation entails a strong preference that confrontation between the witness and the accused be "face-to-face" (at 857). Any exception to this presumption in favour of face-to-face confrontation would have to be based on a case-specific finding of trauma, instead of a general presumption, as set out the Iowa Code, that facing the accused would be traumatic.

Judge Scalia, in his majority judgement, explained at 1014 that the Confrontation Clause guaranteed the accused a face-to-face meeting with witnesses and he based this opinion on the fact that "...there is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution'" (1015). He was of the opinion that potential emotional upset of a witness was not a sufficient ground for making exceptions to the face-to-face confrontation clause, and wrote that "face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protection have costs". (at 2802). He concluded that the one-way screen had violated the accused's Sixth Amendment rights because there had been "no individualized findings that these particular witnesses needed special protection".

However, the decision does not imply that the use of screens or closed-circuit television will always be unconstitutional or even that the statute itself is unconstitutional. The decision implies that the error was the judge's in that he applied the statute before a need to use it was proved. This can be seen from the judgement of Justice Sandra Day O'Connor at 1019:

"While I agree with the Court that the Confrontation Clause was violated in this case, I wish to make clear that nothing in today's decision necessarily dooms such efforts by state legislatures to protect child witnesses... I would permit use of a particular trial procedure that called for something other than face-to-face confrontation if that procedure was necessary to further an important public policy. The protection of child witnesses is, in my view and in the view of a substantial majority of the States, just such a policy... if a court makes a case-specific finding of necessity, our cases suggest that the strictures of the Confrontation Clause may give way to the compelling state interest of protecting child witnesses."

Justice Blackmun, in his dissenting opinion, argued that the Confrontation Clause establishes only a preference for face-to-face confrontation, saying that "... the ability of a witness to see the defendant while the witness is testifying does not constitute an essential part of the protection afforded by the Confrontation Clause..." (at 1021). He explained at 1019 that the essential elements of confrontation is "the right to be shown that the accuser is real and

the right to probe accuser and accusation [i.e. cross-examination by counsel] in front of the trier of fact [judge or jury]."

Only one month later a Maryland Appeal Court became the first to apply the decision in *Coy v Iowa*. In *Maryland v Craig supra* the accused, a day care operator, was charged with having committed certain sexual offences upon a six year old girl. This was based on certain disclosures made by the little girl, Brooke, to a therapist and the results of a medical examination which revealed a scarred hymen (at 255). Brooke was allowed to testify via closed circuit television in terms of s9-102(a)(1)(ii) of the Maryland Courts and Judicial Proceedings Code. The trial court heard evidence from professionals who had treated or interviewed Brooke and three other child witnesses, and came to the conclusion that the children would experience emotional trauma if they had to give evidence in the presence of the accused and this would make it difficult for the children to communicate effectively. Brooke testified from the judge's chambers in the presence of the prosecutor, the accused's counsel and a technician. The accused's, one of her attorneys, a prosecutor and the judge remained in the courtroom with the jury. The accused was linked to her counsel via a private telephone. The child was cross-examined by defence counsel.

The accused was convicted and appealed to the Maryland Court of Special Appeals, arguing that her constitutional right to confront the witness had been violated by the use of closed circuit television. The court did not accept these arguments and affirmed the conviction, holding that the right to confrontation is not absolute and that it was "necessary to further an important public policy" (at 260). The accused then appealed to the Court of Appeals of Maryland which reversed the conviction and remanded for a new trial, finding that the trial judge did not meet the standards laid down in *Coy v Iowa supra* since he had not made a particularised finding that the children would experience emotional distress in the presence of the accused. The Court of Appeals rejected the accused's argument that the Confrontation Clause required that there had to be a face-to-face courtroom encounter between the accuser and accused, but found that in the particular case the showing made by the state was insufficient to reach the high threshold required by s9-102(a)(1)(ii) which provides that the judge must determine "that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate". They were of the opinion that the judge should have conducted a preliminary hearing with the children in the presence of the accused to determine whether they could give evidence in her presence.

The constitutionality of the Maryland statute was then brought before the U.S. Supreme Court. The latter held, in a 5-4 decision, that the right to face-to-face confrontation is not absolute and may be abridged upon a finding of an important state interest. Justice O'Connor, for the majority, explained at 3163-4 that "although we reaffirm the importance of face-to-face confrontation with witnesses appearing at trial, we cannot say that such confrontation is an indispensable element of the Sixth Amendment's guarantee of the right to confront one's accuser". At 3157 she concluded as follows:

"[the] confrontation clause did not categorically prohibit [a] child witness in [a] child abuse case from testifying against the defendant at a trial, outside [of the] defendant's physical presence, by one-way closed circuit television; [the] finding of necessity...had to be made on [a] case specific basis; but...observation of [a] child's behavior in [the] defendant's presence and exploration of

less restrictive alternatives...were not categorical prerequisites...as a matter of federal constitutional law."

The Supreme Court held that the trial court must make a case-specific finding that the child needs to be protected. This determination must be based on three factors:

- i. a hearing must be held and evidence heard in each case to determine whether the use of closed-circuit television is necessary to protect the child;
- ii. the court must make a finding that the child will be traumatised specifically by being in the presence of the accused and not by the courtroom generally;
- iii. there must also be a finding that the emotional trauma suffered by the child must be more than *de minimis* i.e. more than the nervousness or excitement ordinarily present when testifying and not just a reluctance to testify (at 3169).

However, the court refused to insist that the trial court observe the child's demeanour in the presence of the accused before allowing the child to give evidence via closed-circuit television (at 3171).

The U.S. Supreme Court sent the case back to the Maryland Court of Appeals to reconsider the matter in the light of their decision. The Maryland Court reheard the case in *Craig v Maryland*, no.110, Spring Term 1988 (Court of Appeals of Maryland, April 8, 1991) and upheld their earlier ruling that the procedures adopted by the trial judge did not comply with the Supreme Court's criteria of an individualised finding that the child witness will experience emotional trauma. At 12 they held "when the trial judge made his... finding that authorized the use of closed-circuit television, he had the benefit only of expert testimony on the ability of the children to communicate; he did not question any of the children himself, nor did he observe any child's behaviour on the witness stand before making his ruling".

The constitutionality of the Maryland statute also came before the courts in *Wildermuth v State*, 310 Md. 496, 530 A.2d 275 (1987) where the chief witness, the victim of abuse, was the nine year old daughter of the accused. The latter objected to the state's request to make use of the statute and allow the child to give evidence via closed-circuit television, arguing that the statute violated the Confrontation Clause. The Maryland Court of Appeals found that the statute was not unconstitutional, although the requirements set out in the section were not satisfied in the particular case.

In summary, therefore, the position as laid down by the Supreme Court is that the presiding judge must make an individualised finding that a particular child witness will be harmed psychologically by giving evidence face-to-face in the presence of the accused. Although the Supreme Court refused to lay down what evidence had to be presented in order to make such a finding, they nevertheless stated that the trial court must find that the witness was traumatized by the presence of the accused and the emotional distress must be more than ordinary nervousness or excitement or reluctance to testify.

Although the U.S. Supreme Court in *Craig supra* found that there must be a case-specific finding of necessity in each case, Pershkov (1991:942) argues that the decision is nevertheless a broad one. It "effectively declares as constitutional all state child protection statutes that can still preserve certain elements of confrontation". The latter would include the following: the child must be competent to testify and must do so under oath; the accused must have full opportunity to cross-examine the child; and the judge, jury and accused must be able to view (including via video monitor) the demeanour of the witness as the latter testifies. The Court in *Craig* avoided the language in *Coy supra* that strongly favoured an absolute right to face-to-face confrontation, and focused primarily on possible exceptions. This, Pershkov (1991:942) explains, "has returned confrontation clause jurisprudence to the line of precedent that alertly and properly recognized the need for limitations on the right to confront one's accusers".

### 3.4.5.1 Criteria for Determining Emotional Trauma

There is general agreement that the court is entitled to make use of protective measures where the child would suffer "unreasonable mental and emotional harm" if testifying, according to *Vigil v Tansy*, 917 F.2d 1277 (10th Circ.1990) at 1279 and the court emphasised that there had to be an individualised, case-specific finding of harm. The courts have insisted that the finding must be case-specific. In *People v Henderson*, 554 N.Y.S. 2d 924 (A.D. 2 Dept. 1990) the Appeal Court reversed a babysitter's conviction because the trial court had based their finding of the children's need to give evidence via closed-circuit television solely on an expert's testimony that all sexually abused children would benefit from this procedure, not the specific children involved in the case.

In *State v Self*, 56 Ohio St.3d 73, 564 N.E. 2d 446 (1990) at 451 the court stated that there had to be "serious emotional trauma" and in *State v Crandall*, 120 N.J. 649, 577 A.2d 483 (1990) at 490 the criteria were described as "severe emotional or mental stress". However, in *Leggett v State*, 565 So.2d 315 (Fla. 1990) at 317 the court felt that there had to be "at least moderate emotional or mental harm", which suggests a slightly lower standard than the former cases.

The Supreme Court of Kansas in *State v Chisholm*, 250 Kan. 153, 825 P.2d 147 (1992) set out the following factors which they believed should be used when determining the child's capacity to testify in court in the presence of the accused:

- i. the probability that the child will suffer psychological injury if the child testifies in court;
- ii. the degree of the injury that is anticipated;
- iii. whether the anticipated psychological injury will be substantially greater than the reaction of the average victim of sexual violence.

Another list of factors to be considered was set out by the New Jersey Supreme Court in *State v Crandall supra* at 490:

- i. the heinousness of the crime;

- ii. whether the child is particularly susceptible to psychological injury because of a pre-existing mental condition;
- iii. whether the alleged abuser has any position of authority over the child;
- iv. the duration of the abuse;
- v. whether any weapon was used during the offence;
- vi. what physical harm, if any, was inflicted upon the victim;
- vii. whether the child had been threatened in the event of reporting the alleged incident;
- viii. the family relationship between the victim and the accused;
- ix. whether the child has any history of child abuse or incest.

The different states vary in the factors that are required before face-to-face confrontation will be dispensed with. Some states require only a finding of "good cause", others require a finding of medical or other unavailability, and some even insist that the child must have been harmed or violently threatened by the accused. A number of states actually stipulate the factors which judges have to consider when deciding to use close-circuit television or videotaped evidence (Whitcomb 1992:155).

What evidence will then be required to prove the above factors? What standards need to be complied with?

At the original trial in *Maryland v Craig supra* several professionals gave evidence. One professional, a counsellor, testified that one of the victims with whom she had conducted a number of sessions would find it "very difficult if not impossible... to sit in the same room with Mrs. Craig and discuss the alleged abuse incidents, [and] she would be unable to talk about what happened to her" (at 285). Giving evidence about another of the alleged victims whom she had counselled, the counsellor testified that he "would have great difficulty in talking in front of people, particularly in front of Mrs Craig, whom he sees as a threatening figure... he becomes agitated and depressed... bursts into tears and would be unwilling or unable to proceed at that point... [and] it would be necessary to remove the threatening agent... Ms. Craig" (at 286). She also testified, with regard to another victim whom she had counselled, that the latter "perceived Ms Craig as having threatened her life and the lives of her parents and her sibling... [and] I believe that her fear would impair her ability to sit in front of that person or be in the same room with that person, [she] would be unable to discuss or to share with the required individuals that information which she has to share regarding these allegations" (at 286).

A psychologist, who had been counselling another of the alleged victims in the same case, testified that if the child were forced to give evidence in the presence of the accused, he would experience "an extreme level of high anxiety and distress... and that he exhibits extreme regressive behaviour, thumb-sucking, you know, wanting the blanket, wanting clingingness, extreme dependency, all those kinds of behaviour... his ability to communicate would be grossly impaired if he were to testify in open court in the presence of Ms. Craig,... [and his] chances of communicating clearly would be enhanced if he were allowed to testify outside of Ms. Craig's presence" (at 286).

In *State v Self supra* the alleged victim's psychotherapist testified at 464 that "it would be extremely difficult for [the victim]... emotionally difficult for them to appear in court in the presence of her father and tell the court what

occurred to her. I feel that it would be extremely traumatic for her and I obviously feel that videotaping would definitely be to her advantage." In *People v Guce*, 164 A.D. 2d 946, 560 N.Y.S. 2d 53 (2nd Dept. 1990), 76 N.Y.2d 986, 563 N.Y.S.2d 775, 565 N.E. 2d 524 (1990) the trial court allowed the child to give evidence via closed-circuit television. In coming to this decision the court relied on the evidence of a social worker who specialised in working with sexually abused children. The social worker testified at 56 that the offences had been committed in a particularly heinous manner; that the children were very young, aged 6 and 8; that the accused held a position of authority over the children; the mother had threatened the children that they would be responsible if their father went to prison; and the children were particularly susceptible to psychological harm because they felt that they had been abandoned by their parents.

It is clear from some cases that people who are not professionals, but who do have some knowledge of the child's behaviour, may be allowed to give evidence. In *State v Tafoya*, 108 N.M. 1, 765 P.2d 1183 (N.M.App.1988) the court was satisfied that a child should not face the accused after evidence was given by three experts and the children's parents that testifying in court would cause the children "unreasonable and unnecessary harm".

In *Gilbert v Maryland*, No.63, Spring Term, 1990 (Court of Appeals of Maryland, April 8, 1991) the trial judge held a preliminary hearing at which the prosecutor and defence counsel were present but the accused, who was the stepfather of the twelve year old complainant, was excluded. The judge questioned the child and came to the conclusion that the child had difficulty testifying, and was terrified of the accused. The judge refused to hear evidence from expert witnesses on this point and preferred to rely on her own observations. The judge then allowed the child to give evidence via two-way closed-circuit television. The Maryland Court of Appeals found the procedure to be correct explaining their reasoning at 27:

"The judge made a case-specific finding of the necessity for the child to testify out of the physical presence of the defendant. She personally observed, and carefully and fully interviewed, the child on the record. It is perfectly clear from the child's reaction to and responses to the judge's questions that the presence of the defendant at the interview was not desirable because it would be harmful to the child. We hold that, in the circumstances here, the judge did not abuse her discretion in conducting the interview out of the presence of the defendant".

From the *Maryland v Craig* decision *supra* it is clear that professionals will be required to give evidence to assist the court in determining whether the trauma is severe enough to allow face-to-face confrontation to be dispensed with. The above cases give some idea of what kind of evidence needs to be put before the court, but it should be noted that the Supreme Court did not give an opinion on how the experts should arrive at their conclusions or whether an objective second opinion was required. There is also no indication of how the conclusions of the experts were evaluated (Gembala and Serritella 1992:21).

### 3.5 The Rule Against Hearsay and Child Witnesses

#### 3.5.1 Introduction

Hearsay, according to American law, is defined as an out-of-court statement which is admitted in evidence to prove the truth of its contents (Myers 1987:261). Rule 801(c) of the Federal Rules of Evidence defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted".

The admissibility of hearsay statements becomes very important when dealing with child witnesses. As Myers (1987:260) points out, a 'significant proportion' of evidence from child witnesses comes in the form of out-of-court statements. In cases of sexual abuse, the admissibility of hearsay becomes even more crucial since the out-of-court statements by the children usually constitute the most important evidence.

This evidence is often regarded as vitally important because the statements made by the children are usually the only available evidence, since physical evidence is very rare in sexual abuse cases. The majority of these crimes are non-violent in nature, such as petting, fingering, oral sex etc. Added to this, is the fact that these crimes are of such a nature that they are usually performed in secret so there are no other witnesses, and, finally, children's memory fade with time (Myers 1987:260-1). In the light of this, out-of-court statements made by children provide very important evidence.

"In cases of child sexual abuse, the child's out-of-court statements may be the most compelling evidence in the government's arsenal. Indeed, hearsay may be the only evidence, since child sexual abuse frequently occurs in the absence of other witnesses or physical trauma to the child, and the child may be found incompetent or otherwise unavailable as a witness. But even the youngest, most immature sexual abuse victims often make casual, innocent remarks that are alarmingly accurate in their portrayal of sexual activities that should be unknown to a child. Such statements are usually inadmissible because they cannot fit into the available exception categories." (Whitcomb et al 1985:69).

In practice, the most common form of hearsay evidence available in sexual abuse cases, is where the child victim makes a statement to a mother or another adult about what happened. The mother (or other adult) gives evidence at the trial and the child's statement is offered as evidence to prove the truth of the assertion where the child does not give evidence (Myers 1987:262). In *Alston v United States*, 462 A.2d 1122 (D.C. 1983) a four year old child made a certain statement to adults in which she revealed the details of sexual abuse. At the trial the child did not give evidence and these statements were held to be hearsay, and therefore inadmissible. Also in *United States v Nick*, 604 F.2d 1199 (9th Circ. 1979) a three year old made a statement to a physician describing a sexual assault. Since the child was unable to give evidence at the trial, the statement by the physician as to what the child had told him was held to be hearsay and inadmissible.

The general rule is that hearsay evidence is inadmissible because it is unreliable. It is excluded because it is generally less reliable than live testimony. It consists of statements which are not made under oath, and the defence is not given an opportunity to cross-examine the original utterer of the statement (Whitcomb et al 1985:69). Myers (1987:275), quoting Weinstein, explains the reasoning for the inadmissibility of hearsay statements:

"The orthodox approach - which, prior to the adoption of the Federal Rules of Evidence, had been followed by a majority of courts - rejects all such statements offered substantively because their value depends ... on the credit of a declarant who was not under oath, not subject to demeanour observation by the trier and not exposed to cross-examination at the time he made his statement".

According to Myers (1987:295-6) there are four risks involved in accepting hearsay evidence. Firstly, there is the danger of misperception. The person who makes the out-of-court statement may not have the capacity to perceive the event he is talking about accurately. Secondly, the declarant's memory regarding the event may be inaccurate. Thirdly, there is a danger that the declarant's statement may be ambiguous and there is no guarantee that the hearer heard correctly. Fourthly, the declarant may be exaggerating or even lying. Although these risks would apply to in-court statements as well, there are three differences that have an important effect on the admissibility of this type of evidence. The witness in court takes an oath which intends to stress the special duty of speaking the truth. The witness is in court so the court can observe the demeanour and credibility of the witness. Finally, the witness can be subjected to cross-examination in court and this is supposed to test the weaknesses of the witness's evidence.

Although the general rule is that hearsay is inadmissible, the courts have never interpreted the Confrontation Clause to exclude all out-of-court statements (Note 1985:809). In 1895 the Supreme Court in *Mattox v United States supra* admitted that the rule against hearsay "must occasionally give way to considerations of public policy and the necessities of the case" (at 243). This has given rise to the development of a number of exceptions over the years in terms of which certain hearsay statements can be admitted. This is based on the argument that certain classes of out-of-court statements are likely to be reliable, for instance the exception relating to dying declarations is based on the belief that a person who is about to die will speak the truth (Note 1985:810).

Other commonly applicable hearsay exceptions are complaints of rape, medical complaints and excited utterances. In addition to these exceptions, there are specially enacted exceptions in the Federal Rules of Evidence allowing the admission of certain hearsay statements, as well as certain enactments in some states.

### **3.5.2 Common Law Exceptions to Hearsay**

#### **3.5.2.1 Complaint of Sexual Assault**

Traditionally in cases of sexual offences, it is admissible to lead evidence that a woman made a complaint that she was assaulted. The origin of this exception has been traced back to the old law of 'hue and cry' where the victim had to raise the alarm immediately after she was raped.

"In England, the evidential use of those outcries and explanations came down to us in the 1700s as a traditional relic of the old law of hue and cry. Not only in such cases, but in all charges of

violence, the accuser must show, to sustain his charge, that he made hue and cry, alarming the neighborhood freshly after the occurrence" (Wigmore 1974:240).

Although the original reason for raising a 'hue and cry' no longer applies, the exception still remains and is based on a number of grounds (Myers 1987:345). Firstly, there is the belief that any person who has been raped will immediately tell somebody about what has happened. If the victim is silent, this is regarded as a form of self-contradiction of the victim's allegation.

"... the fact of a failure to speak when it would have been natural to do so is in effect an inconsistent statement or self-contradiction ... It was entirely natural, after becoming the victim of an assault against her will, that she should have spoken out. That she did not, that she went about as if nothing had happened, was in fact an assertion that nothing violent had been done." (Wigmore 1974:298)

Therefore a complaint of rape is admitted as corroboration of the victim's evidence, and rebuts the inference of silence which is (supposedly) inconsistent with her allegation of rape (Whitcomb et al 1985:69).

The general rule is that for such a complaint to be admissible, the victim must testify. Wigmore (1974:307) explains that "[s]ince the only object of the evidence is to repel the supposed inconsistency between the woman's present testimony and her former silence, it is obvious that if she has not testified at all, there is no inconsistency to repel, and therefore the evidence is irrelevant". There is, however, authority that if the victim is too young to take the stand, the complaint may still be received (*People v Meacham*, 152 Cal.App.3d 142, 199 Cal.Rptr. 586 (1984)).

The evidence admissible under this exception is limited to the fact that a complaint was made. The details of the complaint do not become admissible. In *Lawson v State*, 377 So.2d 1115 (Ala.Crim.App. 1979) the court at 1118 explained:

"[i]t is a well established rule in Alabama that testimony concerning the prosecutrix's complaint must be confined to the fact of the complaint. Details of the occurrence such as specifying the identity of the person accused, the injuries claimed to have been sustained, or other minute circumstances of the offense are not admissible."

This is set out even more clearly in *State v Ramos*, 203 N.J.Super. 197, 496 A.2d 386 (1985) at 388:

"Only the fact of complaint, not the details. The purpose is to negative the supposed inconsistency of silence by showing that there was not silence. Thus the gist of the evidential circumstances is merely non silence, i.e., the fact of complaint, but the fact only."

Secondly, these fresh complaints are admissible when they are introduced to rebut an attack on the witness's evidence in court. If the defence were to allege that the story the victim has given on the stand has been made up, evidence of her recent/fresh complaint made soon after the assault may become admissible (Myers 1987:347).

In this instance the details of the event will become admissible, as explained by Wigmore (1974:311):

"The details of the statement are admissible. Since the purpose is to show that she tells the same story as on the stand, the whole of the complaint as made by her, with its terms and details, is to be received, and not the mere fact of the complaint."

Evidence of the fresh complaint is strictly speaking not hearsay. It is not introduced to prove the truth of its contents, but simply to corroborate the victim's evidence at the trial (Myers 1987:348). This is explained in *State v Ramos supra* at 388 where the court explained that "[a]lthough fresh complaint is often characterized as an exception to the hearsay rule ... neither the hearsay rule nor its exceptions are involved with this principle of admissibility. The statement of the victim is offered not for the purpose of proving the truth of the assertion made, but to show that it was in fact made as corroboration of the victim's assertion that she was assaulted". There are, however, decisions which describe this as an exception to the hearsay rule. In *State v Sanders*, 691 S.W.2d 566 (Tenn.Crim.App. 1984) the court held at 568 that the statements of a five year old "were admissible under the fresh complaint exception to the hearsay rule". In *Commonwealth v Bailey*, 370 Mass. 388, 348 N.E.2d 746 (1976) the court explained at 750 that "[f]resh complaint in cases of sexual crime evolved into a hearsay exception".

Although this exception originally arose in cases of rape, it has been extended to include other sexual offences against children (Myers 1987:349). In *State v Campbell supra* the Oregon Supreme Court allowed a mother of a three year old to give evidence that "at my home while seated in the recliner chair in the front room my three-year-old told me that a person licked her tee-tee" (at 701). The court in this case traced the exception of complaint of sexual conduct all the way back to 1840 and explained that the basis of this exception was to admit evidence "to corroborate the testimony of ... witnesses or to negate an inference of consent" (at 702).

An important requirement for admissibility in terms of this exception is that the complaint be made promptly i.e. within a reasonable time after the assault (Myers 1987:352). Court decisions as to what a reasonable time would be vary greatly in interpreting this requirement. In *In re Cheryl H.*, 153 Cal.App.3d 1098, 200 Cal.Rptr. 789 (1984) a three year old victim made statements approximately two months after the alleged assault. The court held that these statements were too remote to be admissible in terms of this exception. However, in *State v Baca*, 56 N.M. 236, 242 P.2d 1002 (1952) the court found a three month delay to be reasonable, whereas in *State v Gibbons*, 97 Nev. 299, 629 P.2d 1196 (1981) a complaint made two to three hours after the assault was too remote.

Some legal commentators argue that this exception has very limited value for children, especially those who are victims of sexual abuse. This is based on two grounds. Firstly, the exception is usually introduced to corroborate the victim's evidence that consent was absent. Since children cannot consent to sexual acts, some courts have held that the complaint of sexual assault is irrelevant in the case of children and, therefore, inadmissible (Whitcomb et al 1985:70). The second argument is that the exception requires that the complaint be made within a reasonable time, and this happens very rarely in the case of children. Victims of child sexual abuse frequently endure abuse for long periods of time before revealing what has happened, and then the revelation usually occurs by accident or inadvertently without the child even making a statement. In *United States v Lips*, 22 M.J. 679 (A.F.C.M.R. 1986) a psychologist gave evidence that approximately 70-90% of rapes go unreported or "are delayed in being reported because the victim is ashamed or fearful that no one will believe her" (at 683). According to Russell (1983:142) only a small percentage of child sexual abuse is reported, with only 2% of intrafamilial and 6% of extrafamilial abuse being reported.

Dziech and Schudson (1989:140-1) argue that this exception is still very important for a number of reasons. It serves to remind lawyers and judges that the creation of exceptions to the hearsay rule is not a new concept, and that the courts, especially in the case of child sexual abuse, have considered the statements made by children to adults to be important. The admissibility of these statements, they argue, is often essential in view of the trend of the defence to raise allegations of recent fabrication, persuasion, coercion or subsequent recantation.

### 3.5.2.2 Medical Complaints

In terms of this exception, certain hearsay statements will be admissible to prove the truth of their contents if the statements describe symptoms or feelings and are made to doctors or physicians for the purpose of diagnosis or treatment. This exception has been codified into Rule 803(4) of the Federal Rules of Evidence, which provides:

"The following are not excluded by the hearsay rule, even though the declarant is available as a witness. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

These statements are admissible since they reduce the usual risks associated with hearsay evidence. There is very little chance that a person can make mistakes about the physical symptoms he is experiencing since the declarant has the best knowledge of what he himself is feeling. It is also argued that the risks of lying are limited because the declarant has a motive to tell the truth so that he can get the correct treatment (Myers 1987:358). Dziech and Schudson (1989:142) explain "that because a patient has a compelling reason to tell the truth to the doctor, the statements are very reliable". Selkin (1991:294) explains that the rationale behind the exception is that the trustworthiness of the statements are "assured by the likelihood that the patient believes that the effectiveness of the treatment he receives may depend largely upon the accuracy of the information he receives". The rationale that an individual may be highly motivated to give a doctor an accurate statement of his symptoms may be applicable to adults and older children, but young children may not understand the reason for being truthful (Myers 1987:358). Myers, quoting from a note in the Georgia Law Journal, explains that "[a] very young child, however, might not realize that the doctor is trying to treat him. In such a case, the rationale for the exception would be inapplicable". In *People in re W.C.L.*, 650 P.2d 1302 (Colo.App. 1982) the child victim was found incompetent to give evidence, but the trial court allowed a physician to testify regarding statements made to him by the child under the Colorado Rule of Evidence 803(4) which enacted the medical exception. The Appeal Court, however, found that the hearsay statements of the child should not have been admitted in terms of R803(4) since (at 1304) there was "nothing in the record ... which would establish that the victim understood, or was aware of, the purpose of the questioning by the doctor". However, in *State v Nelson*, 138 Wis.2nd 418 (1987) the Wisconsin Supreme Court held that even a three year old child is aware that statements made to a doctor and a psychologist are for medical purposes, thus extending the exception to very young children who would not normally have fallen within this exception.

To qualify in terms of this exception, a statement must be reasonably relevant to diagnosis or treatment. In *Begley v State*, 483 So.2d 70 (Fla.Dist.Ct.App. 1986) certain statements were made to a counsellor at a sexual assault centre. The court held that the statements did not fall within this exception since the counsellor explained that she

had interviewed the complainant "just to see how she was doing and what was troubling her at the time" (at 73). At 74 the court explained that it must be shown that the statements were made for the purpose of diagnosis and treatment, and that the victim was aware of the purpose for which the statements were being made.

Statements of past medical history would fall within the exception. If a child were injured and the child made a statement describing former instances of abuse which gave rise to the incident, these would be admissible. In *State v Bawdon*, 386 N.W. 484 (S.D. 1986) a six year old was taken to a physician to be examined on the premise that she may have been sexually abused. The physician asked her whether anyone had touched her down in the genital area, and the child nodded her head in affirmation. The South Dakota Supreme Court found this evidence to fall within the exception and, therefore, to be admissible.

There is some confusion as to whether the statement is allowed to include the identification of the person responsible for the injury. Originally this was held to be inadmissible. In *State v Bellotti*, 383 N.W. 308 (Minn.Ct.App. 1986) the court elucidated this point at 312: "Dr Levitt's testimony included statements of the children not admissible under Rule 803(4). Dr Levitt testified that each child identified appellant as the man who had touched them. Such statements regarding who caused injuries generally are not admissible because they are irrelevant to medical diagnosis and treatment".

This was one of the reasons that this exception has been regarded as having a very limited application in the case of children since the doctor was allowed to tell what had happened but not who had done it (Dziech and Schudson 1989:142). However, the Wyoming Supreme Court ushered in a new approach in *Goldade v State*, 674 P.2d 721 (Wyo. 1983), cert. denied, 467 U.S. 1253 (1984). The court held that in child abuse litigation, a statement made by a child complainant identifying the abuser may be admissible under this exception. The court came to this decision on the basis that part of the treatment of child abuse is to remove the child from the abusive environment. In order to do this the doctor has to discover the identity of the abuser and, therefore, this becomes pertinent to treatment. In *People v Oldsen*, 697 P.2d 787 (Colo.App. 1984) the physician repeated the hearsay statement of a child which identified the accused as the perpetrator. The Appeal Court held that the statement was admissible under the medical diagnosis exception because "medical diagnosis in the child abuse context required prevention of future abuse by identifying the perpetrator". States have been divided about the admissibility of the perpetrator's identity after this decision. Some have continued to hold that these statements would be inadmissible whereas the growing majority have found them to be admissible (Myers 1987:360).

In 1985 the Federal Court of Appeals followed the line of thought adopted in *Goldade supra* and strengthened the arguments for making these statements admissible. In *United States v Renville*, 779 F.2d 430 (8th Circ. 1985) the accused was charged with various counts of sexual assault on his eleven year old stepdaughter. The latter's doctor gave evidence that the girl had described acts of anal intercourse and oral sex during an examination after the assault. The doctor was permitted to testify that the child had identified the accused as the abuser. The court explained the reason for their decision as follows at 435:

"First, child abuse involves more than physical injury; the physician must be attentive to treating the emotional and psychological injuries which accompany this crime ... The exact nature and extent of the psychological problems which ensue from child abuse often depend on the identity of the abuser... Second, physicians have an obligation, imposed by state law, to prevent an abused child from being returned to an environment in which he or she cannot be adequately protected from recurrent abuse ... information that the abuser is a member of the household is therefore 'reasonably pertinent' to a course of treatment which includes removing the child from the home".

Although in this case the statement emanated from a doctor, it has provided a basis for the exception being extended to include other professionals, such as psychologists, counsellors etc, who treat the emotional and psychological injuries accompanying the crime (Dziech and Schudson 1989:143). For instance, in *State v Robinson supra* a statement by a psychologist about what a ten year old victim said, including the identity of the abuser, during treatment was found to be admissible. And in *State v Clements*, 734 P.2d 1096 (Kan. 1987) the court broadened the scope of these statements to include those made to mental health therapists.

The broadening of this exception has been welcomed since it has often been regarded as having limited application insofar as children are concerned. The exception, however, applies only when the child has sustained injuries or discomfort serious enough to require medical attention. In practice, the majority of sexual abuse cases do not give rise to injuries and would, therefore, not fall within this exception (Whitcomb et al 1985:70).

In *People v Oldsen supra* the accused was charged with various counts of sexual assault and incest committed on his five year old daughter. The child was found to be incapable of understanding the nature of the oath and was too young to communicate and relate facts to the court. At the trial the prosecution called as witnesses a school psychologist, a physician, an investigator and a social worker, all of whom had spoken to the child in a professional capacity. The psychologist tested the child at the request of a teacher because the girl was having trouble at school. The psychologist testified that the child told her that she was hurt when the accused tried unsuccessfully to put his penis into her vagina, that he hurt her brother to prevent the latter from reporting what had happened, and that she had touched the accused's penis. The child was then referred to a physician, who examined her. The physician observed that there were certain injuries and asked the child who had caused the injuries. The child replied that it was her daddy, that the injury was caused by his penis and he had told her not to tell anybody. An investigator gave evidence that the child told her that she and her father slept together and that she did not like to touch him but that he wanted her to touch his penis. The social worker testified that the child told her that daddy had put his penis in her ... all the way. She said that daddy had done it "lots of times, millions".

The accused was convicted and appealed to the Court of Appeals, arguing that the child's hearsay statements should not have been admitted. The Court of Appeal had, therefore, to decide whether the child's statements had been correctly admitted in terms of the medical exception as set out in the Colorado Rules of Evidence. Rule 803(4) provides that "statements made for purposes of medical diagnosis or treatment and describing medical history or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment". The Appeal Court affirmed the conviction and held that the statements introduced by the social worker, the psychologist and the physician were properly admitted under R803(4).

On review the Supreme Court, referring to *People in re W.C.L. supra*, found that there was no evidence on the record that the child was capable of recognising the need to provide accurate information for the purpose of medical diagnosis and treatment, and therefore, none of the statements were admissible under the medical diagnosis exception. However, the court did find that the statements were supported by circumstantial guarantees of trustworthiness and they were, therefore, admissible in terms of Rule 803(24), which was the residual exception to the hearsay rule.

*Idaho v Wright supra* dealt with the admissibility of statements made by a two and a half year old girl to her paediatrician. At a preliminary hearing it was agreed by both the prosecution and the defence that the child was not competent to testify. The trial court admitted the child's hearsay statements to the paediatrician as falling within the exception of medical complaints. The accused, the mother of the two little girls involved, was found to have held the children down while her co-accused had sexual intercourse with each child. Both were convicted and sentenced to imprisonment. Both accused appealed separately against the conviction with respect to the younger child. The appeal under discussion here relates only to the first accused, namely the mother of the child, who argued that the admission of the child's hearsay statements should not have been allowed and that they violated her constitutional rights. The essence of the appeal related to the evidence of the paediatrician, Dr Jambura, and I shall concentrate on his evidence in some detail since it raises issues which are very relevant to this study. The relevant evidence of the doctor was set out at 3143-4:

- "A ... I started out with basically, 'Hi, how are you', you know, 'what did you have for breakfast this morning?' Essentially, a few minutes of just sort of chit chat.
- Q Was there response from Kathy to that first - those first questions?
- A There was. She started to carry on a very relaxed, animated conversation. I then proceeded to just gently start asking questions about, well 'how are things at home', you know, those sorts. Gently moving into the domestic situation and then moved into four questions in particular, as I reflected in my records. 'Do you play with daddy? Does daddy play with you? Does daddy touch you with his pee-pee? Do you touch his pee-pee? And again, we established what was meant by pee-pee, it was a generic term for genital area.
- Q Before you get into that, what was, as best you recollect, what was her response to the question 'Do you play with daddy?'
- A 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.
- Q And 'Does daddy play with you?' Was there any response?
- A She responded to that as well, that they played together in a variety of circumstances and, you know, seemed very unaffected by the question.
- Q And then what did you say and her response?
- A When 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."

These statements were admitted by the trial court, even though the declarant was not available to give evidence. On appeal to the Idaho Supreme Court the accused argued that the hearsay statements did not fall within any of the traditional exceptions, and there was no showing of particularised guarantees of trustworthiness supporting the doctor's statements. It was argued that, in fact, the hearsay statements were not trustworthy because of the interviewing techniques employed by Dr Jambura. The majority of the court found that the circumstances surrounding the interview indicated that there were dangers of unreliability. The paediatrician, who was aware that the older child had made allegations of sexual abuse, may have had preconceptions. He did not videotape or make

an audio tape of the interview. He lost the picture that he worked with when he was communicating with the little girl. He used leading questions while interviewing the child and made no accurate record of her responses. He merely testified that the child 'admitted' the facts - does this mean she said 'yes' or nodded or offered an explanation. The court came to the following conclusion:

"Dr Jambura's testimony as presented lacks particularized guarantees of trustworthiness and, in fact, is fraught with the dangers of unreliability which the Confrontation Clause is designed to highlight and obviate. We are not convinced, beyond a reasonable doubt, that the jury would have reached the same result had the error not occurred. Thus, we reverse Wright's conviction on the count charged with respect to the acts against the younger daughter because of the Confrontation Clause violation and remand the case for trial consistent herewith." (116 Idaho 289, 775 P.2d at 1231)

Chief Justice Bakes dissented, arguing that the majority adopted a severely limited application of the 'indicia of reliability' test. The particularised guarantees of trustworthiness and indicia of reliability, as interpreted in other United States Supreme Court cases, are to be determined from all the facts and circumstances of the case. In terms of the majority decision, evidence which would otherwise satisfy the trustworthiness standard, such as corroborating physical and medical evidence, becomes irrelevant.

The State appealed to the U.S. Supreme Court, but the latter found the statements to be inadmissible, although the court was closely divided in their 5 to 4 decision. The court set out a two part test at 3147 for determining whether hearsay in child sexual abuse cases will be admissible. Firstly, if the child's statement falls under a firmly rooted exception to the hearsay rule, then the statement will be admissible. Secondly, if the child's statement falls under an exception to the hearsay rule that is not firmly rooted, then the statement will be presumed to be unreliable and inadmissible. In order for the latter statement to become admissible, there must be a showing of 'particularized guarantees of trustworthiness' (at 3147). In determining what constituted 'particularized guarantees of trustworthiness', the U.S. Supreme Court refused to lay down specific procedures that ought to be followed when interviewing children that would guarantee admissibility:

"Although the procedural guidelines propounded by the [Idaho Supreme Court] may well enhance the reliability of out-of-court statements of children regarding sexual abuse, we decline to read into the Confrontation Clause a preconceived and artificial litmus test for the procedural propriety of professional interviews in which children make hearsay statements against a defendant." (at 3148)

The U.S. Supreme Court did give examples of some factors that would serve as indicators of the reliability of such hearsay statements, the trustworthiness being determined only from the circumstances surrounding the making of the statement (at 3149). This had the effect that any physical injuries the child may have would not be allowed to be used to increase the trustworthiness of the hearsay. Kennedy, in his dissenting judgement, argued very vehemently that physical evidence is often the best way of determining the trustworthiness of a child's hearsay statement (at 3153-7). However, the following were the factors which the court suggested could be used as indicators of reliability: spontaneity and consistent repetition; mental state of the child making the statement; the use of terminology which would be unusual or unexpected in a child of a similar age; and the child's lack of motive to fabricate. The court did add at 3149-50 that "[t]hese factors are, of course, not exclusive and courts have

considerable leeway in their consideration of appropriate factors. We therefore decline to endorse a mechanical test for determining 'particularized guarantees of trustworthiness' under the Confrontation Clause. Rather the unifying principle is that these factors relate to whether the child declarant was particularly likely to be telling the truth when the statement was made". Using this test, the Court found that the child's statements in this particular case did not have sufficient trustworthiness to satisfy the Confrontation Clause, and were therefore inadmissible.

Gembala and Serritella (1992:22) argue that the judgement does not offer any guidance as to when a hearsay exception becomes 'firmly rooted'. For instance, 'medical treatment' and 'excited utterances' have been held to be firmly rooted exceptions. However, the further problem is that it is difficult to determine when a child's statement will fall under these exceptions, the result in the *Wright* decision *supra* itself being in point where the paediatrician's statements regarding what the child had said were not admitted under the medical treatment exception. Despite this, the lower courts have applied the test in the *Wright* decision *supra* when trying to determine if a hearsay statement of a child contains the 'particularized guarantee of trustworthiness'.

Two trends have emerged in the more recent cases which are of particular importance to the admissibility of children's hearsay statements (Gembala and Serritella 1992:23). Firstly, professionals who interview children do not have to videotape their interviews, but the courts do look favourably upon those interviews that have been taped. Although the court in *Wright supra* found the children's statements to be inadmissible, because they were made in response to leading questions, subsequent courts have held that leading questions will not automatically make the child's evidence unreliable.

"Instead, some courts have recognized that it is somewhat absurd to conduct counselling sessions by simply waiting for a child to blurt out statements relating to sexual abuse. Therefore, these few courts have granted some leeway to counsellors when leading questions were used if they were carefully worded so as not to be overly suggestive. However, this is still controversial in both the legal and mental health field." (Gembala and Serritella 1992:23-4).

In summary, the position seems to be that the court will in certain circumstances admit the hearsay statements of some children, depending on the nature of the interview procedures that were conducted. The court refused to specify the criteria for interviewing procedures that would ensure the admissibility of such statements, and it is therefore difficult to provide guidance as to how these interviews should be conducted (Gordon 1992:69). Gordon (1992:70) explains that many child protection teams are developing interview protocols that could be used for questioning children in these situations. Firstly, children's statement should as far as possible be allowed to be made as spontaneously as possible with very careful use of leading questions. Secondly, where possible interviews should be videotaped or audiotaped to provide a record of the interview.

Chief Justice Bakes in his dissenting judgement in the *Idaho v Wright* decision *supra* highlighted a number of problems that this decision would give rise to. A child's allegation of abuse is not always directed at a professional who is specifically trained in interviewing child victims of abuse. A family doctor or paediatrician may notice evidence of abuse when conducting a routine examination, and may question the child and receive important hearsay evidence. In terms of the Idaho Supreme Court decision this evidence will be inadmissible unless the doctor was professionally trained to interview children. In such a case it would be highly unlikely that the interview be

videotaped since family doctors do not normally videotape their examinations of patients. Rural communities do not have videotape equipment easily accessible and this could then, in terms of the above decision, affect the trustworthiness of any interview taking place under these circumstances.

A further criticism of the majority decision and a possible disadvantage of proceeding in terms of this exception, is the fact that the majority found that one of the grounds that contributed to the lack of trustworthiness in that case was the fact that the interrogation was performed by someone with a preconceived idea of what the child should disclose (at 1227). This suggests that the court is setting an additional standard which requires that the interrogation be performed by someone who has no idea what the child will be disclosing. In most cases, however, the specially trained person will be advised as to why he is performing the examination, either by the parents or the investigators, but this will mean that he has a preconceived idea of what the child will disclose and this will in turn affect the trustworthiness of the child's statements. In fact, the judge concludes that "[t]o automatically disqualify an interview because he has 'a preconceived idea of what the child should be disclosing' will, in all probability, eliminate the use of nearly all statements made by young children to medical doctors, psychologists or social workers".

### 3.5.2.3 Excited Utterances

This is the most commonly used hearsay exception in the case of child sexual abuse cases (Whitcomb et al 1985:70), and has been codified in Rule 803(2) of the Federal Rules of Evidence. This Rule provides that statements will be admissible as an exception to the hearsay rule where the statement relates "to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition".

The rationale for the admissibility of these statements is that they are considered to be trustworthy since they are made "shortly after a startling event, while the declarant remains affected by the stress of excitement caused by the event" (Myers 1987:329). People are unlikely, it is argued, to have the opportunity to think of lying, and there is very little chance of a memory lapse since the declarant makes the statement under the influence of the event. The Advisory Committee, in their Note to Federal Rule of Evidence 803(2), as quoted by Myers (1987:329), explain:

"The theory of Exception (2) is simply that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication."

The reasoning behind the admissibility of excited utterances is set out in *Bishop v State*, 581 P.2d 45 (Okla.Crim.App. 1978) at 48: "That is, an excited utterance made contemporaneous with a specific event, which relates to or describes the event, is held to be reliable because its nearness to the stimulating event excludes the possibility of premeditation and fabrication".

There are, on the other hand, many critics who argue that this type of evidence is very unreliable. Excitement is not a guarantee against lying and may even exaggerate distortions in perception and memory (Stewart 1970:27).

Myers (1987:320) argues that, in addition to being unreliable, excited utterances usually consist of crucial evidence which the defence does not have an opportunity to test by cross-examination.

In order to be admitted as an excited utterance, the statement must comply with the following requirements: there must be a sufficiently startling experience which suspends reflective thought, and there must be a spontaneous reaction. The latter requirement is often measured by the amount of time which lapses between the event and the statement (Whitcomb et al 1985:70). In *People v Butler*, 249 Cal.App.2d 799, 57 Cal.Rptr. 798 (1967), a five year old witnessed alleged offences perpetrated against other children. Immediately after she left the accused's home, she stated that the accused was "playing nasties" with some children. Although she did not give evidence at the trial, the above statement was admitted as an excited utterance.

Originally the question of contemporaneity was very narrowly interpreted. For instance, in *Brown v United States*, 152 F.2d 138 (D.C. Circ. 1945) the court reversed a conviction on appeal on the ground that a statement made by a complainant at dinner that he had been sexually assaulted earlier that day at school was not sufficiently contemporaneous. As a result of the difficulties associated with child sexual cases, the courts have expanded the traditional concept of contemporaneity to include the child's first disclosure, even if it comes months or weeks after the event. In *Bertrang v State*, 50 Wis.2d 702 (1970) the Wisconsin Supreme Court explained the new approach at 707-8:

"The fact that the assertions are not made within a few minutes or even hours of the alleged assault is not controlling, nor is the fact that they are not volunteered but made in response to questions ... A young child may be unable or unwilling to remember ... or be unwilling to testify, or at least inhibited in doing so from a feeling of fear or shame, ... The trial court should consider the age of the child, the nature of the assault, relationship of the child to the defendant, contemporaneity and spontaneity of the assertions in relation to the alleged assault, reliability of the assertions themselves, and the reliability of the testifying witness."

An increasing number of courts admit statements which have been made months after the assault. They have based this on knowledge which is now available regarding the way abused children react, namely that the child's disclosure may be delayed and spontaneous at the same time (Whitcomb et al 1985:71). The court recognised that young children are not skilled at "reasoned reflection and at concoction of false stories under such circumstances" (Dziech and Schudson 1989:144). The courts now examine not only the length of time that has elapsed between the assault and the statement but also whether the time could have reduced the spontaneity or in some way motivated fabrication. In *In re O.E.P.*, 654 P.2d 312 (Colo. 1982) the court explained at 318 that "[a]lthough the temporal interval between the 'startling event' and the child's statement is not without significance, it is not conclusive on the question of admissibility". In *State v Mateer*, 383 N.W.2d 533 (Iowa 1986) the court at 535 added that "lapse of time is only one of several relevant factors for the trial court to consider in determining the spontaneity of declarant's out-of-court statements". In *In re C.A.*, 201 N.J. Super. 28, 492 A.2d 683 (1985) the court at 686 specifically stated that it is proper to make allowances for a child's youth in extending time during which nervous excitement continues and in *Commonwealth v Bailey supra* at 368: "The definition of spontaneity is relaxed when the declarant is the victim of sexual assault". In *State v Bawdon supra* the court explained the question relating to lapse of time in the case of children at 486: "Where the victim is of an age as to render improbable that her

utterance was deliberate and its effect premeditated the utterance need not be so nearly contemporaneous with the act as in the case of an older person". In *State v Doe supra* the court explained that "cases have extended the time limit for young children because the danger of fabrication is more remote", although in this particular case the court rejected a statement offered as an excited utterance when the delay was only three days.

The important requirement appears to be the element of spontaneity and stress, as explained in *State v Padilla*, 110 Wis.2d 414, 329 N.W.2d 263 (Ct.App. 1982) at 267 that "a three-day time period, as in the case here, is less contemporaneous than the time periods of the other reported cases. This does not matter, however, because spontaneity and stress are the keys". The position is well summarised in *State v Doe supra*:

"Normally, in order to fall within the excited utterance exception, a statement must occur immediately after the event in question. Complete spontaneity is not required, however, and we have allowed statements made by declarants a short time after the event in question ... The question involved is not how much time has passed, but 'whether the statements was made while the declarant was still under the influence of the event to the extent that his statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment."

The extension of time lapse has been welcomed by many professionals, who argue that the younger the child and the closer her relationship to the abuser, the more likely it is that there will be a long delay before disclosure. It is for this reason that the assault, the period between the assault and the disclosure, and the disclosure itself are part of the traumatic event (Yun 1983:1755).

Despite the court's willingness to broaden the time element in the case of excited utterances, there are still a number of difficulties associated with this exception as far as children are concerned. Yun (1983:1759) argues that the expansion of the *res gestae* exception in this way destroys "the integrity of the exception, stretching it far beyond its traditional bounds, and creating much uncertainty in its application". She suggests that a separate hearsay exception be introduced which is designed specifically for children who have been abused.

A further criticism levelled at the *res gestae* exception, as far as children are concerned, is that there are many cases which do not fall within the requirements of this exception. Whitcomb et al (1985:71) explain that young children may be unaware that what has happened to them is 'wrong' and may relate their experience in a casual or unconcerned way without any shock or excitement. A child who has been abused by a parent for years may not regard such an assault as shocking or outrageous. In certain cases the child may even experience warmth and pleasure. In these situations it is unlikely that any statement made by the child would qualify as an excited utterance (Myers 1987:331). In most cases the child's delay in reporting the incident is so great that it cannot be forced within the excited utterance exception. In the vast majority of cases, children do not readily report sexual assaults for a wide variety of reasons, amongst others the fear of being disbelieved, guilt, attempts to forget and threats by the accused of reprisal if disclosed (Whitcomb et al 1985:71).

Lack of knowledge by the judiciary as to the reasons for the delay has resulted in a very narrow interpretation of the time element in some cases. For instance, in *Vera v State*, 709 S.W.2d 681 (Tex.Ct.App. 1986) a statement made by an eleven year old who had been sexually assaulted was held not to be an excited utterance since a delay

of five hours was found to be too long. The court came to this conclusion after considering the fact that before the child made her statement she had conversations with both her sister and her mother, and the child only began to cry three and a half hours after the event. The reality of the way children deal with sexual assaults often does not allow statements made by them to be introduced as excited utterances since they do not fall within the rigid requirements laid down by the law.

One of the more recent decisions of the Supreme Court deals with a number of the issues relating to child witnesses and hearsay. In *White v Illinois*, 112 S.Ct. 736 (1992) the accused was charged with sexually assaulting a four year old child. The court tried twice to call the child to give evidence, but emotionally she was incapable of doing so. The babysitter gave evidence that he was awakened by the child's scream and saw the accused leaving the child's room. The child then told him that the accused had put his hand over her mouth, threatened to beat her if she screamed and then proceeded to touch her in the wrong places (at 739) while pointing to the vaginal area. The mother testified that she arrived an half an hour later and the child told her that the accused had "put his mouth on her front parts" (at 739). A police officer gave evidence that he arrived on the scene forty five minutes later and the child told him the same story that she first told her babysitter and mother, including a statement that the defendant had "used his tongue on her private parts" (at 739). Four hours after the child screamed, she was taken to hospital where she was examined by a nurse and then a doctor. The nurse and the doctor testified that she made identical statements to those she had made earlier to her babysitter and her mother. The Supreme Court approved the admission of the above evidence. It held that the child's statements to the babysitter, the mother and the police officer all fell under the excited utterance exception since they occurred immediately after or within forty-five minutes of the event. The statements made to the nurse and the doctor were held to fall under the 'firmly rooted' medical treatment exception since the statements were made for the purpose of treatment.

#### 3.5.2.4 The Residual Hearsay Exception

The Federal Rules of Evidence contain an exception in terms of which the court may admit hearsay which does not fall within the traditional hearsay exceptions. This is known as the residual exception and is found in Rule 803(24) and Rule 804(b)(5). In terms of Rule 803 the availability of the witness is immaterial and in terms of Rule 804 the declarant must be unavailable. The language used in both are the same and there is in fact no difference between the two (Myers 1987:360). This is supported by the decision in *Huff v White Motor Corp.*, 609 F.2d 286 (7th Circ. 1979) where the court at 291 explained that "[t]he two provisions are identical, and Rule 804(b)(5) is therefore redundant, since 803(24) applies whether or not a declarant is a witness".

Federal Rule of Evidence 803 provides:

"Rule 803. Hearsay Exceptions: Availability of Declarant Immaterial  
Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be

admitted under this exception unless sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, has intention to offer the statement and the particulars of it, including the name and address of the declarant."

The purpose of this exception is to admit reliable hearsay evidence which does not fall within the existing exceptions. However, this exception was intended to be used as rarely as possible, especially in criminal trials. In *Huff v White Motor Corp supra* it was mentioned by the Seventh Circuit Court at 291 that "Congress intended that the residual exception 'be used very rarely, and only in exceptional circumstances'".

The requirements that must be complied with in order for a statement to fall within this exception are set out in *United States v Renville supra* at 439:

- i. The statement must have circumstantial guarantees of trustworthiness.
- ii. The statement must be offered as evidence of a material fact.
- iii. The statement must be more probative on the matter for which it is offered than any other evidence that can reasonably be obtained. In *State v McCafferty*, 356 N.W.2d 159 (S.D. 1984) the court found the hearsay statement of a seven year old child to be more probative than other evidence, explaining at 162 that "[i]t is obvious that the statement is more probative than any other evidence the State could produce through reasonable efforts. In this type of *loco-parentis* and child situation, it is difficult to envision any evidence more probative than the statements and actions of the victim".
- iv. The interests of justice must be served by admitting the statement into evidence.
- v. The opposing party must be given the notice specified within the rule.

Most states have adopted this Federal exception or enacted a similar provision. For instance, the State of Colorado has enacted a residual hearsay exception in Rule 803(24) which codified the circumstantial guarantees of trustworthiness standard as set out in a number of U.S. Supreme Court cases. This was set out in *People v Oldsen supra* where the court had to ascertain whether circumstantial guarantees of trustworthiness had been complied with:

"We can ascertain from the record that the other requirements of CRE 803(24) were met: the statements were offered as evidence of material facts; the statements were more probative on the points for which they were offered than any other evidence that reasonably could be procured; the general purposes of the rules of evidence and the interests of justice were best served by the admission of the statements; and the defendant had adequate notice in advance of trial that the prosecution intended to offer the statements."

This exception is particularly applicable to children since the hearsay statements of children usually have the necessary circumstantial guarantees of trustworthiness. The factors showing trustworthiness would include, for instance, the age of the child, the nature of the abuse, any physical evidence available, the relationship between the accused and the child, and the spontaneity with which the statement was made (Whitcomb et al 1985:72). In *State v Taylor* 103 N.M. 189, 704 P.2d 443 (Ct.App. 1985) the child's hearsay statement was enhanced by medical evidence. The child had made an out-of-court statement that the accused had stuck his finger in the child's "butt" (at 452). The examining physician was called to testify and he gave evidence that the child's rectum was irritated. The court found that the physician's evidence of the physical examination could be used to corroborate the child's hearsay statements. Also in *United States v Quick supra* the court accepted that the child's hearsay statements were

corroborated by the physical evidence of inflammation of her vagina.

A child's hearsay statements will also be enhanced by the detail which the child supplies of the alleged abuse. In *United States v Dorian*, 803 F.2d 1439 (8th Circ. 1986) a five year old made statements in which she accurately described an erection and explicit sexual behaviour the accused was alleged to have performed. At 1445 the court found that "[i]t is unlikely that Roxanne would have fabricated the story ... and ordinary experience suggests that Roxanne would not have engaged in the behavior with the anatomically correct dolls that Monica Whiting observed absent some prior similar experience". In *United States v Cree*, 778 F.2d 474 (8th Circ. 1985) the court at 477 also found it "highly unlikely that a four-year-old child would fabricate such accusations of abuse".

The use of the residual exception is clearly illustrated in the case of *People in re W.C.L. supra* where a four year old girl went to visit her aunt. While undressing for a bath the child spread her legs, faced her cousin and said: "Get me". When the aunt inquired what she was doing, she pointed to her genitals and said that Uncle W. tickled her. The child was taken to a doctor who examined her. The child told the doctor that Uncle W. touched her genitals "with his cock" and that it hurt (at 1303). At the trial the judge admitted the hearsay statements of the aunt and the doctor, the former as an excited utterance and the latter as a statement to the doctor for treatment. On appeal, the court confirmed the conviction, but for different reasons. They held that the statement to the aunt did not fall within the excited utterance exception because too much time had elapsed since the assault took place. They also found that the statement to the doctor was not for diagnosis or treatment because the child did not understand the purpose of the examination. However, the Colorado Appeal Court admitted the hearsay statements under the residual exception since the circumstances indicated that there was no "intellectual contrivances by the child" (at 1305), the statements were reliable, and they were essential to the jury's search for the truth.

In *United States v Cree supra* two boys, aged four and two, were severely injured as a result of a beating they received from the accused. The children did not give evidence but a social worker was allowed to relate the description of what had happened which had been given to her by the four year old boy. On appeal to the Federal Court, the decision was confirmed and the hearsay statement was found to be admissible under the residual exception:

"Maurice's age is a significant factor supporting the finding that the challenged statements are trustworthy ... It is highly unlikely that a four year old child would fabricate such accusations of abuse ... The propriety of requiring extremely young victims of abuse to take the stand as they only method for putting before the jury what is, in all probability, the only first-hand account of abuse ... is debatable ... In a more relaxed environment, the child in this case was able to provide his version of the relevant events and yet avoid a potentially traumatic courtroom encounter." (at 479)

Dziech and Schudson (1989:146) argue that this decision is important for three reasons. Firstly, it has broadened the exception to include instances of physical abuse as well. Secondly, it allowed statements for treatment to be made to a social worker, in addition to the already accepted professions of doctors and nurses. Thirdly, the federal court was of the opinion that the reliability of a child's statement may actually be enhanced if made out of court. This was further confirmed by the decision of *State v Bellotti supra* where the court emphasised at 314 that "[i]f

a child cannot remember at trial an incident occurring months previously, she may nevertheless have remembered the incident and truthfully related it at the time she made the out-of-court statement. This is particularly true of children who have short memories and cannot accurately remember events occurring months or years prior to the competency hearing".

### 3.5.2.5 Hearsay Exception for Sexually Abused Children

Since cases involving allegations of sexual abuse are difficult to prove and are often based on hearsay statements made by children who are too young or emotionally incapable of giving evidence, and the fact that these statements often do not fall within traditional hearsay exceptions, a number of states have created specific exceptions to the hearsay rule to allow the admissibility of statements made by children in these circumstances (Myers 1987:372). The Colorado statute (Colo. Rev. Stat. s18-3-411(3) (1986) serves as an example:

"Out-of-court statements made by a child describing any act of sexual contact, intrusion, or penetration, as defined in section 18-3-401, performed with, by, or on the child declarant, not otherwise admissible by statute or court rule which provides an exception to the objection of hearsay, may be admissible in any proceeding in which the child is a victim of an unlawful sexual offence pursuant to the provisions of section 13-25-129 ..."

Washington enacted a similar provision in 1982 which formed the basis for statutes in a number of other states (Whitcomb et al 1985:72-3). It is only the Kansas statute which is substantially different, since the latter applies only if the child victim is not available to give evidence at the trial, and it applies to any crime in which the victim is a child (Note 1985:811). The wording of the Washington statute is as follows:

"9A.44.120 Admissibility of child's statement - Conditions. A statement made by a child when under the age of ten describing any act of sexual conduct performed with or on the child by another, not otherwise admissible by statute or court rule, is admissible in evidence in criminal proceedings by the courts of the state of Washington if:

- (1) The court finds, in a hearing, conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
- (2) The child either:
  - (a) Testifies at the proceedings; or
  - (b) Is unavailable as a witness; Provided, that when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement".

In terms of this statute, if the child is not available as a witness there must be corroborative evidence. This requirement is in addition to the reliability requirement which means that even where there are sufficient indications of reliability, the statement will be excluded unless there is corroboration.

According to Myers (1987:377) the following factors would amount to corroboration: evidence by an eyewitness, evidence given by another child victim, an admission or confession by the accused, medical evidence that supports the child's submission, psychological evidence, and any other evidence which would corroborate what the child said. In *State v Gitchel*, 41 Wash.App. 820, 706 P.2d 1091 (1985) the medical finding that partial penetration had occurred was used to corroborate the child victim's statement, and in *Runion v State*, 180 Ga.App. 440, 349 S.E.2d 288 (1986) the accused's confession was sufficient corroboration of the victim's statement.

A major difference between the residual exception in the federal rules, and the statutory exceptions enacted by the various states is one of approach. The former is to be used as sparingly as possible and only in exceptional circumstances, as discussed earlier. However, the specially enacted exceptions by the various states are intended "to reach out and embrace as much reliable hearsay as possible" (Myers 1987:373).

A number of courts have held that these statutes do not abridge the accused's constitutional rights, even where the child does not testify, using the test set out in *Ohio v Roberts supra*. The test to determine constitutionality has two parts: the witness must be found to be unavailable, and if unavailable, the statements must either fall into a firmly rooted hearsay exception or have adequate indicia of reliability (at 66). Hearsay exceptions, such as the Washington statute, are not firmly rooted exceptions, therefore in terms of the *Ohio v Roberts* decision *supra* to be admissible the statements must have adequate guarantees of reliability (Myers 1987:375). In *State v Slider*, 38 Wash.App. 689, 688 P.2d 538, (1984) the court explained at 543:

"It cannot be disputed that the child sexual abuse exception is not a 'firmly rooted' hearsay exception. Therefore, 'particularized guarantees of trustworthiness' are required before hearsay is admissible".

The Washington statute requires that a hearing first be held to determine whether the statement is sufficiently trustworthy. The kind of evidence admissible at such a hearing would include an interview with the person who is going to repeat the child's statement, any other person who may have witnessed the making of the statement, any person who has knowledge of the alleged sexual assault, and, where possible, the child herself (Petersen 1983:829). According to Petersen (1983:827) the hearing should focus on the amount of time that has elapsed between the act and the statement and whether the statement was made in response to a leading question. The court must question the witnesses to determine whether the child or the witness has any bias against the accused or any motive for lying, and whether any event occurred between the alleged act and the child's statement which could have accounted for the contents of the statement. Further factors to be investigated would be whether the child was in pain or upset when the statement was made and whether the terminology used was age-appropriate.

### 3.5.2.6 Competence of Hearsay Declarant

The general rule is that the declarant of an out-of-court statement must also be competent. This is explained by Wigmore (1974:255):

"The hearsay rule is merely an additional test or safeguard to be applied to testimonial evidence otherwise admissible. The admission of hearsay statements, by way of exception to the rule, therefore presupposes that the assessor possessed the qualifications of a witness in regard to knowledge and the like. These qualifications are fundamental as rules of relevancy. Thus these extra-judicial statements may be inadmissible because of their failure to fulfill the ordinary rules about qualifications, even though they meet the requirements of a hearsay exception".

However, in the case of children there appears to be an exception to this rule that the declarant must be competent at the time the statement is made. The majority of decisions hold that an excited utterance will be admissible even though the declarant may be incompetent when the statement is made. This is based on the argument that excited utterances are reliable due to the circumstances in which they are made and not from the trustworthiness of the declarant (Myers 1987:378-9).

In *State v Bauer*, 146 Ariz. 134, 704 P.2d 264 (Ct.App. 1985) the court stated at 267 that "[i]n Arizona excited utterances of children who are incompetent to testify because of their age are admissible in evidence". And in *Bishop v State supra* the court at 48 explained that "the fact [that] a witness is ruled incompetent to testify because of age does not by itself negate the independent indicia of reliability which excited utterances possess, and which are the key to their admissibility". In *State v Galvan*, 297 N.W.2d 344 (Iowa 1980) a witness testified that two days after the alleged incident her two year old daughter began to behave in a strange way. The child took a belt from her mother's clothing and tied her hands with it, making gestures as though she were beating her chest. The child had witnessed a brutal murder, which was the subject of this case. At 347 the court held the following:

"... the witness's daughter was undoubtedly not competent to take an oath as a witness. The authorities make it clear that admissibility in such cases does not turn on the competence of the child to take the oath, but on the spontaneity of the utterance or act described."

However, when dealing with statutory exceptions to the hearsay rule, the picture is slightly different. The Washington statute, for instance, does not apply when the child, who made the statement, is found to be incompetent. This statement, unless it is an excited utterance, is regarded as being inherently unreliable and is therefore inadmissible (Whitcomb 1985:74).

In *State v Ryan supra* the accused was convicted of sexually abusing two little boys, aged four and five. In terms of the Washington hearsay exception, the trial court allowed the mothers and the aunt of the children to repeat certain out-of-court statements the boys had made to them. The prosecution and the defence agreed that the children were incompetent to testify and the court found corroboration in admissions made by Ryan. The Washington Supreme Court overturned Ryan's conviction on the basis that the trial court had made three errors in their application of the statute. Firstly, the Washington Supreme Court held that unavailability cannot be established by simply stipulating that a child is incompetent, but rather a good faith effort must be made to produce the children.

Secondly, the court held that if the boys were found incompetent to testify, this finding of competency would render their hearsay statements unreliable and therefore inadmissible. At 203 the Washington Supreme Court explained that "[i]f the declarant was not competent at the time of making the statements, the statements may not be introduced through hearsay repetition". The third reason for overturning the conviction was that the trial court had failed to find circumstantial guarantees of the reliability of the boys' statements as was needed by both the Washington statute and the Confrontation Clause, although the Washington Supreme Court confirmed that the accused's admissions constituted sufficient corroboration of the abusive acts.

### 3.6 Public Hearing

#### 3.6.1 The Right to a Public Trial

Traditionally trials have been open to the public, the procedure going back to the days before the Norman Conquest when cases in England were brought before so-called 'moots', a body very similar to a public town meeting (*Press-Enterprise Co v Superior Court*, 464 U.S. 501 (1984) at 505).

The right to a public trial was incorporated into the United States Constitution and is found in both the First and the Sixth Amendments. The First Amendment provides that "Congress shall make no law...abridging the freedom of the press..."(Amendment I, the Constitution of the United States) and the Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right to a...public trial" (Amendment VI, the Constitution of the United States).

The accused therefore has a right to a public trial. The right belongs to the accused and not to the public nor to the press. Neither the public nor the press have an unconditional right to an open trial in terms of the Sixth Amendment. They only have a limited right under the First Amendment to have access to criminal trials (Perry and Wrightsman 1991:141). This limited right derives, firstly, from the long tradition of open criminal trials and, secondly, from its role in the judicial process. In terms of the latter, public access to criminal trials allows the public to participate in and serve as a check upon the judicial process, and it fosters the appearance of fairness which increases the respect the public will have for the judicial process (*Globe Newspapers Co v Superior Court*, *supra* at 606-7).

This right has been upheld in a number of court decisions. In *In re Knight Publishing Co*, 743 F.2d 231 (4th Circ. 1984) the court found at 233 that "[t]he public and press have a right, guaranteed by the first amendment, to attend criminal trials". In *Globe Newspapers Co v Superior Court supra* the US Supreme Court held at 603 that "[t]his Court's recent decision in *Richmond Newspapers* firmly established for the first time that the press and general public have a constitutional right of access to criminal trials".

### 3.6.2 Limitations on the Right to a Public Trial

Although the right which the accused has to a public trial is of vital importance, it is not absolute and will be weighed up against any competing interest (Myers 1987:425). However, any denial of the right to a public hearing must be exceptional, as was explained in the case of *Waller v Georgia*, 467 U.S. 39 (1984) where the Supreme Court provided the following guidelines at 48:

"[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure."

The trial judge therefore has a limited discretion to override the accused's Sixth Amendment right to a public trial, as well as the First Amendment right which the press and the public have. However, evidence must be led which proves that it is essential to close the court. The judge must make a finding on this evidence and ensure that there are no other possible ways of dealing with the situation. The press or public would then have to be given an opportunity to address the court as well, forwarding arguments as to why they should not be excluded from the trial (Myers 1987:431).

Any exclusion of the public must therefore be based on strong evidence. The Supreme Court in *Press-Enterprise Co v Superior Court supra* at 510 explained that:

"Closed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness...The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."

Although convincing reasons have been forwarded for the closing of proceedings, as in the case where evidence is given by an informer, it is relatively common for this to happen in cases involving child witnesses, particularly those who are alleged to be complainants in sexual offences (Perry and Wrightsman 1991:142).

In *United States in re Latimore v Sielaff*, 561 F.2d 691 (7th Circ. 1977), 434 U.S. 1076 (1978) the trial court excluded the public during the evidence of a twenty one year old rape victim. The exclusion was upheld and the Seventh Circuit Court gave the following reasons for their decision at 694-5:

"[E]xclusion of spectators during the testimony of an alleged rape victim 'is a frequent and accepted practice when the lurid details of such a crime must be related by a young lady' ...Primary justification for this practice lies in the protection of the personal dignity of the complaining witness. The Supreme Court has recognised that, short of homicide, rape is the 'ultimate violation of self.'...Rape constitutes an intrusion upon areas of the victim's life, both physical and psychological, to which our society attaches the deepest sense of privacy. Shame and loss of dignity, however unjustified from a moral standpoint, are natural by products of an attempt to recount details of a rape before a curious and disinterested audience. The ordeal of describing an unwanted sexual encounter before persons with no more than a prurient interest in it aggravates the original injury. Mitigation of the ordeal is a justifiable concern of the public and of the trial court."

This view was adopted by the Supreme Court in *Press-Enterprise Co v Superior Court*, 106 S.Ct. 2735 (1986) where the court mentioned in *obiter* that the victims of sexual offences would in certain circumstances justify the exclusion of the press and the public to protect them "from the trauma and embarrassment of public scrutiny" (at 2741).

In terms of these decisions, the constitutional right granted to the accused and to the public and press will yield where the complainant in a sexual offence is exposed to trauma and embarrassment. In the case of children it has been held that the state has a duty to protect children from further trauma. In *Globe Newspaper Co. v Superior Court supra*, the court at 607 explained that the state has an interest in "the protection of minor victims of sex crimes from further trauma and embarrassment". This is especially so in the case of sexual crimes where the child has to relate degrading and embarrassing details to strangers. In addition to the trauma and embarrassment, children are placed in an alien setting and confronted with a number of strangers. The courtroom is often frightening and intimidating for children, especially when it is filled with strangers. This may result in the child becoming so frightened that the child is unable to give accurate evidence (Myers 1987:427).

Further arguments for the exclusion of the press and the public is the need to protect the child from intrusive media coverage which might ensue from the child's evidence. The other argument that has been forwarded is that other victims, knowing that they will be exposed to the press and public, will be deterred from reporting these offences (Whitcomb et al 1985:43).

Although the courts have recognised that the accused's rights will yield in favour of the above arguments, this does not mean that whenever a child gives evidence the public will automatically be excluded. The court will in each case have to decide whether it is necessary to protect the child. In *State v Hightower*, 376 N.W.2d 648 (Iowa Ct.App. 1985) the prosecution applied for the public to be excluded when a ten year old complainant gave evidence. Although the accused objected, the trial judge granted the application. The Appeal Court awarded the accused a new trial because the prosecution had not proved that it was necessary to protect the child in this case.

In order to determine whether in a particular case it is necessary to exclude the public, in order to protect a child, the trial judge needs to look at a number of factors. The court has to examine the age of the child, the nature of the alleged crime, the psychological profile of the child, the preferences of the parents, and the wishes of the child. In each case the court must be persuaded that there is "an overriding need" to exclude the public (Myers 1987:427).

In response to the problems experienced by sexual complainants having to give evidence publicly, a number of states have enacted statutes which bar some part of the public from the courtroom while the complainant of a sexual offence gives evidence. Some statutes limit the privilege to children while others apply to all cases involving sexual offences or cases involving vulgar or obscene language (Whitcomb et al 1985:43). Certain states, for instance Arizona, Florida, Illinois and South Dakota, allow the press to remain in the courtroom while the child is giving evidence. Others exclude all persons who do not play a role in the actual conducting of the trial, and this would result in the exclusion of both the public and the press (Whitcomb et al 1985:44). A number of states have enacted the provisions which exclude the public and the press, but have added certain exceptions or limitations to the

enactments. An example is the Alaskan Code, which excludes the public from the trial while the young victim of a sexual offence is giving evidence. However, this privilege is granted on condition that the evidence, which is led while the public is excluded, will be available to the public upon request in the form of a tape recording or a transcript (Whitcomb et al 1985:43-4).

These statutes have come up against constitutional challenges. In *Richmond Newspapers Inc. v Virginia*, 448 U.S. 555 (1980) the U.S. Supreme Court decided on the constitutionality of a Virginia statute which permitted the court to exclude the public and the press at the sole discretion of the judge. Acting in terms of this statute, the judge excluded the public and press from the trial. The Supreme Court found the trial court's action to be unconstitutional since it violated the right of the public to an open trial. The trial judge did not make any findings which supported the closing of the trial; he did not try to find out whether there were any alternative solutions and he did not give due weight to the right of the press and the public to be present at the trial. In the *Globe* case *supra* the constitutionality of a Massachusetts's law, which required the press to be excluded when child complainants gave evidence, was at issue. The Court found the law unconstitutional and suggested that the question of whether the press and public should be excluded in a particular case should be left to the discretion of the presiding officer. This decision does not rule out the possibility that the press could, in certain circumstances, be excluded (Berliner 1985:173). In fact, the court agreed at 607 that "safeguarding the physical and psychological well-being of a minor" was a compelling interest that would on occasion override the accused's right to a public trial.

The state argued in this case that they were justified in closing the trial on two grounds: firstly, to protect minor victims of sex crimes from further trauma, and , secondly, to encourage other victims to come forward and testify. The Supreme Court found the first interest to be compelling, but it could better be served by deciding the matter in each case rather than having a blanket exclusionary rule since not all victims will be traumatised by the presence of the public and press. The court found the second ground to be speculative and open to serious question on the basis of logic and common sense.

Therefore, the question whether a trial will be open or not to the public rests completely in the hands of the presiding judge and the prosecution, who will have to argue that "the interests of the particular child are compelling enough for the judge to close the trial to the press and public" (Perry and Wrightsman 1991:142). When the word 'public' is referred to in this context, it does not include the following persons: the judge, the jury, the accused and his attorney, the parents of the child, the prosecution, a support person if the child should require one, the guardian *ad litem* for the child and the court personnel (Whitcomb et al 1985:43-4).

Even if the press are excluded from the courtroom, this does not necessarily mean that there will not be any intrusion into the child's privacy. The press are still entitled to publish details of the offence and the trial. It was for this reason that the Attorney General's Task Force on Family Violence strongly urged that there be carefully managed press coverage of trials in which child victims were involved. Whitcomb et al (1985:46) discovered, however, in the course of their research that the media's co-operation in suppressing any identifying information had been "variable". For instance, the child's name is often withheld in the press but then the parents are clearly identified, or the child's name is withheld but photographs or film clips of the child are published. So, although

closing the trial to the public and the press can shield a victim from the trauma of having to give evidence in an open court, it does not protect the child victim against public exposure by the media.

### **3.7 The Competency Requirement relating to Child Witnesses**

#### **3.7.1 The Common Law Position**

The majority of states in the USA do not have statutory provisions dealing with the competency of child witnesses, but have left the matter to be decided by common law. Although the age at which the presumption of competency is set varies from state to state, there is generally a rebuttable presumption that children under a certain age are incompetent to testify. It must be determined in each case whether the child is competent to give evidence or not. Even in those states where there is a statutory regulation, the presumptions are rebuttable (Melton 1981:73).

According to Wigmore (1974:399) the presumption that young children are incompetent to testify probably arose from the belief that children below a certain age did not have the capacity to take the oath. Gard, quoted by Myers (1987:59), explained the common law position as follows:

"Under the rule of the later common law, children of the age of fourteen years are presumed to have sufficient intelligence to testify and to comprehend the nature of an oath, unless the circumstances of the case are such as to raise doubt. As to a child who is under that age, there is no presumption in favour of competency; it is for the court, in its discretion, to determine the question as to whether the child has sufficient intelligence to testify and to comprehend the obligation of an oath."

This is supported by the decision of *State v Schossow* 145 Ariz. 504, 703 P.2d 448 (1985) where the court at 449 said: "At common law no child under 14 years of age was eligible to testify as a witness...it was not until 1779 that the law renounced the rule of absolute disqualification." The English common law tradition of excluding the evidence of young children was found in the American colonies as well, and children younger than fourteen were excluded from giving evidence at a trial (Perry and Wrightsman 1991:38).

The earliest recorded instance in American jurisprudence which involved the evidence of children occurred in the 1600s and culminated in the Salem Witch Trials of 1692. During the course of 1692 a number of girls living in the town of Salem in Massachusetts began to display strange symptoms and apoplectic fits. Doctors were unable to explain the hysteria and it was suspected that 'darker forces' were at work. Influenced by tales of voodoo magic told to them by a West Indian slave, the young girls claimed that they were possessed by the devil and accused three women, including the West Indian slave, of witchcraft (Selkin 1991:6).

The number of accused alleged to be involved in the incident increased. The girls were urged by the elders to name the person involved in the witchcraft and, as Selkin (1991:8) puts it, "it appeared that nearly half the people in the village had signed their souls over to the devil". These accusations resulted in 250 people being arrested and tried.

The key evidence in 19 of the 20 trials, which led to conviction and execution, was provided by four girls who became known as the 'circle girls'. These girls provided 'evidence' that they had been afflicted by witchcraft by having apoplectic fits and vomiting pins at the trial (Perry and Wrightsman 1991:39).

The girls, at the time of the trial, were aged between five and sixteen and gave evidence that they had seen the accused flying on broomsticks and that they had seen animals speaking. On the basis of their evidence, nineteen people were convicted and executed. A number of others who had been convicted were spared execution because they admitted that they were involved in witchcraft (Ceci and Bruck 1995:8).

By the early 1700s a number of the accusers had recanted their evidence and begged forgiveness. Perry and Wrightsman (1991:39) quote the confession of Ann Putnam, the most damning of the child accusers, in 1706:

"I desire to be humbled before God for that sad and humbling providence that befell my father's family in the year 1692: that I, then being in my childhood, should by such providence of God, be made an instrument for the accusing of several persons of a grievous crime, whereby their lives were taken away from them, whom now I have just grounds and good reason to believe they were innocent persons..."

Selkin (1991:6-7), in analysing the Salem Witch Trials, suggests that they are "[t]he quintessential example of masked sexual motive, expressed in hysterical form". He also theorises that the roots of the witch mania sprouted from the imaginary games played by a group of young girls at the village minister's house, and that the children, stimulated by the attention they were receiving, became more involved in their own imaginings. The elders of the community, in their desire to protect the community against danger, were remarkably credible and gullible as the following interrogation of Sarah Carrier, aged eight, demonstrates. Sarah's mother was subsequently hanged as a witch (Selkin 1991:8):

"How long hast thou been a witch?"  
 "Ever since I was six years old."  
 "How old are you now?"  
 "Nearly eight years old."  
 "Who made you a witch?"  
 "My mother. She made me set my hand to the book."  
 "You said you saw a cat once. What did the cat say to you?"  
 "It said it would tear me to pieces if I would not set my hand to the book." [Sarah is speaking here of the Devil's Book.]  
 "How did you know it was your mother?"  
 "The cat told me so, that she was my mother."

These trials had important implications for American legal history since they highlighted a number of issues which became significant as far as child witnesses were concerned. As Perry and Wrightsman (1991:39) point out, the major effect of the Salem Witch Trials was that for two hundred years after the trials the courts frequently referred to the Salem 'circle girls' as grounds for not allowing the uncorroborated evidence of children at trials.

The issues raised by the Salem trials are still of significance today. At what age is a child qualified to be a credible witness; do children have the ability to remember accurately and is it possible to interview young children without being suggestive (Selkin 1991:9).

Children under the age of fourteen were thus irrebuttably presumed to be incapable of testifying in court. As Gabarino et al (1989:127) explain, the "guiding hypotheses was that children are unreliable witnesses in general, and that the good child witness is a rare exception". It was only in 1779 that a panel of twelve judges, influenced by the decision in *Rex v Brasier supra* in England, moved away from the idea that there was a specific age below which children were incompetent to testify. As Wigmore (1974:400) explains, after the decision in *Brasier supra* "the rule has been clearly accepted, that there is no specific age below which capacity will always be deemed wanting".

This is particularly illustrated in the case of 'Little Mary Ellen', which led to the formation of the Society for the Prevention of Cruelty to Children. The case dealt with the physical abuse and neglect of an eight year old girl, Mary Ellen Wilson, as reported in the New York Times, April 22, 1874 and quoted in Sloan (1983:148-9):

"The little child was put upon the stand, and having been instructed by Recorder Hackett in the nature and responsibility of an oath, was sworn. At first she answered the questions put to her readily, but soon became frightened and gave way to sobs and tears. She was soon reassured, however, by the kind words of Recorder and District Attorney Rollins, and intelligently detailed the story of her ill-treatment."

Traditionally the leading case in the USA has always been *Wheeler v United States*, 159 US 523 (1895) where the witness was the 5 year old son of a murder victim. The court held that there is no age below which a child automatically becomes disqualified as a witness, rather it depended in each case whether the child could differentiate between the truth and lies:

"That the boy was not by reason of his youth, as a matter of law, absolutely disqualified as a witness is clear. While no one would think of calling as a witness an infant only two or three years old, there is no precise age which determines the question of competency. This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former. The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath." (at 524-5)

From 1895 it was, therefore, settled law that children could testify in court. This was further emphasised by the decision in *Rosen v United States*, 245 U.S. 467 (1918) where the Supreme Court had the following to say regarding competency at 471:

"...the conviction of our time that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court, rather than by rejecting witnesses as incompetent."

However, in practice the competency criteria were so rigidly applied that countless children were excluded from giving evidence, many of whom would probably have conformed with the *Wheeler supra* standards if correctly applied (Dziech and Schudson 1989:134).

Although the Supreme Court in the *Wheeler* case *supra* allowed a five year old to give evidence, a number of states began enacting provisions that presumed children under the age of fourteen to be incompetent. Using these provisions, judges found so many children to be incompetent that these sections were accused by Galante (1984:31) of being the prime legal rule responsible for preventing the successful prosecution of child abuse cases.

### 3.7.2 Federal Rules of Evidence

The Federal Rules of Evidence became effective on the 1st July 1975 and indicated a move away from the common law rule which presumed competency only in the case of children over the age of fourteen (Whitcomb et al 1985:31). Federal Rule 601 deals with the question of competency, and provides:

"Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law."

Since Federal Rule 601, or a version of it, has been adopted by various states in the USA, it is important to analyse the implications of this rule. The Advisory Committee Note on Rule 601 says that a "witness wholly without capacity is difficult to imagine. The question is one particularly suited to the jury as one of weight and credibility". As Myers (1987:63) points out, the intention of the legislative drafters was to remove the emphasis on competency as a prerequisite for giving evidence. Commentators on Rule 601 have suggested that the Rule is designed "to curtail the need for preliminary inquiry into witness competency" so that the jury simply evaluate the evidence in terms of its weight and credibility. According to Weinstein and Berger, commentators on the Rule, although the traditional inquiry into competency is no longer required, judges may nevertheless conduct such an examination to determine whether a witness should be allowed to testify or not (Myers 1987:64).

Literally, Rule 601 provides that every person is competent to be a witness. The question that has been asked is whether the Rule has removed the court's discretion to determine whether a witness has the capacity to testify or not. According to Myers (1987:64), the answer to this question is a definite 'no', since there are a number of other Federal Rules in terms of which incompetent witnesses could be prevented from testifying. For instance, the child's evidence could be excluded in terms of Federal Rule 401 in that it was not relevant since the witness was so lacking in credibility. Weinstein and Berger, as quoted by Myers (1987:65), explain it as follows:

"[S]ince there are no longer artificial grounds for disqualifying a witness as incompetent, the traditional preliminary examination into competency is no longer required. But a trial judge still has a broad discretion to control the course of a trial (Rule 611) and rule on relevancy (Rule 401 and 403). If competency is defined as the minimum standard of credibility necessary to permit any reasonable man to put any credence in a witness's testimony, then a witness must be competent as to the matters he is expected to testify about; it is the court's obligation to insure that he meets that minimum standard. In making this determination the court will still be deciding competency."

Examples of other Federal Rules in terms of which a child's evidence could be excluded are set out by Myers (1987:65-7): If the child is very young, the court could in terms of Rule 602 rule that the child lacks personal

knowledge; if the child is unable to remember events at the trial, the evidence could be excluded on the ground that the child does not possess personal knowledge in terms of Federal Rule 602; if the child is so marginally competent the court could find that the probative value of the evidence is outweighed by the prejudice to the accused in terms of Rule 403. Rule 603 is of special importance since it provides that "[b]efore testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation". This obviously implies that the witness understand the difference between the truth and lies and be able to appreciate the duty to tell the truth. If a child witness is unable to do this, then his evidence could be excluded in terms of this rule.

Therefore, although Rule 601 does in theory remove the competency requirement by presuming all witnesses to be competent, there are other rules in terms of which the evidence of a witness could be excluded. However, Myers (1987:67) does suggest that the competency examination may perhaps be used under the guise of other rules. As he points out, "a competency decision by any other name is still a competency decision, and that conceptualizing competency in terms of minimal credibility or relevance has more to do with semantics than substance". Weinstein and Berger acknowledge this point by saying that "[i]n making this determination the court will still be deciding competency" (Myers 1987:67).

However, Federal Rule 601 has introduced a trend of moving away from the old competency rule, and Blinka (1986:15) explained in 1986 that "[a]nything resembling the old...procedure should be used sparingly and rarely, since jurors are readily capable of assessing the veracity of the child witness. The...evidence code is in favor of allowing the child to testify. All doubts should be resolved in favor of permitting the child to take the witness stand".

The modernisation of the competency rules does not imply that children have the same ability to recall and communicate as adults. All it intends to do is give the jury an opportunity to see and hear child witnesses and then to evaluate their credibility (Dziech and Schudson 1989:136). This view is found in some jury instructions, for instance the Wisconsin Jury Instructions on child witnesses reads as follows:

"A child is a competent witness and his testimony should be weighed in the same manner as testimony of any other witness. Considerations of age, intelligence, ability to observe and report correctly, ability to understand the truth, conduct on the witness stand, interest, appearance, and other matters bearing on credibility apply to a child witness in common with all witnesses." (Dziech and Schudson 1989:206).

There are very few federal court decisions relating to the competency of child witnesses. This is because, firstly, the district court judges follow Rule 601 and allow all persons to testify and, secondly, because it is a matter which does not normally arise in a federal court (Myers 1987:67). The decisions that do reach the federal courts seem to indicate that the courts follow the ordinary common law principles of competency. In *United States v Saenz*, 747 F.2d 930 (5th Circ. 1983) the court, in interpreting Rule 601, held that every witness is competent to testify, and competent here means that "she is capable of communicating relevant material and understands she has an obligation to do so" (at 936). In *United States v Odom*, 736 F.2d 104 (4th Circ. 1984) the court discussed the

question of competency under Rule 601 and said that the only ground for disqualifying a witness in terms of this rule would be if the witness did not have knowledge about the event which he had to testify to, did not have the capacity to remember or did not understand the duty to tell the truth (at 110).

However, in *United States v Gutman*, 725 F.2d 417 (7th Circ. 1984) the defence wanted the trial court to hold a pretrial hearing on the competency of a witness who suffered from a mental illness. The trial judge denied the motion and on appeal the Court held that this was not incorrect, but did add that "[a]lthough insanity as such is no longer a ground for disqualifying a witness, ... a district judge has the power, and in an appropriate case the duty, to hold a hearing to determine whether a witness should not be allowed to testify because insanity has made him incapable of testifying in a competent fashion". This decision would then seem to sanction the use of preliminary competency examinations similar to those which were held before the introduction of Rule 601 (Myers 1987:69).

Although in terms of Rule 601 the courts do not have to hold an inquiry into competency as trial judges have been invested with the authority to evaluate and decide upon the competency of children, according to Myers (1987:70-1) the courts will probably continue to conduct preliminary competency examinations.

### 3.7.3 State Rules Regarding Competency

Each state has its own competency standards and these are found in state laws, court rules of evidence or codified rules of evidence. In analysing the competency provisions of various states, Whitcomb et al (1985:31-2) divided the states into the following groups:

- i. There are those states (twenty in number) which follow Federal Rule 601 and declare every person to be a competent witness. This rule was interpreted literally in the case of *Commonwealth v Anderson*, 552 A.2d 1064 (Pa.Super. 1988) where the Pennsylvania court interpreted the rule at 1064 as meaning that "testimony of any person, regardless of mental condition, is competent evidence, unless it contributes nothing at all because the witness is wholly untrustworthy". Although the traditional competency examination is unnecessary, as mentioned above the trial judge still has the authority to evaluate and rule on a child's competency.

Although a number of states have adopted some version of Rule 601, there are very few legal decisions interpreting it. The courts appear to follow the Federal lead by relying on the traditional common-law principles of witness competence. For instance, in *State v Guy*, 419 N.W.2d 152 (Neb. 1988) the State of Nebraska interpreted it as follows at 155:

"In ruling whether or not a child is a competent witness, the trial court must determine whether a child is sufficiently mature to receive correct impressions by his or her senses, whether the child can recollect and narrate intelligently, and whether the child appreciates the moral duty to tell the truth."



In certain states a proviso of some sort has been added to Rule 601, qualifying it in some way. For example, in the state of Kentucky the statute reads that "every person is competent...unless he be found by the court incapable of understanding the facts concerning which his testimony is offered". The statute in Massachusetts provides that "[a]ny person of sufficient understanding ...may testify". The effect of these qualifications is simply to ensure that the trial judge has the power to evaluate the competency of a witness.

- ii. There are those states (thirteen in number) which presume that any person will be competent if he understands the concept of the oath or the duty to tell the truth. An example here would be the state of Georgia which has a statute providing that children who do not understand the concept of the oath will not be competent to give evidence (Myers 1987:72).
- iii. There are states (five in number) which specifically stipulate that children will only be competent to testify if they understand the nature and obligation of the oath or the duty to tell the truth. Witnesses can substitute an affirmation for the oath. In both, the underlying concept is an understanding of the seriousness of the proceedings and the duty to speak the truth.
- iv. Thirteen states hold that children under certain ages are presumed to be incompetent. In eleven of these states the threshold age is ten, while in two states children under twelve are presumed to be incompetent. In Idaho the Idaho Code provides that "[t]he following persons cannot be witnesses: Children under ten (10) years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly". Although children below these specific ages are presumed to be incompetent, the vast majority of children over the age of five are found to be competent to testify once they have been questioned by the courts. This is supported by the decision in *People v Rowell*, 463 N.Y.S.2d 426 (1983) where the appeal court confirmed that the trial court had correctly found an eleven year old to be competent even though there was a presumption in the state that children under the age of twelve were incompetent to testify.

Also in *Victor v Smilanich*, 54 Colo. 479, 131 P.392 (1913) where the court said that incompetency did not apply to all children under the age of ten but only to those children under ten who "appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly". Here a six and a half year old boy was held to be competent since he understood that he was supposed to tell the truth and could be punished if he did not and he had a fair understanding of the obligation imposed by the oath. In *Berger v People*, 122 Colo. 367, 224 P.2d 228 (1950) a seven and a half year old boy was found to be competent as he was able to "receive just impressions of fact and truthfully relate the same".

Although there are specific age limits mentioned in the statutes of these states, the limits would appear to affect only the presumptions. Children above those specific ages are presumed competent whereas children below those ages are presumed incompetent. As stated in *People v Waltrous* (1935)7 Cal.App.2d 7 at 10 "the test is not one of age but of understanding and the capability of receiving just impressions and relating

those facts truthfully". According to Selkin (1991:118), this appears to be the only Californian case where the children, twin girls aged four, were found incompetent to testify. California has been regarded as quite liberal in finding children competent. In *People v Slobodian* (1948) 31 Cal. 2d 555 a 6 year old who believed there were 12 days in a week was regarded as competent, as was a five year old in *People v Pike* (1960) 183 Cal.App.2d 729 who could not recall where she lived, the name of her school, how long she had gone to school, or the names of her classmates.

- v. There are states (five in number) which do not have any statutes or court rules relating to the competency of children. According to the case law, these states seem to follow the traditional common law standard that children under the age of fourteen are presumed to be incompetent. There would, therefore, have to be an inquiry in each case to determine whether a child under fourteen was competent or not.
  
- vi. A number of states have created a specific exception in the case of sexual abuse matters, without interfering with their overall competency provisions. This is in accordance with recommendations by the American Bar Association's National Legal Resource Center for Child Advocacy and Protection that child victims of sexual assault be considered competent witnesses and be allowed to testify without first having to qualify to do so. The presiding officer would then determine the weight and credibility that should be given to the evidence (Myers 1987:73). In response to this various states created specific statutory exceptions. In Alabama a statute was enacted which provided that "[n]otwithstanding any other provision of law or rule of evidence, a child victim of sexual abuse or sexual exploitation, shall be considered a competent witness and shall be allowed to testify without prior qualification in any judicial proceeding". A similar provision is found in the Utah statute which provides that a "child victim of sexual abuse under the age of ten is a competent witness and shall be allowed to testify without prior qualification in any judicial proceeding" (Myers 1987:74). The use of the word "shall" in these statutes appears to be peremptory. The question that arises is whether the traditional role of the presiding officer to evaluate the child's competency has been completely removed. Although there is an obvious need for the court to hear the evidence of a child in a sexual abuse case, it is also important that the accused be granted basic fairness and due process of law (Myers 1987:74).

#### 3.7.4 The Test for Competency

The onus to determine competency is on the presiding officer (Stafford 1962:312). It is his duty to evaluate the child's ability to differentiate the truth from a lie, the ability to understand the duty to tell the truth and the consequences of not doing so (Benedek and Schetky 1986:1225). The landmark decision of *Wheeler v United States supra* formulated the basis of the competency test, when the court at 525 said that it depended on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as the duty to speak the truth.

Although the primary emphasis is on the child's ability to differentiate truth from falsehood, there are other aspects which are included in the examination. It is also necessary for a child to have adequate cognitive skills to comprehend the event he has witnessed and be able to communicate his memories of the event in response to questions (Melton 1981:75). The test for competency was explained by the court in *Cross v Commonwealth*, 195 Va. 62, 77 S.E.2d 447 (1953) at 449:

"A child is competent to testify if he possesses the capacity to observe events, to recollect and communicate them, and has the ability to understand questions and to frame and make intelligent answers, with a consciousness of the duty to speak the truth."

Benedek and Schetky (1986:1225) summarise the position of the courts as follows:

"The courts have decided that to understand the duty to tell the truth, a child must possess the mental capacity at the time of the occurrence to observe and register the event accurately (registration and memory); the memory sufficient to retain an independent (uncoached) recollection of the event (storage capacity); the ability to communicate this memory (recall and communication); and the ability to understand one's obligation to speak the truth."

The test, therefore, of a child's competency involves four fundamental issues: firstly, the child must have the mental capacity at the time of the occurrence in question to observe and register the event; secondly, the child must possess memory which will be sufficient to enable him to retain an independent recollection of the observations made; thirdly, the child must have the capacity to translate the memory of these observations into words; and, fourthly, the child must possess sufficient intelligence to understand the obligation to speak the truth (Stafford 1962:313). This implies that to assess a child's competency to testify, an assessment of the child's moral, cognitive and emotional capacities to give evidence is required (Melton 1981:75).

#### **3.7.4.1 Mental Capacity to Observe**

To be able to give evidence as a witness, a child must have the capacity to observe an event. This implies the ability to register sensory perceptions i.e. the child must be able to see things, hear them, touch them, smell them or taste them.

It is obvious that children do possess the physical capacity to register these perceptions, but the real issue is whether children notice what goes on around them in the same way as adults do. Johnson and Foley (1984:35-6) conducted research into children's ability to observe and remember events, and they came to the conclusion that it could not be said that children notice less than adults. Children are as capable as adults of observing and remembering simple events. More complex or symbolic events present greater difficulty for young children, but there are circumstances in which children are actually better at observing events than adults. This and other research will be investigated in greater detail at a later stage.

The requirement here is that the child must have the capacity to observe at the time the event occurred (Melton 1981:75). The general rule is that competency is determined when the child gives evidence, which means that the child's competency will be assessed at the trial. This is accepted by common law sources. Wigmore (1974:641)

says that the "time of utterance of the testimony is ordinarily the time when the qualification must exist". The court in *State v Garner*, 116 Ariz. 443, 569 P.2d 1341 (1977) held at 1344 that "[t]he competency of a child to testify relates to the time when the child is produced as a witness, not to the time when the event occurred". However, in *State v Butcher*, 165 W.Va. 522, 270 S.E.2d 156 (1980) the court at 158 held that competency is determined at the time the child gives evidence but in relation to some elements of competence, such as the capacity to observe or register perceptions, incompetence at the time of the event could disqualify a child as a witness.

It does not follow by implication that incompetence at the time of the event would automatically disqualify a witness later at the trial. There are two separate factors that are being dealt with here: the child must be able to relate facts truly (at the time of the trial) but must also be capable of receiving just impressions of the facts (at the time of the event). This has the implication that it is possible for a child to be much younger with different mental capabilities at the time of the event as opposed to the date of the trial (Stafford 1962:306).

Myers (1987:103) gives an example, showing how incompetence at the time of the event does not necessarily disqualify a child from giving evidence. If a three year old were to witness a collision, the child would have the capacity at the time of the collision to observe the event but would not have the ability to relate what was observed. The child would therefore be incompetent at the time the event occurred. If, at the time the trial takes place, the child has the ability to relate what was observed, then the child would be competent.

Although it is accepted that the question of competency has to be decided at the time of the trial, most states hold that the court must determine that the child was also competent at the earlier date as well (Stafford 1962:306).

### 3.7.4.2 Memory

A child witness must have the capacity to remember the event about which he has to testify at the trial. This requirement is complex as there are actually three issues involved: firstly, the child must have the capacity to recall events; secondly, the child must be able to separate fact from fantasy; and thirdly, the child must be able to maintain those memories independently, without being influenced by others (Whitcomb et al 1985:35).

Although a child must possess a certain degree of memory in order to be competent, this does not mean that the child's memory has to be perfect. In *Phillips v State*, 173 Ga.App. 396, 326 S.E.2d 775 (1985) the court held that the fact that the eight year old witness could not remember the time of or the year in which the incident took place did not render her incompetent.

Most children have sufficient memory to qualify as witnesses, but this does not mean that memory is the same in children as in adults. For instance, children are less skilful than adults in remembering events using free recall. This does not mean that children provide incorrect information, they simply produce less information. When questioned using specific questions, children have been found to be on par with adults (Whitcomb et al 1985:35).

Marin et al conducted a study in which the performance of children was compared to adults on eyewitness tasks.

Students, aged between five and twenty-two, were placed in a situation where a specific incident was staged, and were then questioned about the event after a brief interval and again after two weeks. Memory was assessed using free recall and objective questions. The results showed that the older subjects were superior only on the free narrative tasks. Older subjects produced much more material on free recall, but the youngest subjects were significantly more likely to recall correctly those items which they did recall, with only 3% of the answers being incorrect (Melton 1981:76). Since younger children require cues to assist them in remembering, the style of questioning is very important. Research seems to indicate that it is the style of questioning which could be to blame for inaccurate evidence rather than the age of the child (Whitcomb et al 1985:36).

### 3.7.4.3 Capacity to Communicate

The child witness must have the capacity to communicate in order to make himself understood. According to Wigmore (1974:713), the witness must communicate his memory to the court, and communication involves "a capacity to understand questions put, and to frame and express intelligent answers". In *Rhea v State*, 705 S.W.2d 165 (Tex.Ct.App. 1985) a three year old child was declared incompetent because she could not communicate adequately.

The vast majority of children possess the ability to communicate the facts of a case. This problem is more relevant to younger children, although children as young as two are capable of relating simple occurrences. By the age of five children understand most of the grammatical rules of their native language and can construct complex sentences (Myers 1987:84).

It has been accepted that young children do have the capacity to communicate if certain minor accommodations are made, the most obvious being an adjustment to the child's level of language development (Whitcomb et al 1985:37). As Wigmore pointed out *supra*, in order to communicate a child must be able to understand the question that is being asked. Adults often use metaphors, analogies, words and concepts that are beyond the comprehension of children. Legal professionals use specialised technical language that most adults do not understand (Myers 1987:85). If a child is expected to understand a question, it must be framed in language that the child is able to comprehend.

In addition to understanding the question, the child witness must be able to communicate facts. Children often communicate differently from adults but this will not necessarily render the child incompetent. In *State v Lairby*, 699 P.2d 1187 (Utah 1984) a six year old used the word 'winky' instead of penis. Although the court was not dealing with the question of competency here, they stated at 1206 that a child may "relate facts differently than would an adult, but that does not prevent a child from testifying truthfully, accurately, and in a manner which can be understood by the jury".

The mere fact that a child hesitates to reply or is shy does not render the child incompetent. In *State v Armstrong*, 453 So.2d 1256 (La.Ct.App. 1984) a four year old gave evidence. The court held that even though her answers were hesitant, this did not render her incompetent. According to Myers (1987:85), even refusing to answer some

questions will not render a child incompetent. He refers to the case of *Pendleton v Commonwealth*, 685 S.W.2d 549 (Ky. 1985) where a six year old refused to listen to questions and placed her fingers in her ears towards the end of cross-examination. The child was nevertheless held to be competent and her evidence accepted.

The majority view appears to be that inconsistency in relating events will not necessarily render a child incompetent. In *State v Butcher supra* the West Virginia Supreme Court explained at 159 that the "fact that the testimony of a witness is inconsistent does not render her incompetent as a witness; rather, such inconsistency goes to her credibility". This is supported by the decision in *State v Rogers*, 692 P.2d 2 (Mont. 1984) where the Montana Supreme court found that inconsistencies in the evidence of a four year old regarding the dates, times and details went to credibility and did not affect her competence. However, in *Barnes v State*, 173 Ga.App. 907, 328 S.E.2d 583 (1985) Judge Benham delivered a dissenting judgement in which he argued that the inconsistencies in the five year old's evidence were so serious and related to such crucial matters that she was incompetent. In *State v Phelps*, 696 P.2d 447 (Mont. 1985) the Montana Supreme Court found a five year old, who thought he was in a police station and that the judge was a karate expert, to be competent. In *Busby v State*, 174 Ga.App. 536, 330 S.E.2d 765 (1985) a five year old witness was found to be competent even though "her replies were not always fully responsive and did not demonstrate a firm grasp of such abstractions as the duration and frequency of events occurring in a temporal framework" (at 767). The basis of these decisions appears to be that if the child can communicate effectively about the events concerned, then mistakes and inconsistencies will not render the child incompetent.

Generally children communicate verbally, but there may be occasions when they use non-verbal communication. This may occur when the child has difficulty putting thoughts into words or if the child is too shy or embarrassed to say certain words. For instance, the child may attempt to communicate by means of a drawing or the use of anatomically correct dolls. In *State v Rogers supra* the four year old witness was allowed to demonstrate the accused's actions using an anatomically correct doll. Also in *Kehinde v Commonwealth*, 1 Va.App. 342, 338 S.E. 2d 356 (1986) where the Appeal Court held that the trial court had not abused its discretion when it allowed a child to illustrate penetration by the use of anatomically correct dolls.

#### **3.7.4.4 Personal Knowledge**

Federal Rule 602 requires every witness to have personal knowledge regarding the matters he is to testify to. This rule has been re-enacted in a number of State Codes. For instance, section 702 of the Colorado Evidence Code includes the requirement of personal knowledge (Selkin 1991:119). Although this requirement is usually found in the general competency and disqualification sections of rules and codes, this is "now a condition for admission of testimony of the witness regarding a particular matter, not their general competency to testify" (Selkin 1991:119). Myers (1987:76) agrees with this explanation, stating that the requirement of personal knowledge is not a component of competency. He illustrates the point by using the following example of a thirteen year old standing on a street corner. The child is intelligent, has a good memory, is able to communicate very well and understands the duty to speak the truth. A person passes behind the child, outside the child's field of vision. Although the child

would be perfectly competent to give evidence as a witness, the child would have no personal knowledge.

All that is required is that the witness possess some personal knowledge of the event. In *Senecal v Drollette*, 304 N.Y. 446, 108 N.E. 2d 602 (1952) the Appeal Court held that the trial court erred in excluding the evidence of a twelve year old boy who had obtained only a brief glance of a passing car on the basis that he did not have personal knowledge.

### 3.7.4.5 Obligation to Tell the Truth

The final requirement is that the child must possess sufficient intelligence to understand the obligation to speak the truth. This implies that the child must understand the difference between the truth and lies, and also be able to appreciate the obligation to tell the truth. Whitcomb et al (1985:33) define it as "an appreciation and consciousness of the duty to speak the truth and a sense of moral responsibility".

This requirement is the one which is probably emphasised the most by the courts, and even states that have liberal competency standards require a minimal understanding of what it means to tell the truth. In *State v Eiler*, 762 P.2d 210 (Mont.1988) an eight year old girl was found to be competent to give evidence about an incident which had occurred four years earlier. The accused appealed against his conviction on the grounds that the child had not appreciated the duty to tell the truth and he quoted the following portion from her evidence (at 214):

- "Q. What is the reason for telling the truth?  
 A. (No response)  
 Q. Do you believe in God?  
 A. Yes  
 Q. Okay. And does God have anything to do with you telling the truth?  
 A. Yes  
 Q. What does God have to do with that?  
 A. I don't know."

The Appeal Court ruled that the child did understand the difference between the truth and a lie, and was aware that lying entailed punishment. They referred to the following portions of her evidence which the defence had neglected to highlight at 214:

- "Q. What does it mean to tell the truth?  
 A. To tell what really happened.  
 .....  
 Q. Okay. What do you think happens if you don't tell the truth?  
 A. You won't be resurrected.  
 Q. Okay. Do you get in trouble for not telling the truth, not telling the truth at school?  
 A. Yes.  
 Q. What happens if you don't tell the truth at school?  
 A. You have to go to detention.  
 Q. What is detention?  
 A. You have to stay in in recess.  
 Q. And do you ever - would you get in trouble at home for not telling the truth?  
 A. Yes.  
 Q. What happens if you don't tell the truth?  
 A. You have to go to bed."

The child must in some way be able to distinguish between the concept of truth and lies. In *Heckathorne v State*, 697 S.W.2d 8 (Tex.Ct.App. 1985) the court had to consider the competency of a five year old witness. They came to the conclusion that the child did understand the difference between the truth and lies because she explained that the truth was "telling what really happened" and a lie was "what didn't really happen" (at 11). In *In re R.R.*, 79 N.J. 97, 398 A.2d 76 (1979) the New Jersey Supreme Court found the following child capable of understanding the difference between the truth and a lie and, therefore, to be a competent witness:

"Sean responded that truthfulness 'means to be good' and that if he told a lie, 'I be bad'. Sean also stated that if he were bad he would 'get a beating', and therefore he tried to be good all the time. Finally, Sean indicated that he would not be 'bad' when answering questions in court but would instead relate what happened 'the way it was'" (at 79).

And in the well known case of *Wheeler v United States supra* the United States Supreme Court had the following to say about the competency examination at 524:

"The boy... said among other things that he knew the difference between the truth and a lie; that if he told a lie the bad man would get him, and that he was going to tell the truth. When further asked what they would do with him in court if he told a lie, he replied that they would put him in jail. He also said that his mother had told him that morning to 'tell no lie', and in response to a question as to what the clerk said to him, when he held up his hand, he answered 'don't you tell no story'."

Understanding the difference between the truth and lies does not mean that the child must understand the abstract concepts of truth and falsity. In *Posey v United States*, 41 A.2d 300 (D.C.Ct.App. 1945) a ten year old said that he did not understand the "difference between right and wrong; that he did not know what an oath was; but upon inquiry as to what did happen to him if he did not tell the truth he said he would be whipped" (at 301). The Appeal Court found the child to be competent, stating at 301-2 that the fact that the boy said he did not understand the difference between right and wrong did not bind them as the court had to reach a decision on the whole examination:

"Many an intelligent adult would hesitate before claiming an understanding of the difference between right and wrong...Philosophers, theologians and moralists have dealt with this subject at length and have not always reached the same conclusion...It is easily understandable that this ten year old boy, in a strange and embarrassing setting would give negative answers to abstract questions concerning the difference between right and wrong or the nature of an oath, and yet at the same time have sufficient capacity for observation, recollection and communication, plus a consciousness of the duty to tell the truth, to fully qualify him as a witness..."

In *People v Norfleet*, 142 Mich.App. 745, 371 N.W.2d 438 (1985) a seven year old witness said that she did not know the difference between the truth and a lie and did not know the difference between right and wrong. The trial court excluded her evidence. The Michigan Appeal Court held that it was an error to exclude the child's evidence without further inquiring into her capacity.

The mere fact, therefore, that a child says he does not understand the difference between right and wrong, does not automatically make him incompetent. The court must examine the child to find out whether he really does understand the concepts or whether he is simply confused (Myers 1987:96). This is supported by the decision of

*State v Ybarra*, 24 N.M. 413, 174 P. 212 (1918) where the court had the following to say at 213:

"The fact that a child states in express terms that he does not understand the nature of an oath is not of itself sufficient ground for his exclusion as a witness, where it clearly appears that the child has sufficient intelligence to understand the nature of an oath and to narrate the facts accurately..."

In *State v Pettis*, 488 A.2d 704 (R.I. 1985) the Appeal Court upheld the decision of the trial court who found a mentally retarded fourteen year old witness to be competent despite the fact that she could not explain the difference between truth and falsehood as the trial judge was "satisfied that in her own humble way she appreciates the necessity for telling the truth".

In addition to being able to understand the difference between the truth and lies, the child witness must also be aware of the obligation to tell the truth. Historically children were asked questions about church attendance and their belief in God to determine their knowledge of truth and lies, but the current trend of the courts has recognised that these types of questions "may be irrelevant due to the changes in attitudes and cultural emphasis on religion and church attendance" (Whitcomb et al 1985:33-4). For instance, in *State v Collier*, 23 Wn.2d 678, 162 P.2d 267 (1945) a nine year old boy was asked "Who is God?" He was unable to answer the question, saying only "I know he never told a lie." In determining whether the child was competent, the court said at 272: "We may observe, parenthetically, that a good many adults would have some difficulty with that question".

The child witness must also be aware that telling lies will result in punishment. It is not necessary that the child understand the concept of divine punishment for lying under oath nor the legal concept of perjury. All that is required is that the child must believe that the punishment will follow. It is irrelevant where the punishment will come from. It could emanate from God, the judge, the police or a parent (Myers 1987:98). In *In re R.R. supra* the court at 82 stated that children are allowed to testify "so long as they evince a commitment to speak the truth out of fear of future punishment of any kind". In *State v Higginbottom*, 312 N.C. 760, 324 S.E.2d 834 (1985) a four year old, who believed that "a heavenly Father punished persons who told lies" (at 839), was held to be competent.

It is sufficient that the child believes in punishment, it does not matter what the punishment is. In *In re A.H.B.*, 491 A.2d 490 (D.C. 1985) the eleven year old witness believed that he would be put in "a home" if he told a lie (at 494), whereas in *People v Delaney*, 52 Cal.App. 765, 199 P. 896 (1921) the child believed he would go to jail if he lied.

### 3.7.5 The Oath

At common law a child was incompetent if there was no understanding of the religious implications of an oath or a belief in divine retribution (Myers 1987:99). According to Wigmore (1974:400), "[t]he nature of the child's belief is in theory to be judged by the same theological tests ordinarily applicable. For children, however, it is customary to employ simpler language and more concrete tests than are usual with adults".

The oath has not been abolished, instead witnesses are entitled to choose between the oath or an affirmation. Although historically the purpose of the oath was to instil a fear of divine retribution for swearing falsely, in terms of current law the purpose is more secular. Its function is "to arouse the conscience of the witness and remind the witness that she has a special duty to tell the truth in court" (Myers 1987:100). Federal Rule 603 provides that before testifying "every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so". In *People v Parks*, 390 N.Y.S. 2d 848 (1976) the court explained the oath as serving two functions, namely "to alert the witness to the moral duty to testify truthfully and to deter false testimony by establishing a legal basis for a perjury prosecution". In the case of a child witness, all that is now required is that the child must understand that he will be punished if he tells a lie. This duty is summarised by Stafford (1962:318) as follows:

"It is not necessary that he understands the legal nature of an oath or appreciates the formality of taking it as long as he has an adequate sense of the impropriety of falsehood. In other words, he need not be able to define an oath, perjury or testimony."

The administering of the oath does not require any particular words. The administering officer simply has to use a method which is most binding on the person. Therefore, it is not necessary to use the words 'oath' or 'swear'. All that is required is that the child must understand the necessity of telling the truth. It will be sufficient if he asks the child 'to promise' to tell the truth (Stafford 1962:319). In *Burkett v State*, 439 So.2d 737 (Ala.Crim.App. 1983) a five year old child promised to tell the 'absolute truth' but did not take the oath. The court held that her promise served the purpose of swearing an oath to tell the truth 'in substance if not in form'. In *In re R.R. supra* the Supreme Court mentioned that it was not necessary "that an infant mouth the traditional litany nor comprehend its legal significance".

The oath will in most cases be administered to the child after competency has been decided, although this will not be affected if the oath is administered before the competency examination (Myers 1987:100). Since Federal Rule 601 assumes all the witnesses to be competent, states following this rule will not always conduct a preliminary examination into competence, and the oath will therefore be administered before any issue of competence arises.

There are a number of states which allow children to testify without taking the oath or making an affirmation. In Florida, for instance, the court has the discretion to allow the child to give evidence without taking the oath if the court is satisfied that the child understands the obligation to speak the truth. In New York children under the age

of twelve who do not understand the concept of the oath can give unsworn evidence if the court is satisfied that the witness has sufficient intelligence and capacity. The latter statute does, however, add the proviso that the accused may not be convicted on unsworn evidence without corroboration (Myers 1987:101).

If a child does not understand the concept of the oath, the court has the discretion to instruct the child on the meaning of the oath and, according to Myers (1987:102), a recess may be called for this purpose. Wigmore (1974:406) deals with the question whether a child may become competent to take the oath after he has been instructed by the court, and says that the law is settled that the judge is allowed to make a temporary postponement in order to instruct the child on the oath. He explains it as follows:

"But if the test is after all only a formal one, if practically the necessary belief is only an acceptance, an authority, of certain theological positions unprovable by personal knowledge, then it is perhaps not inconsistent to allow its content to be explained and accepted in five minutes or some longer time proportionate to the child's intelligence; in other words, the judge may instruct the child what this belief is, and the child may accept it on this authority and be as well prepared to take the oath on the spot as he would have been after receiving the same direction from parental authority."

### **3.7.6 The Competency Examination**

It falls within the judge's function to determine whether a child is competent to testify or not (Myers 1987:104). Since there are a number of states which presume all witnesses to be competent or, more specifically, all child victims to be competent, it has been argued that these statutes have removed the traditional function of the court in as far as the competency examination is concerned. However, as soon as the defence raises the competency of the child as an issue or it becomes apparent that the child may be incompetent, then the court will have to conduct such an examination. So, even in those states which presume all witnesses to be competent, the competency examination may still, and in many cases will still, take place. For instance, Delaware took over Federal Rule 601, enacting it verbatim. This means that all children in Delaware are presumed competent and therefore a preliminary examination would not be necessary. In practice, preliminary examinations are still held and this was endorsed by the Delaware Supreme Court which stated in *Ricketts v State*, 488 A.2d 856 (Del.Super.Ct. 1985) at 857 that "under the Delaware Rules of Evidence the six year old rape victim is presumed competent to testify once the trial judge is satisfied by *voir dire* that the child understood her obligation to tell the truth, and the difference between truth and falsehood.

The trial court has a broad discretion to determine the competency of child witnesses, and their decisions will be affirmed unless it is shown that the court abused its discretion (Myers 1987:104). The trial court's decision will, therefore, not be disturbed unless it has been abused. Once the trial court has determined the question of competency, "it will not be disturbed on review, unless it appears from the examination of the child...or from his testimony, that the trial court clearly abused its discretion" (Selkin 1991:116). Abuse of discretion in relation to a mentally ill witness came before the court in *People v Cola*, 3 Colo.App. 264, 564 P.2d 431 (1977) where the trial court found a witness, who had previously been adjudicated insane, to be competent without holding an inquiry into the witness's present competency. The Colorado Appeal Court held that the trial court had abused its

discretion. What will amount to an abuse of discretion will clearly depend on the facts in each case. The appeal courts are loathe to interfere with a trial court's discretion because the latter has the advantage of seeing and speaking to the witness, as can be seen from the decision in *State v Moser*, 82 S.D. 149, 143 N.W.2d 369 (1966) where the supreme court found that the trial court had not abused its discretion by finding a child younger than three years to be incompetent without conducting a competency examination.

There are certain limits to the court's discretion in conducting the examination. For instance, the court is not allowed to promise the child a reward for telling the truth (Myers 1987:105). In *State v Cook*, 485 So.2d 606 (La.Ct.App. 1986) the trial judge gave the child sweets after she had given evidence. The Appeal Court held that the "trial judge's decision to reward the child witness with candy in the presence of the jury cannot be justified" since his behaviour "could certainly be viewed by the jury as an indirect comment on the witness's veracity" (at 609). Also in *State v R.W.*, 104 N.J. 14, 514 A.2d 1287 (1986) where the judge promised to give the child witness an ice cream if she said what was 'real', the appeal court found that there had been an abuse of discretion and said at 1289:

"...we state without hesitation that the trial judge abused his discretion by promising the child ice cream and in subsequently giving it to her, thereby suggesting to the jury, albeit inadvertently, that the infant had indeed testified truthfully."

It would appear that this rule applied to the courts only, possibly since they have to maintain a stance of objectivity, because in *People v Matthews*, 17 Ill.2d 502, 162 N.E.2d 381 (1959) the Appeal Court upheld the trial court's decision that a child was competent even though her mother had promised her a paint set if she told the truth.

In those jurisdictions where children below a certain age are presumed incompetent or where they must be able to distinguish between truth and lies, the court will have to conduct an examination into the competency of the witness. The traditional procedure is to conduct a preliminary examination, which is also referred to as a *voir dire* examination. The latter phrase includes all questioning on the subject of competency (Myers 1987:105-106). In *Toney v Bouthillier*, 129 Ariz. 402, 631 P.2d 557 (Ariz.Ct.App. 1981) the Arizona Appeal Court at 562 said that the trial court must examine a child witness on *voir dire* before determining competency. Similarly in *State v Samson*, 388 A.2d 60 (Me. 1978) the court held at 64 that a preliminary examination must be held to determine competency.

In determining competency, the primary emphasis is on the child's ability to differentiate truth from falsehood, to understand the duty to tell the truth and to understand what will happen if the truth is not told (Melton 1981:74). How then are these examinations to be conducted? According to Wigmore (1974:642), one way of ascertaining competency is by observing the behaviour of a witness. Myers (1987:108) is of the opinion that this method is unlikely to be used on its own under the present approach to competency with the majority of states presuming children to be competent. He finds it hard to imagine a court excluding a child without first conducting a *voir dire* examination. Although rare, this has already happened, as in the case of *State v Moser supra* where the appeal court upheld the trial court's decision that the witness, under the age of three, was incompetent even though the trial court had not conducted a preliminary inquiry into competency.

In practice it would seem that the court will conduct a preliminary examination into the child's competency, while at the same time observing the child's behaviour in the witness stand. How the competency examination is to be conducted remains within the discretion of the presiding officer. This is supported by a number of court decisions. In *Wilson v State*, 221 So.2d 100 (Miss. 1969) at 102 the court said that the "competency or incompetency of children to testify is largely an issue within the sound discretion of the trial judge".

It is usual for the competency examination to be conducted by the judge himself, although the parties to the case may examine the witness provided that the final determination remains with the judge. The Court of Appeals in *In re A.H.B. supra* at 492 explained that the trial judge "may conduct a *voir dire* of the child with or without the participation of counsel, either in the presence or the absence of the jury (if there is one), during or before trial". On the other hand, in *State v Wilson*, 103 N.E.2d 552 (1952) the court at 555 explained that when a child witness is under the age of ten "it is the duty of the trial judge to immediately examine the child, without the participation or inference of counsel, to determine the child's competency to testify". Similarly in *State v Workman*, 471 N.E.2d 853 (1984) the court stated at 859 that the examination as to competency is exclusively for the court with counsel playing no part. Wigmore (1974:398) disagrees with the latter decisions and argues that the examination should not be limited to the court alone, and that counsel should be given an opportunity to take part in the examination.

It would appear from the decisions that it is the role of the court to conduct the preliminary examination into the competency of a child witness, but it would not be an abuse of discretion if the court allowed counsel to conduct the examination provided that the court makes an independent decision on the question of competence (Myers 1987:109-110). The position is summed up in the case of *Sprayberry v State*, 330 S.E.2d 731 (1984) where the court allowed counsel to question two children rather than conduct the examination itself. The court then decided that the children were competent to testify on the basis of counsel's examination. The Appeal Court confirmed this decision and explained the position at 733:

"The objective is for the court, not anyone else, to determine competency as a preliminary to the calling of a challenged witness. Here the court clearly assumed and discharged that function. The fact that the court allowed the attorneys representing both sides to actually pose the questions did not diminish the function or abdicate responsibility for making the decision based on evidence produced before it and its observations."

Although courts do allow counsel to question the child during the course of the competency examination, there is disagreement as to whether the defence has a right to question the child. Wigmore (1974:87) notes that it could be argued that, because the ordinary rules of evidence do not apply at preliminary hearings, there is no absolute right to cross-examination at the competency examination. However, he adds that in modern practice cross-examination at these hearings is permitted as a matter of routine and this may therefore be a matter of constitutional right.

This gives rise to the issue whether the right to question the child at the competency examination is a constitutional matter. As dealt with above, the accused has a Sixth Amendment right to confront witnesses who give evidence against him in criminal prosecutions. Does this right extend to the competency hearing? In *People*

*v Garland*, 393 N.W.2d 896 (1986) the Michigan Appeal Court upheld the decision that the defendant be excluded from the competency hearing. This was also the decision in *People v Breitweiser*, 349 N.E.2d 454 (1976) where the court held that the preliminary examination of a child witness did not interfere with any right of the accused, and his interests were not violated when he was excluded from a competency hearing (Myers 1987:112). In *State v Roberts*, 139 Ariz. 117, 677 P.2d 280 (Ariz.Ct.App. 1983) the judge questioned a nine year old victim in chambers outside the presence of the accused, and refused to produce a transcript of the examination. The Arizona Court of Appeal held that this procedure did not violate the accused's rights to due process, confrontation, or effective assistance of counsel. In *Moll v State*, 351 N.W.2d 639 (Minn.Ct.App. 1984) the court at 645 held that the accused's right to confrontation was not denied when he and his counsel were excluded from the preliminary hearing. The court further added that, although an accused could be excluded from the competency examination, counsel should be allowed to attend the hearing unless the court is of the opinion that the attorney's presence might intimidate the child or interfere with the latter's ability to communicate. If the judge does allow the accused or his counsel to be present at the competency hearing, he has the discretion to prevent any questioning from the defence or to limit and control the questioning (Myers 1987:112). In *Moll v State supra* the court found at 643 that the accused had no right to question the child at the competency examination, and in *State v Taylor supra* the Court of Appeal upheld the trial court's decision that counsel submit their questions in writing rather than question the child orally.

As Oseid (1985:1380) points out, the preliminary competency hearing is of crucial importance because in many cases, especially those relating to abuse of children, a finding of incompetency means the child will not be allowed to testify and often the state is then forced to withdraw the charges. This process creates a number of conflicts between the state (in its role of protecting the child and ensuring convictions in the case of guilty offenders), the child (and the psychological trauma that the child had to undergo during the criminal process) and the accused (who has rights to confrontation, representation and due process). She goes on further to explain how an accused's rights can become important in a competency hearing. Since part of the competency examination relates to testing the child's ability to remember, the judge may inquire about the actual event in issue. If such questioning does take place, Oseid (1985:1384) says that "the pre-trial competency hearing becomes a crucial point in the proceedings because suggestion, through leading questions about the assault during the competency hearing, may dictate how the child will later testify at the trial". In *Moll v State supra* the Minnesota Court of Appeals addressed the problem at 643 in passing and suggested that the court should not refer to the actual matter before trial by saying that "the trial court has broad discretion as to the type of question to be put to the child during this preliminary examination, but should not elicit from the child the anticipated testimony concerning the alleged offense, recognizing the suggestibility of young children".

To determine whether the accused has a right to be present at a hearing, the test is whether his presence might affect his opportunity to defend (Oseid 1985:1387). In *State v Cermak*, 350 N.W.2d 328 (Minn.1984) the Minnesota Supreme Court made mention of the accused's constitutional right to be present at *in camera* hearings relating to the competency of child witnesses. However, in *Moll v State supra* the Minnesota Court of Appeals dismissed this statement as *obiter dicta* and found that the accused had no constitutional right to be present at the preliminary hearing.

Oseid (1985:1389) argues that there are a number of factors which support the decision in *Moll v State supra*. Firstly, the accused only has the right to be present when his presence affects his opportunity to defend. The sole function of the competency hearing is to determine competency and not the content of the trial evidence. The confrontation rights of cross-examination, appearance before the jury and the giving of evidence under oath are not applicable at this preliminary hearing. Secondly, competency is a question of law, and one which falls solely within the trial judge's discretion. In *State v Ritchey*, 107 Ariz. 552, 490 P.2d 558 (1971) the Arizona Supreme Court held the following at 561:

"We do not find the same compelling need for a defendant to be present at such proceeding [competency determination] as we find when a personal constitutional right, such as trial by jury, is at stake. Here a defendant's attorney can adequately exercise the defendant's rights. The determination of the competency of a witness to testify is a matter of law to which legal counsel is specially qualified to address himself."

Thirdly, a strong argument favouring the exclusion of the accused from a competency hearing is the welfare of the child. As pointed out by the court in *Moll v State supra* at 42 the defendant's presence at a competency hearing often "serve[s] no other purpose than to intimidate the child".

The majority of court decisions hold that excluding the accused is "both proper and constitutional" (Oseid 1985:1390). The Illinois Appellate Court in *People v Breitweiser supra* was of the opinion that the purpose of the competency examination was to determine the competency of the witness and not to cross-examine the child, therefore there was no need for the accused to be present. The court noted at 456 that once the witness took the stand, then "this witness may be cross-examined, like any other competent witness to determine the weight and credibility of his testimony. It is here, in open court, that the defendant has the right to confront the witness and probe into his capacity for memory and perception". At the trial there will be adequate opportunity for the accused to test the competency of the child.

A more serious problem arises from the use of varied practices by judges in conducting competency hearings. Some hold them in open court just before the trial and allow the accused to be present while others hold the proceedings in chambers and exclude the accused. Oseid (1985:1391-2) argues that it is these inconsistent practices which may infringe upon the accused's rights, and suggests that a single procedure should be followed nationwide. As far as cases of sexual abuse are concerned, she suggests that the accused be excluded from the preliminary competency hearing since the purpose of the hearing is to determine competency and not the guilt or innocence of the accused. She further suggests that the judge be careful not to ask any questions relating to evidence that is to be heard at the trial.

However, this still leaves unanswered the issue of how the accused's rights are to be protected by ensuring that there is no suggestion or leading of evidence that is to be presented at the trial if the accused is going to be excluded from the competency hearing. Oseid (1985:1392) suggests that the most logical compromise would be to allow the accused's legal representative to be present at the hearing. In *United States v Wade*, 388 U.S. 218 (1967) the United States Supreme Court accepted that suggestibility is a problem in pre-trial proceedings. In *Miranda v Arizona*, 384 U.S. 436 (1966) the Supreme Court accepted the danger of possible suggestion when police

interrogate an accused in the absence of his counsel. The court was of the opinion that the "assistance of counsel can mitigate the dangers of untrustworthiness". Although his case related to the interrogation of the accused, the court's analysis of the benefits of having defence counsel present would also apply to the pre-trial hearing (Oseid 1985:1395).

The presence of defence counsel at a preliminary hearing will assist in ensuring that the questions asked are related solely to the issue of competence and are not suggestive. As mentioned *supra* the questioning of the child is in the discretion of the judge, and this discretion is so wide that it will only be interfered with by an appeal court if there has been an abuse of discretion. Although various courts have found that there was no error in permitting a witness to testify about specific events when testing the child's competence, Oseid (1985:1396) argues that "a high potential for suggestibility results if a judge not only tests a child's abilities to remember and truthfully relate the assault information but also asks leading questions to test those abilities. Such leading questions may taint the child's later trial testimony unless defense counsel is there to serve as a check".

The best compromise then would seem to be allowing defence counsel to be present at the competency hearing while excluding the presence of the defendant. One problem that might arise is if the accused decides to represent himself. Since he would not have counsel to represent him, he would then have to attend the competency hearing and, as Oseid (1985:1392-1393) suggests, some accused might tactically choose to represent themselves, believing that they might be able to intimidate the child during the hearing. A possible solution would be the use of closed-circuit television which would enable the accused to observe the hearing.

As far as the jury is concerned, the practice is to hold the competency examination in their absence. This was the decision in *State v Singh*, 586 S.W.2d 410 (Mo.Ct.App. 1979) where the court held that the established procedure is to hold the *voir dire* examination outside the presence of the jury. Also in *State v Hunsaker*, 39 Wash.App. 489, 693 P.2d 724 (1984) the court came to the same decision at 725 where it said that "the trial court followed the approved and accepted practice of conducting a competency hearing for each child out of the presence of the jury". Myers (1987:113) points out the danger that, since rules of evidence do not apply during the preliminary hearing, the jurors might be exposed to inadmissible evidence.

Some courts have promoted the idea of allowing the hearing to take place in the presence of the jury since the evidence may be relevant to credibility. This was mentioned as an *obiter* comment in the case of *State v Butler*, 27 N.J. 560, 143 A.2d 530 (1958) at 555 where the court said that the hearing could be conducted in or out of the presence of the jury as "[i]t may be desirable to take the testimony in the presence of the jury because, assuming a finding of competency to testify, ordinarily the evidence is relevant to the subject of the credibility of the witness".

The courts will consider any evidence that will assist them in determining the competency of the child. The child himself will provide the primary evidence in the form of the examination. This involves an inquiry with questions aimed at investigating the child's understanding of truth and falsehood, and questions relating to his cognitive ability. According to Melton (1981:74), the typical kinds of questions would include: what is your name? how

old are you? where do you live? do you go to school? do you know what happens to anyone telling a lie? do you know why you are here today? would you tell a true story or a wrong story today? suppose you told a wrong story, do you know what would happen? do you know what an oath is?

According to Stafford (1962:314), a judge of the Superior Court in Washington, these questions should be simple and direct and designed to ascertain the general intelligence of the child and his ability to understand the duty to tell the truth. The questions should be understandable to the child otherwise they become meaningless. For instance, a child will probably not understand what is meant by the question 'with whom do you reside?' whereas 'with whom do you live?' would make sense. I submit that 'who do you live with?' would make even better sense to a child.

Stafford (1962:315) gives the following example of a typical competency examination conducted by the court:

- "Q. What is your name?  
 A. Katherine Anne Craig.  
 Q. How are you feeling today, Katherine?  
 A. Fine.  
 Q. What are the names of your mother and father?  
 A. ....  
 Q. Do you have any brothers and sisters?  
 Q. What are their names?  
 Q. Do they live at home?  
 Q. By the way, how do you spell your name?  
 Q. How old are you, Katherine?  
 Q. When is your birthday?  
 Q. How did you get here today?  
 Q. Do you know what building you are in now?  
 Q. What town are you in now?  
 Q. Where do you live?  
 Q. What school do you go to?  
 Q. How far do you live from school?"

According to Stafford, these questions will reveal the following information: the child's ability to understand simple questions; the child's age, knowledge of his own age and birthdate; his residence; knowledge of the people who live with him; his ability to remember; and his general intelligence. Stafford does not supply us with the age of the child who took part in this competency hearing, but I submit that the questions would have to be very different in the case of a very young child. Questions relating to time and place have to be phrased in far more concrete terms for younger children.

If, after examining the child, the court does not have sufficient information to make a decision, the court has the discretion to consider other evidence relating to the child's competency, such as the child's school records or a teacher or a parent may give evidence of the child's ability. In rare cases a psychiatrist or psychologist would be allowed to give evidence regarding the child's competency (Myers 1987:114).

Although the question of competency relates to concepts such as the child's cognitive ability, which is psychological in nature, it is rare for the court to hear evidence from psychologists or psychiatrists regarding the competence of

children with normal intellectual ability. Rarely the court may allow a child to be evaluated by a psychiatrist or psychologist where there is doubt as to competency as in the case of some mentally retarded children (Myers 1987:115). In *United States v Benn*, 476 F.2d 1127 (D.C. Circ. 1972) the witness was a mentally retarded eighteen year old rape victim. The trial court denied an application that the witness be evaluated by a psychiatrist on the question of competence. This decision was affirmed by the circuit court. In *Page v State*, 274 Ind. 264, 410 N.E.2d 1304 (1980) the witness was a thirteen year old mentally retarded rape victim with the mental age of five-and-a-half. The defence counsel requested that the child undergo psychiatric evaluation to determine competency. The trial court denied this application and found the witness to be competent. This decision was upheld by the Supreme Court and they added at 1306 that the accused did not have a "right" to subject the child to a psychiatric evaluation.

Since most children are regarded as competent by the courts, psychiatric evaluations are seldom necessary. Myers (1987:116) explains that the judge is almost always capable of coming to a decision without such an evaluation and, secondly, they "constitute an unwarranted invasion of the child's privacy, and may lead to harassment". This was the view accepted by the court in *Collins v United States*, 491 A.2d 480 (D.C. 1985) where the court had the following to say regarding psychiatric evaluations at 484, although the witness in this case was not a child:

"The decision whether to order a psychiatric examination of a witness to determine his competency or to aid the jury's assessment of credibility is a matter within the court's discretion...Because such an examination has the potential to impinge upon a witness's right to privacy and to harass a witness, a presumption exists against ordering mental examinations."

In the majority of jurisdictions it is the trial judge who has the discretion to order that a child undergo a psychiatric evaluation to determine competency (Myers 1987:117). In *State v Hubbard*, 601 P.2d 929 (Utah 1979) the court explained it as follows at 930:

"...if it were to appear that there is a substantial doubt that a witness is capable of understanding and appreciating the duty to tell the truth, or that he is able to perceive, remember and communicate facts with reasonable accuracy, the trial judge might grant a request for [a psychiatric] examination before permitting him to testify ...[T]he determination as to whether such an examination should be had must necessarily rest largely within the discretion of the trial judge."

Despite the fact that trial judges do have the discretion to allow these examinations, decisions of the various appeal courts have held that these examinations should be the exception and not the rule (Myers 1987:117). The Appeal Court in *State v Butler supra* pointed out at 556 that the granting of psychiatric examinations of witnesses has to be decided with great care and "[o]rders to permit it to be done should be executed only upon a substantial showing of need and justification".

### **3.7.7 Overturning of Competency Decision**

In practice the vast majority of children over the age of five, including some children aged three, are judged to be competent after questioning by the court. However, what happens when a child, who has been found to be

competent, demonstrates at the trial that he is in fact not competent. The courts have held that a pre-trial decision of competence can be overturned at trial. This was held in *People v Murphy*, 526 N.Y.S.2d 905 (Supp. 1988). The judge held a pre-trial hearing to determine the competency of the nine year old victim. The examination consisted of two interviews. At the first, the judge found the boy to be so unresponsive that he decided he was incapable of providing sworn evidence. Having been requested a second opportunity to examine the boy, the judge found the boy to be more responsive and capable of articulating his understanding of the need to tell the truth. He thus found the child capable of understanding the oath and giving sworn evidence. At the trial it became increasingly obvious that the boy did not understand the importance of telling the truth and "that at times he became so unnerved by the questioning that he did not even know what the truth was" (at 908). The New York Supreme Court upheld the trial court's decision, explaining it as follows at 908:

"As a rule, the determination of that capacity made prior to the trial is not altered by events at the trial. However, as this case demonstrates, the more informal, comfortable atmosphere in which the exploration of a child's testimonial competence is conducted can result in a miscalculation of the child's capacity. Under these circumstances the trial court has an obligation to alter its determination. To hold otherwise would require that court to adhere mechanically to a ruling made in the exercise of its discretion which it knows to be erroneous."

Therefore, although most children over the age of five will be found to be competent, the decision made at the competency hearing is not irrevocable. As Perry and Wrightsman (1991:43) explain, the competence of the child can be questioned at any stage of the trial. Cleary (1984:643) supports this, arguing that often the incompetency of a witness only appears when the trial is in progress. It is only when the witness's evidence is being led or he is being cross-examined that the incompetency becomes obvious. The witness must then be stopped and the "preceding testimony ordered expunged".

### **3.8 The Cautionary Rule relating to Child Witnesses**

#### **3.8.1 The Common Law Position**

The court is entitled in terms of the common law to convict an accused on the uncorroborated evidence of a complainant in a sexual offence. Wigmore (1974:451) explains that "the testimony of the prosecutrix or injured person, in the trial of all offences against the chastity of women, was alone sufficient to support a conviction; neither a second witness nor corroborating circumstances were necessary". Corroboration only becomes necessary where the complainant's evidence is unclear or unconvincing or the credibility of the witness has come under attack. This approach was accepted in *Roberts v State*, 87 Okla.Crim. 93, 194 P.2d 219 (1948) where they explained the position as follows at 224-5:

"The court has often announced the rule to be that where the evidence of the prosecutrix is contradictory, uncertain, improbable, or she has been impeached, it is necessary, under the law, that her testimony be corroborated...But this court has also held that one may be convicted upon the uncorroborated evidence of the prosecutrix where her evidence is not contradictory, uncertain or improbable, and she has not been impeached."

The need for corroboration in cases of doubt was also accepted by the court in *State v Baldwin*, 571 S.W.2d 236 (Mo. 1978) at 239, where it was stated that "in those cases where the evidence of the prosecutrix is of a contradictory nature, or when applied to the admitted facts in the case, her testimony is not convincing and leaves the mind of the court clouded with doubts, that she must be corroborated or a judgment cannot be sustained".

As time progressed this practice began to be interpreted as insisting upon the requirement that, unless evidence was clear and convincing, there had to be corroboration, and Wigmore refers to a number of cases where convictions were reversed because there was no corroboration (Myers 1987:173). In addition a further practice developed of requiring corroboration in the case of child witnesses specifically. In *People v McGrath*, 28 Ill.2d 132, 190 N.E.2d 746 (1963) the court explained at 748 that "where a conviction for taking liberties is based upon the testimony of a child of tender years, the evidence must be corroborated or otherwise clear and convincing in order to sustain a judgement of guilt". In response to this a number of states enacted statutes which required that the evidence of a complainant in a sexual matter and the evidence of children had to be corroborated.

### **3.8.2 Basis of Corroboration Requirement**

***Perception of children:*** Child witnesses are unique in a number of respects and it is specifically these characteristics which affect the perceived credibility of children. Goodman (1987:28) conducted research on how jurors perceive child witnesses, and found that children exhibit a number of characteristics which lower their credibility in the eyes of adults, for instance, powerless speech style, low status, and lack of confidence. Less than fifty percent of the respondents in the study believed that children would respond accurately, indicating that jurors perceived children as being less reliable witnesses than adults.

***Children tend to fantasise:*** There is also the fear that children fantasise and fabricate allegations of sexual abuse. Many psychiatrists, who were trained in Freudian analysis, attributed children's reports of abuse to fantasy (Sloan 1983:12). This finding is supported by Goodman (1984:11) who gave the following reasons therefore:

"These historical perceptions about children continue in society today: Our culture holds ambivalent views about children; they are seen as innocent and truthful, but at the same time as manipulative or even devious. A child who reports a sexual assault may be seen as an innocent, truthful victim or as a creature of uncontrolled sexual fantasy. A child who witnesses a murder may be viewed as having no reason to lie, but as being highly suggestive."

Since complainants in sexual cases have traditionally been regarded with suspicion, this suspicion was then also transferred to children who were victims of sexual assaults. The dangers of convicting on the uncorroborated evidence of female complainants was explained in the famous passage by Wigmore, as quoted by Myers (1987:118):

"Modern psychiatrists have amply studied the behavior of errant young girls and women coming before the courts in all sorts of cases. Their psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offenses by men. The unchaste (let us call it) mentality finds incidental but direct expression in the narration of imaginary sex incidents of which the narration is the heroine or the victim. On the surface the narration is straightforward

and convincing. The real victim, however, too often in such cases is the innocent man; for the respect and sympathy naturally felt by any tribunal for a wronged female helps to give easy credit to such a plausible tale...

No judge should ever let a sex offense charge go to the jury unless the female complainant's social history and mental make-up have been examined and testified to by a qualified physician."

These comments carried such weight that courts began to insist that women, including young girls, undergo psychiatric examinations to determine their credibility. Over the last thirty years Wigmore's beliefs have been rejected as legally and psychologically unsound (Myers 1987:118-9). In *People v King*, 41 Colo.App. 177, 581 P.2d 739 (1978) the court held at 741 that a psychiatric examination of a child in a sexual abuse case should be held "only where there is a compelling reason for it". In *Holder v State*, 272 Ind. 52, 396 N.E.2d 112 (1979) the appeal court upheld the trial court's decision to refuse to order a psychiatric evaluation of a nine year old rape victim. Finally, in *State v Romero*, 94 N.M. 22, 606 P.2d 1116 (Ct.App. 1980) the court accepted that the belief that psychiatric examinations need to be ordered routinely in rape cases "is based on outmoded notions of the instability and duplicity of women in general, and, as such, should be discarded altogether". This has led to some jurisdictions banning psychiatric evaluations of victims in cases of sexual assault. For instance, the Californian Penal Code provides as follows:

"Cal.Penal Code s1112 (West 1985): The trial court shall not order any prosecuting witness, complaining witness, or any other witness, or victim in any sexual assault prosecution to submit to a psychiatric or psychological examination for the purpose of assessing his or her credibility.

***Children are suggestible:*** A further danger involved in accepting the evidence of a child is suggestion. The event may have been implanted in the child's mind by another adult. This danger is explained by Coleman in the following extract quoted by Myers (1987:369):

"When it comes to a child's statements about sexual victimisation, there are not two possibilities - lying or telling the truth - but three. A child may be neither lying nor telling the truth. A child, particularly a very young one, may say what he or she believes is true, even though it is not the truth.

At first blush, this seems a rather unlikely possibility, to say the least. A child believes in sexual abuse which has not taken place. I would certainly be skeptical of such an idea if I hadn't had a chance to see how children are being manipulated by adult interviewers - sometimes by a police officer or protective service worker, sometimes by a mental health professional - who have been trained to believe that those who really care and are sufficiently skilled at their work will help the child talk about sexual abuse."

For these, and many other reasons, children have traditionally been regarded as suspicious witnesses. The law's response to these perceived dangers was to require that a child's evidence in sexual offence cases be corroborated.

### 3.8.3 Statutory Position

Based on the above grounds, the majority of the states introduced corroboration requirements regulating the evidence of complainant in sexual crimes, including in this category both children and adults. However, by the 1970s with the acceptance of psychological research, there was a move away from the requirement that complainants in sexual crimes had to be corroborated (Myers 1987:173).

In 1980 in *Lancaster v People*, 200 Colo. 448, 615 P.2d 720 (1980) the court was already saying that "children of tender years are generally not adept at reasoned reflection and at concoction of false stories under such circumstances" (at 723). In *State v Myatt*, 237 Kan. 17, 697 P.2d 836 (1985) the court followed the same approach, stating at 841 that "[i]t is also beginning to be recognised that a child's statements about sexual abuse are inherently reliable". In response to these developments the courts in various states began to reject the idea that corroboration was essential in the case of children. In *United States v Bear Runner*, 574 F.2d 966 (8th Circ. 1978) the court explained that "[a]t least 35 states now reject any corroboration requirement for rape", while in *State v Byers*, 102 Idaho 159, 627 P.2d 788 (1981) the court stated that the requirement for corroboration in sexual cases no longer applied in Idaho. The Minnesota Court of Appeal held that "[c]orroboration of the testimony of a complainant in sex offenses is not required" in *State v Carver*, 380 N.W.2d 821 (Minn.Ct.App. 1986) at 826.

By 1983 Sloan (1983:112) reported that only four jurisdictions, namely Nebraska, Columbia, Georgia, and New York, still required the corroboration of minors in all sex offence cases, while seventeen states had watered down versions, only requiring corroboration in special or limited circumstances.

The position at present is that there is no substantive requirement insisting on corroboration in cases of sexual offences. Rather, the rule is that the court can convict on uncorroborated evidence but if the complainant's evidence is uncertain or unclear they may require corroboration (Myers 1987:173). The position was explained in *State v Myers*, 359 N.W.2d 604 (Minn. 1984) at 608 as being that "in a prosecution for criminal sexual conduct the complainant's testimony need not be corroborated. Corroboration of an allegation of sexual abuse of a child is required only if the evidence otherwise adduced is insufficient to sustain conviction". The Texas Court of Appeal stated in *Moore v State*, 703 S.W.2d 762 (Tex.Ct.App. 1985) at 763 that the "rule is well-established that in statutory rape cases the victim's testimony need not be corroborated".

But, as Sloan (1993:113) points out, even where the strict corroboration requirement has been abolished, corroboration may still be necessary. Juries are less likely to convict on the evidence of a child alone, since they perceive children to be less credible than adults, as argued *supra*. Although, therefore, there may be no substantive requirement for corroboration, in effect corroboration will still remain a requirement as long as presiding officers and jurors harbour suspicion regarding the credibility of children.

Where corroboration is required, it can include any admissible evidence which tends to support or strengthen the child's evidence (Myers 1987:175). What constitutes corroboration will vary from one case to another, as was pointed out by the court in *In re Brunken*, 139 Ill.App.3d 232, 487 N.E.2d 397 (1985) at 401 where it was explained that "[w]hat facts or evidence will serve as confirming or corroborative facts will necessarily vary depending on the facts to be corroborated". Corroboration could include physical evidence such as that produced by a medical examination, a confession or admission by the accused, eyewitness testimony or even expert testimony. The final decision as to whether evidence will be capable of serving as corroboration will depend on the discretion of the judge (Wigmore 1974:464-5).

## 4. CHILD WITNESSES IN INQUISITORIAL SYSTEMS

### 4.1 Introduction

The procedures adopted in the various continental countries vary from being completely inquisitorial in nature in some instances to a mixture of inquisitorial and accusatorial in others. A very brief investigation will be made into the procedures specifically relating to child witnesses in the following three continental countries: the former West Germany, France and the Scandinavian countries. Finally, certain aspects of the procedure used in Israel will also be studied.

Of particular importance to child witnesses is the use of psychological experts in West Germany and the development of the science of evaluating witness credibility, which plays an important role in assisting the court in determining the truthfulness of children's statements in this country. This science has now also received much interest in the USA, and is therefore of importance to this study.

In the French legal system children give their evidence to a professional, called the *judge d'instruction*, and are thereby spared the necessity of a court appearance. This practice has, however, given rise to its own difficulties which will be discussed *infra*. A further point of interest in this system is the role of the expert who is appointed to assess and compile a report on the credibility of a child witness for the court.

The Scandinavian countries have a mixture of inquisitorial and accusatorial procedures. In Norway a child's evidence is given at a judicial interview which takes place before the trial. The report of this interview is then presented to the court and the child is spared a court appearance. In Denmark the child's evidence is taken at a hearing before the trial, but the prosecution and defence are entitled to be present and examine the child. In Sweden the videotaped interview conducted by the police is used to replace the child's evidence in court. As can be seen, the legal solutions differ from one Scandinavian country to another, but a common trait in all is an attempt to avoid a court appearance for the child witness.

In Israel the office of the youth interrogator is of particular relevance to this study, since that official is responsible for interrogating the child, making the decision whether the child will appear in court or not and, finally, appearing in court in lieu of the child. He has often been referred to as fulfilling the role of the prosecutor, defence counsel and judge.

### 4.2 Former West Germany

#### 4.2.1 Procedure Adopted in Criminal Trials

The philosophy upon which the inquisitorial procedure in West Germany is based, is the "exploration of what is called 'material truth'". The court decides what has to be proved by evidence and what evidence will be sufficient to do so, and is therefore not limited to motions and evidence presented by the parties (Frelisee 1990:30-1).

The German criminal trial is divided into three phases: the preliminary proceedings, the intermediate proceedings, and the main proceedings (Frehsee 1990:30). In theory the preliminary proceedings are governed by the prosecutor of state, but in practice the police investigate most cases themselves and inform the prosecutor of the outcome. In effect most witnesses are interrogated by the police. In terms of the German Criminal Procedure Code the prosecutor has the status of an 'autonomous agent of justice', which means that he is not only called upon to produce incriminating evidence, but is obliged to act in an independent and neutral manner and must investigate the case thoroughly, producing evidence that would be to the advantage of both parties (Frehsee 1990:30-1).

It is perhaps important to mention one of the characteristic principles of the German criminal procedure, namely that the police and prosecution are forced to investigate any criminal matter they have been notified of. The police have no discretionary power at all in this regard, and prosecutors have only recently been given some discretionary powers insofar as minor cases are concerned. This means that in the case of violent or sexual offences against children there is hardly any possibility of the proceedings being stopped, even if it would be in the interest of the child to do so (Frehsee 1990:31).

In the intermediate proceedings, the court has to make a decision as to whether there is sufficient evidence to open the main proceedings. This is done without an oral hearing. The main proceedings are based on the principle of directness which forces the court to limit evidence to facts which are readily accessible. This has the implication that the court has to interrogate the witnesses themselves. Therefore, if the witness is a child, the court has to interrogate the child. It is the function of the presiding officer to question the witnesses and cross-examination, although not prohibited by law, is completely uncommon in practice (Frehsee 1990:30-3).

Once oral evidence has been heard, the expert gives an oral statement based on his written expert report. The expert is an aid of the court who is appointed to assist the court with his specialised knowledge. The court is not bound by the expert's evaluations and recommendations. Although it is one of the duties of a judge to assess the evidence before him, the courts have recently begun to accept the psychological findings relating to the credibility of witnesses, with the implication that more weight is attached to the expert's opinion (Frehsee 1990:32).

It is not obligatory that such an expert be appointed in every case, but in accordance with the principle of directness the court is obliged to use readily accessible evidence. The court would, therefore, be bound to hear an expert if evaluation is difficult because of the particular facts of a case. This has particular relevance to child witnesses and, in fact, in cases of sexual offences against children the attendance of an expert is common. The obligation to appoint an expert will depend on the factors of each case. For instance, the severity of the accusation, how relevant the child's evidence is, and any deviation in the child's appearance or behaviour that sets him apart from children of his own age (Frehsee 1990:32).

The expert can be appointed at any stage of the proceedings. For instance, a psychological expert can be appointed in the pre-trial phase by the prosecution to assist in determining whether the prosecution possesses sufficient evidence for a formal indictment (Köhnken and Steller 1988:37). The appointment of a psychological expert is traced back to a decision of the Supreme Court of the Federal Republic of Germany in 1954 where the court ruled

that expert witnesses must be called to assess the truthfulness of children's evidence, if the latter constitutes the only or the main evidence and if there is no other corroborating evidence (Köhnken and Steller 1988:37). The expert will be appointed either by the court or the prosecutor during the intermediate proceedings, and may even be appointed by the police in urgent matters. The parties themselves may suggest the appointment of an expert, but the final decision will remain with the judge. If any of the parties are unhappy about the expert's evaluation, the judge does have the discretion to appoint a further expert (Frehsee 1990:32-3).

The expert does not represent either party, but has to make an objective evaluation. This neutrality and objectiveness is reflected in the fact that psychological experts, who were appointed to examine the child at the pre-trial phase, are often later appointed by the court as well with the agreement from the defence. The expert is seen as an 'aid to the court' rather than an aid to either party (Köhnken and Steller 1988:37).

Where called upon to determine the credibility of a witness, the expert only has to answer specific and detailed questions. He does not take over the judge's role in the sense of interrogating the witness to find out any further information (Frehsee 1990:33). Once the expert has completed his examination, he must present a written report, either to the prosecution or the court. In the case of the report to the prosecution, if the expert's evaluation is that the child's statements is truthful, then the prosecution will indict the accused and the trial will follow. The expert then becomes involved from the beginning, and at the end of the hearing of evidence he will have to explain his findings to the court.

## **4.2.2 The Child Witness in Criminal Proceedings**

### **4.2.2.1 Repeated Interviews**

As mentioned *supra*, all cases involving violent or sexual offences against children must be investigated. Child complainants will first be interviewed by the police. In practice the child ends up being interrogated not only by the police, but also by the prosecutor, the expert and eventually the court. In addition to this, a witness can be questioned in several main hearings in the course of the successive stages of appeal. Since repeated interrogations have been found to disturb child witnesses and contribute to the stress they experience, certain guidelines for the conduct of criminal procedure have been introduced, which are binding on the prosecutor and recommended for the judge. In terms of these guidelines repeated interrogations of the child should be avoided as far as possible, and it is recommended that a child psychologist be allowed to attend from the first interrogation (Frehsee 1990:33-4).

### **4.2.2.2 Competency**

As far as competency is concerned, there is no age limit set for the giving of evidence. In each case it will depend on whether the child has the capacity to give evidence. The child must have the mental and cognitive ability to perceive the event, to understand the questions posed and to relate comprehensibly what has happened. In practice,

the limit is usually set between the ages of four and five. Children under the age of sixteen may not take the oath. There is also no formal requirement that a child's evidence must be corroborated (Frehsee 1990:32).

#### **4.2.2.3 Right to Refuse to Testify**

A child can refuse to give evidence, relying on the general right available for a party to refuse to give evidence where the accused is a relative. The child also has the right to refuse to answer particular questions which might put a relative in danger of criminal prosecution. Where the accused is a relative, the court will first have to determine whether the child has sufficient understanding of the meaning of the right to refuse to give evidence. Otherwise the child must be willing to be a witness and the parents have to give their consent. Where one of the parents is an accused, a curator must be appointed to decide if the child may be a witness or not (Frehsee 1990:34).

Also relevant is the fact that a child under the age of fourteen cannot be forced to give evidence, since penalties, as in sentencing for contempt of court, may not be imposed upon children under the age of fourteen (Frehsee 1990:34).

#### **4.2.2.4 Cross-examination**

In inquisitorial proceedings the presiding judge plays the dominant role and it is his duty to question witnesses. Although cross-examination is not prohibited by law, it is completely uncommon in practice. As far as children themselves are concerned, only the presiding judge may pose questions to children under the age of sixteen. Other parties can propose additional questions to be asked by the judge. The judge does have the discretion to allow other persons to ask questions directly, but this can only be done if any disadvantage to the child can be excluded (Frehsee 1990:33).

Frehsee (1990:36) argues that allowing only a single person to question a child will only be advantageous where that person has the requisite ability to communicate with children and be capable of empathy towards them. Since these skills are not necessarily present in presiding officers, the advantage is not guaranteed and Frehsee (1990:37) refers to a number of disappointing failures in practice. It has been proposed that a psychological expert be allowed to interview the child in the main hearing, but this is in total contradiction to the function of the judge and the expert and it would, therefore, not be possible to introduce such a law.

#### **4.2.2.5 Presence of the Accused**

Disadvantages in giving evidence in a courtroom are also to be found in the inquisitorial procedure as highlighted by Frehsee (1990:32):

"The special critical elements of an interrogation in court lie in the formalised, ritual and alienating nature of the situation which is characterised by structural scepticism against the child,

causing fear and insecurity. The creation of a confidential atmosphere is impossible under these conditions".

In fact, the German Criminal Procedure Code provides that the accused can be excluded if any serious disadvantage will be experienced by a witness under the age of sixteen. There are further exceptions to the giving of direct oral evidence in certain instances in the case of children. The record of a former interrogation by a judge can be read in court in lieu of the child giving direct oral evidence where the prosecutor, defence counsel and accused agree. This can also be done where there are "insurmountable impediments" to the child appearing personally. An example of such an impediment would be where the parents refuse to let the child give evidence on reasonable grounds, for instance where it would result in a disturbance in the child's education or development (Frehsee 1990:34-5).

For this reason it is often recommended that use be made of the possibility of requesting an interrogation by a judge during the preliminary proceedings. If at the time of the main proceedings the child is not able to testify and there is no record of interrogation, the court can order that a judge question the child separately. In 1988 provision was made for the admission of records of interrogations carried out by officials other than a judge, for instance, a police officer or a prosecutor. For these records to be admissible, defence counsel must be present at the main hearing and the admission of the record must be acceptable to the prosecutor, accused and his counsel. (Frehsee 1990:36). The record can also be admitted where there is no possibility of hearing the child within a reasonable space of time, usually where another interrogation would be dangerous for the child's health. (Frehsee 1990:36).

Frehsee (1990:36), however, argues that this is no final solution because the relevant provisions were originally aimed at the situation where there is an absolute impediment to the appearance of the witness, as in the case where the witness is dead or in hospital. This then has the effect that the court would have to make a decision as to the degree of danger for the child and the severity of any damage that is anticipated which may require further medical investigation.

It has been proposed that a tape-recording be made of the child's first interrogation and that this tape-recording replace the child's evidence at the main proceedings. However, this is not possible since a tape-recording is only accepted as an object of examination. This means that it can only give evidence for facts which are evident from its existence i.e. that the child is being interviewed. (Frehsee 1990:37).

#### **4.2.2.6 Public Trial**

The presiding officer has the discretion to exclude the public from the courtroom when children under the age of sixteen are being interrogated (Frehsee 1990:34).

#### **4.2.2.7 Victim Protection Act**

In 1988 the Victim Protection Act was introduced. Although the original focus of the act was the protection of women in rape proceedings, it applies to witnesses of all ages who are the victims of crime. The most important innovations include the following: while the victim is being interrogated she may be accompanied by a person whom she trusts; the victim has the right to have an attorney present; the victim's attorney is entitled to inspect evidence and read the records. These provisions have an even wider implication in the sense that, even though a child may have certain rights, the child will very rarely be aware of these. For instance, a child witness is entitled to ask for the public to be excluded or even the accused, for that matter, when being interrogated. A child witness can also refuse to answer certain questions, but the child will be unable to do so unless informed of this right (Frehsee 1990:35).

#### **4.2.3 The Child Witness in Civil Proceedings**

In matters relating to children, namely wardship proceedings and the family court, the procedure is inquisitorial in nature. Where the child is over the age of fourteen, the judge must question the child. On the other hand, where the child is under the age of fourteen, the judge ought to question the child if this is possible. In practice it means that children as young as two and a half are questioned, although in the case of the latter a psychologist is often appointed (Frehsee 1990:28).

Since the procedure is inquisitorial in nature, the judge is the person who examines the witnesses, although he does have the discretion to permit or reject direct questions from the parties. In the wardship court and the family court the interrogation of the child is informal and the judge can question the child at the latter's home in familiar surroundings. Even in other civil actions, which are more adversarial in nature, such as an action for damages, the interrogation can be conducted in the judge's office with the public excluded, although the accused may not be excluded (Frehsee 1990:28-9).

#### **4.2.4 Evaluation of Statement Credibility**

A very important development insofar as child witnesses are concerned took place in the former West Germany and is known as statement credibility analysis. This has special relevance to the evaluation of a child witness's credibility or accuracy. When a child witness gives evidence in a case, the court must evaluate the accuracy and truthfulness of the child's statement. This can be done in one of two ways, either using psychological lay persons or using a psychological expert (Köhnken 1990:39).

The former evaluation is carried out by psychological lay persons, namely jurors, attorneys or police officers. The evaluation is done by observing the child while the child is questioned, and piecing together any additional information relating to the child's personality, cognitive abilities and reputation in order to form a composite approach to credibility. This is also known as a social judgement or impression formation task (Köhnken 1990:39).

The latter evaluation, also known as a psychodiagnostic decision-making task, is where a psychological expert is appointed to assess the truthfulness of a child witness's statement. The psychologist will be an expert in the psychology of witnesses, particularly child witnesses, and will be appointed to collect the relevant data, using specific psychodiagnostic methods (Köhnken 1990:39). The statement analysis approach is based on the assumption that a child witness will not be able to invent a story, producing the same quality of content as would be found when relating a real event (Köhnken and Steller 1988:38).

#### 4.2.4.1 Credibility Judgement by Psychological Lay Persons

Although there is almost no experimental evidence available on the ability to discriminate between truthful and false witness statements in a court setting, there is a considerable amount of empirical findings on this ability in laboratory settings. In these experiments the subjects relate some personal event either truthfully or deceptively. They are videotaped while so doing, and the videotape or a written transcript thereof is then presented to another group of subjects who have to judge whether the statements are truthful or not (Köhnken 1990:40).

The results of more than forty experimental studies have shown that the proportion of correct decisions falls in a range between 45% and 60%, where 50% of the correct decisions are based on chance i.e. guessing (Köhnken 1990:40). In 1988 Köhnken (1990:41) conducted a survey on various aspects of credibility judgement and found that people overestimate their ability to detect deceptions because they make certain fundamental judgement errors when they try to detect deceptions. He refers to the following four errors in judgement which are particularly important and misleading.

- i. People erroneously believe that certain behaviours indicate deception, and other behaviours, which are even more valid indicators of deception, are underestimated or even ignored. For instance, many people are of the opinion that the face, and especially the eyes, reveal deception. However, empirical evidence has shown that the opposite is true i.e. the detection accuracy is worst if the face is the only source of information (Köhnken 1990:41).

People who took part in the experiments were asked whether they could be deceived by the communicator's eyes, and they tended to believe that this was not possible. In fact, eyes seem to be one of the most efficient instruments of deception. Köhnken found that people are particularly efficient at controlling their expression and gaze (Köhnken 1990:41).

- ii. People believe that there are certain behavioural characteristics which exist in most people which act as clues when they lie. Köhnken (1990:41-2) interviewed more than 200 subjects, including jurists and police, about whether they believed in the existence of these clues. Approximately 60% of the subjects believed that these behavioural clues did in fact exist and were more or less consistent across people. Research has itself shown that these behavioural clues not only vary between different people but may even vary for the same person in different situations, and it would therefore be misleading to generalise that certain behavioural characteristics are indicative of deception.

- iii. People assume that these behavioural characteristics associated with lying will increase in frequency and intensity when a person is lying. For instance, it was the belief among the subjects that people who were lying would blink more often, shrug more often, take longer to respond to a question and turn their eyes away more often. However, the data shows that most of these behaviours decrease when a person is lying (Köhnken 1990:42-3).
- iv. Study subjects were questioned as to what strategy they believed would detect deception in another person: either to show suspicion and doubt when questioning someone, or not to show any suspicion and allow the person to feel confident and secure. Most study subjects were convinced that the most efficient strategy to determine whether someone was lying, was to display overt suspicion, ask tough questions and try to make the person nervous (Köhnken 1990:43). Ekman (1985) described this type of error as the 'Othello error'. Othello accused Desdemona of having committed adultery and threatened to kill her. In her fear she showed exactly those behaviours which Othello erroneously interpreted as indicating her guilt.

Recent empirical research has shown that this strategy is misleading in two ways. Firstly, if a witness is a skilful liar, he will recognise that he is under suspicion by the method of questioning and will then accordingly adapt his behaviour to what he believes represents an honest witness. Secondly, an honest witness may become nervous if viewed with suspicion and doubt, and this nervousness often produces the very behavioural characteristics which are interpreted as signs of lying or deception. The best strategy, therefore, in questioning a witness would be to remain as neutral as possible (Köhnken 1990:43).

#### **4.2.4.2 Credibility Judgement by Psychological Experts**

The evaluation of statement credibility is based on three elements, briefly summarised as follows:

- i. an analysis of the individual characteristics of the child witness; and
- ii. an analysis of any possible motive the child might have for making a false statement; and
- iii. an analysis of the child's statement itself (Köhnken 1990:44).

According to Undeutsch (1984:54-5) a major concern for trial courts as well as forensic psychologists on the European continent was the testimony of alleged victims of sex offences who were children. The reasons for the concern arose out of the fact that in cases of this nature there was very little physical evidence, children were not considered to be as competent and responsible witnesses as adults, and society demanded that sex offenders be prosecuted and convicted. As a result of these concerns, German psychologists have been used in trials relating to sex offences against children since the beginning of this century. In fact, the following direction applicable to the interrogation of children in the investigative phase of criminal proceedings was incorporated into the official 'Guidelines for the Prosecuting of Crimes' (Undeutsch 1984:55):

"If there is any doubt as to the credibility, an expert, knowledgeable and experienced in the field of child psychology, is to be called in. (No. 25 in the original 1935 version; No. 19 in the 1977 version)".

Despite this directive, it was only after World War II that the use of psychological experts began to gain momentum in the courts with the establishment of the special juvenile courts in 1953, which were created for hearing criminal offences committed by or against persons under the age of twenty-one. These courts were more inclined to make use of experts, which in turn gave psychologists ample opportunity to become acquainted with the actual needs of the trial courts. The crucial question that arose in most of the cases was the issue of whether children could separate truth from falsehood (Undeutsch 1984:55).

This assessment of the truthfulness of statements has a history in German psychology which goes back to the 1930s, when psychological and juristic literature began to describe certain characteristics as being indicative of truth or lies. It was only in 1982, however, that this method of statement analysis was first described in English by Undeutsch (Köhnken and Steller 1988:39).

In judicial proceedings the credibility of a witness has always depended on evidence of specific instances of conduct which are assumed to be probative of the truthfulness or otherwise of the witness. These assumptions, according to Undeutsch (1984:56), have their roots in public opinion ("the second-hand, irresponsible product of multiplied guesses and gossip which we term 'reputation'", quoting Wigmore) and therefore cannot form a reliable basis for the assessment of the truthfulness of a particular statement. In contradistinction, the assessment of statement credibility is based on the premise that in judicial proceedings it is not the veracity of the reporting person but the truthfulness of the statement that has to be determined. Since truth exists and falsehood has to be invented, the reasonable deduction was made that truthful accounts of events which have been experienced by the witness differ in certain characteristics from those that are entirely or partially invented. This has been referred to as the Undeutsch hypothesis (Steller 1989:137). These characteristics which assist in distinguishing between truth and falsehood are known as 'criteria of reality' or 'reality criteria' and have been developed to form a key for determining the veracity of statements (Undeutsch 1984:57).

When a psychologist is appointed as an expert witness, he will get a complete copy of the case file, including documents of previous investigations, copies of witness statements and any other necessary evidence. He also has the right to examine the child outside the courtroom using any legal psychodiagnostic method he may believe applicable. In order for an expert to evaluate the truthfulness of a statement, certain background information is required regarding the individual's personality, and cognitive and verbal competencies. This information is obtained by interviewing other people who know the child, such as parents or teachers, to find out details about the child's cognitive and social development. In addition to this, a test of general intelligence will be conducted and a personality questionnaire completed (Köhnken 1990:44-5).

The main part of the evaluation will take the form of an interview with the child. The purpose of the interview is to determine whether the child may have any reason to lie, and to observe the child's non-verbal and speech behaviour for any possible clues to lying. It is very important to assess the child's general verbal competence, since this will be used in the analysis of the statement later. For instance, more detail will be required from a child who has a high degree of verbal competence. The analysis of the statement is then conducted according to the reality criteria, which are applied to the content of the statement to determine whether the latter is truthful (Köhnken

1990:44-5). Forensic research has shown that truthful accounts of self-experienced, real occurrences display some of the following fundamental criteria (Undeutsch 1984:59). These criteria (reality criteria) consist of nineteen different criteria, which are organised into five categories, and are briefly summarised as follows:

### **i. General characteristics**

The first category focuses on the general characteristics of the statement. Here attention is paid to the *logical structure (1)* of the statement and whether it contains any contradictions or inconsistencies. Logical structure does not mean that the events in the statement should follow a logical sequence. This leads to the next criteria, namely an *unstructured production (2)*. An unstructured production may be an indicator of credibility, since "[f]abricated testimonies and fantasies are usually characterised by a structured, generally chronological manner of presentation with clear attempts by the witness to demonstrate causal connections" (Köhnken 1990:47). Köhnken (1990:46-7) explains that witnesses, especially children, will rarely have the cognitive capacity to report an invented story in a disorganised way with fragments of the event scattered throughout the statement. The last criteria in this category relates to the quantity of detail (3) supplied by the witness, such as the descriptions of places, persons, events etc. This is assumed to be an indicator of reliability since it is impossible for most children to make up a statement with a lot of details (Köhnken and Steller 1988:41).

### **ii. Specific Contents**

This category refers to the specific contents of the statement and is based on the assumption that a child would not be able to invent stories containing the criteria referred to here. Therefore, if these characteristics are found in the statements, they will be seen as indicators of credibility. *Contextual embeddings (4)* are seen as being an indicator of truthfulness. Events are almost always embedded in larger social and physical situations and related to particular time circumstances. The more complex these interrelationships between everyday occurrences, schedules and habits, the less likely the statement is fabricated because it is very difficult for a lying witness to fit a complex event into a complex environment. The term *descriptions of interactions (5)* is used to explain the fact that naturally occurring events are usually characterised by a sequence of actions and reactions, explained as consequences of previous stimuli. Since it would be extremely difficult for a child to construct such stimulus-response relationships, their presence can be perceived as an indication of credibility (Köhnken 1990:47).

Another indicator of credibility would be the presence of the criteria, known as *reproduction of conversation (6)*. In terms of this criteria the witness reports conversations that take place between different persons, using the same speech behaviour, vocabulary and formulations of the particular person. A further indication of credibility is the presence of *unexpected complications (7)*. Real events are often interrupted by unexpected complications and obstacles, but these are very rarely mentioned by lying witnesses since they would raise difficulties in maintaining the lies, especially when questioned more than once (Köhnken 1990:47).

## ii. Peculiarities of Content

The third category focuses on the peculiarities of the statement's content. This is viewed on a qualitative basis and looks at the concreteness and vividness of the statement. The presence of these criteria are indicators of credibility. If a statement contains details which are unexpected and surprising (*unusual details*) (8) the witness is probably being truthful, since lies very rarely contain unusual details. *Superfluous details* (9) are those details which are not strictly next necessary for describing the event and a person, who was lying, would probably not think about inventing irrelevant, superfluous details. *Accurately reported details misunderstood* (10) is a criteria that is particularly important when evaluating the truthfulness of a child's statement. This includes details and actions which the child reports but which are not understood by the child in their particular context. *Related external associations* (11) are also indications of truthfulness. This refers to a witness describing conversations with the perpetrator which refer to earlier events which are related to the incriminating event. Köhnken (1990:48) provides an example of such a related association in the context of an incestuous relationship where the witness (daughter) mentions a conversation she had with the accused (father) in which they discussed the daughter's sexual experiences with other men. The *account of subjective mental state* (12) would include descriptions of feelings like fear or disgust, and *attribution of the perpetrator's mental state* (13) refers to descriptions of emotions and motivations which are attributed to the perpetrator (Köhnken 1990:48).

## iv. Motivation-related contents

This category relates to the motivation of the child to make a statement. Here the deception is perceived as motivated, goal-directed behaviour. The lying witness tries to construct a report and behave in a way in which he believes a credible person would behave. Therefore, if a child witness *spontaneously corrects his own testimony* (14), *admits lack of memory* (15) or raises *doubts about his own report* (16), these behaviours are seen as indicators of credibility. Included here are the criteria of *self-depreciation* (17) of the witness and *pardoning the perpetrator* (18). If a witness wants to incriminate a perpetrator falsely, it will not make sense then to try to exonerate him (Köhnken 1990:48-9).

## v. Offence-specific elements

The final category relates to the specific elements of the offence and emphasis is then placed on *details characteristics of the offence* (19). The experts will have to have knowledge of the actual characteristics of the offence. Elements of a statement which are discrepant in terms of everyday knowledge or stereotypes but which are consistent with criminological research findings will also be indicators of truthfulness. Köhnken (1990:49) explains this clearly as follows:

"In cases of incest, for example, the veracity of a statement might be questioned because the descriptions of the relationship include no defence, a long period of the incestuous relationship, relatively harmless sexual behaviour, and progressive development as well as a change in the attitude of the victim towards the perpetrator of the crime. All these elements can be considered as offence-specific for incestuous sexual relationships and at the same time are contradictory to

beliefs held by non-professionals".

In addition to providing an objective method for assessing the veracity of a statement, the courts found that experts also provided valuable information about the victim's capacity, developmental stage and personality. Undeutsch (1984:61) explains the situation as follows:

"On the basis of criteria of reality, the assessment of the truth-value of the witness's account was understandable and evident. In this way, the expert proved to be of great assistance to the investigator of fact in arriving at the truth. On the basis of such experience the courts were open-minded enough to welcome expert testimony and to benefit from it".

In 1954 the Supreme Court of the Federal Republic of Germany handed down a policy decision in terms of which they held that a psychologist or a psychiatrist must give evidence as to the truthfulness of the witness's account, especially in sex cases, whenever the conviction depends primarily or exclusively on the evidence of a child, or if the witness's evidence is not corroborated by other evidence. The Supreme Court determined, by judicial notice, "that the subject matter of the expert's inferences regarding the truthfulness of a witness's testimony is one as to which a reliable body of scientific knowledge has been developed" (Undeutsch 1984:61).

Since this decision, psychologists have been used in criminal proceedings to such an extent that Undeutsch (1984:61) quotes Arntzen's statistical figures, indicating that by 1982 experts had been appointed to render opinions on the credibility of statements in at least 30 999 cases with numbers perhaps even reaching the 50 000 mark.

When making a final judgement on the credibility of a statement, the first step is to determine whether these criteria are present or not, then to rate the strength of the criteria. These results are then integrated in an overall judgement against the background of the witness's personality and his cognitive and verbal abilities to form a final assessment of the truthfulness of the statement (Köhnken 1990:49). A detailed report is then compiled, setting out the findings before the date of the trial. If the case goes to trial, the expert will have to give oral evidence at the end of the hearing on the findings contained in the report (Undeutsch 1984:62). Although the psychologist's report will be presented to court, the final decision on the credibility of the statement will still remain with the court. The court will evaluate the expert's opinions in the light of all the other evidence, and will then make a decision on the credibility of the statement (Köhnken 1990:50).

Although a great deal of empirical research has been conducted on statement analysis, with Arntzen reporting that he and his co-workers analysed approximately 24 000 eyewitness statements, 92% of which dealt with children involved in cases of sexual abuse, the question that emerges relates to the validity of the method employed (Köhnken and Steller 1988:42-4). Undeutsch (1984:63-4) argues that it is very difficult to prove the validity of this method of analysis, because laboratory experiments are of very little use in this situation. Laboratory experiments differ considerably from real-life situations, especially when trying to evaluate a technique that is analysing the qualities of genuine experiences of emotionally affecting events. Lersch, as quoted by Undeutsch (1984:63), emphasises the point as follows:

"It cannot be disputed that experimentation in psychology has led to significant results and will

continue to do so in the future. However, anyone with more profound insight into human nature and the peculiarities of mental activities recognizes that laboratory experiments are appropriate only for a limited domain of, predominantly peripheral, mental processes; and that it is particularly the more profound, central experiences which will never be successfully subjected to scientific experimentation".

The validity of this technique will depend on field studies, but these also carry with them unique difficulties. The greatest problem relates to the criterion against which the accuracy of the technique is to be measured, since in criminal cases there is no objective, independent and reliable criterion. In a criminal matter it is virtually impossible in most cases to discover 'the truth', and therefore impossible to evaluate the statement analysis in terms of this 'truth' (Undeutsch 1984:64). Perhaps, as a result of these difficulties Köhnken and Steller (1988:42-4) argue that the empirical support for statement analysis is still insufficient and that more experimental research with more elaborate and ecologically valid material is required. They add however, that statement analysis should not be rejected completely "since the technique reflects a good deal of expert knowledge and is based on the extensive practical experience of psychological experts" (Köhnken and Steller 1988:44). Undeutsch (1984:64) also adds that an important point to bear in mind is that "[a]lthough this method has been applied in many thousands of cases during the last three decades, there is not a single case to be found in the literature, or otherwise documented, in which the analysis of statement, if applied by a competent expert and according to generally accepted rules, led to the clear finding that the statement had to be considered as the truthful account of a personally experienced real event, and which later, in the criminal proceeding or afterwards, turned out to be in conflict with other relevant evidence". This, he argues, can be seen as a strong indication of the validity of this technique.

The development of this field of psychology has spread to neighbouring countries. For instance, the German Democratic Republic have the following guideline, issued by the Supreme Court on 16 March 1978, which allows the appointment of an expert for this purpose:

"If required the child witness's general ability to report events accurately and completely, as well as his/her special ability to report accurately and completely the particular event under investigation is to be assessed by the aid of expert opinion". (Undeutsch 1984:62).

In Austria the Supreme Court has ruled that whenever an evaluation of evidence, which can include the assessment of the credibility of a child witness, requires special knowledge, an expert must be appointed. In Switzerland, too, the Criminal Court of Appeals for the District of Bern ruled that a psychological expert should under certain circumstances be appointed for the character and credibility of a child witness. The assessment of statement credibility has also been accepted in Sweden and the Criminal Procedure Code contains a provision (519) which enables "an expert who possesses special knowledge of child psychology or the psychology of interrogation" to be called if the evidence of a child is going to be of decisive importance for the investigation of the crime (Undeutsch 1984:62-3).

In a effort to develop a standardised and scientifically based method for interviewing children and evaluating the content of their statements to assess their validity, Raskin and Esplin (1991:267) began the development of statement validity assessment in the United States. This has since been modified and extended to satisfy the requirements of the American justice systems.

This version of statement analysis has shifted partially from the traditional German emphasis on the application of content criteria to a broader analysis that focuses more on the interview procedures and possible influences on the child's statement. The aim of statement validity analysis (SVA) has also changed slightly and the primary focus is now to obtain information quickly that will assist in determining whether a crime has taken place and how to protect the child and apprehend the perpetrator, as explained by Raskin and Esplin (1991:268):

"It must be emphasized that the main value of SVA lies in its utility for gathering information, guiding investigations, making administrative decisions, and exercising prosecutorial discretion. In some cases, the results of SVA are presented as evidence through expert testimony in court".

The American version of SVA consists of three components, as explained by Raskin and Esplin (1991:268):

- i. a structured interview conducted with the child witness;
- ii. a criteria-based content analysis based on the Undeutsch hypothesis; and
- iii. an integration of the results of the content analysis with information derived from a set of questions (validity checklist).

The purpose of SVA here is to provide an assessment of the validity of the recorded statement, not of the general credibility of the child witness. Although all the three above components derived from Undeutsch's statement reality analysis, they have been developed and modified by recent research. Horowitz (1991:293) investigated the available research on SVA in the United States, reviewing the few laboratory and field studies that have been completed. The studies suggest that criteria-based content analysis may be a reliable and accurate assessment procedure, although many questions and research issues remain unresolved.

## 4.3 France

### 4.3.1 Introduction

The French penal system works on the principle that an accused is innocent until proven guilty, and the duty is upon the public prosecutor to discharge the burden of proof (Hamon 1990:53). In order to discharge this burden, the prosecutor may use any evidence provided the evidence has been obtained in accordance with procedural rules. Not only is the admissibility of evidence much freer as far as procedure of proof is concerned, but its probative force is also left to the discretion of the judge, the latter known as the system of moral proof or intimate conviction (Hamon 1990:53).

The position of the child witness in France is very similar to that in Germany. A distinction should perhaps at this stage be drawn between the *judge d'instruction* and the final court appearance in the criminal court. The *judge d'instruction* is the legal authority responsible for discovering and gathering evidence. He has the power to conduct searches, seize objects and documents, hear witnesses and question the accused. He has to investigate on behalf of both the prosecution and the defence (Hamon 1990:57).

The child witness will give his evidence without having to take the oath since children under the age of 16 are

exempt from the oath in terms of article 108 of the *Code de Procédure Pénale*. The child can give his evidence in the context of confrontation with the accused, which is left to the discretion of the *judge d'instruction* who can make a decision as to what is appropriate in the circumstances, since the practice of confrontation is not regulated by the *Code de Procédure Pénale*. The whole question of confrontation is optional and the accused does not have the right to object. In practice, confrontations do, however, take place (Hamon 1990:58).

In France children rarely give evidence in a criminal court, and the judges avoid as far as possible making child victims appear in court. In support of this, Harmon (1990:60-1) refers to the 15th *Chambre Correctionnelle du Tribunal de Grande Instance de Paris*, which is a specialist chamber dealing with offences relating to children, especially those involving violence, maltreatment and immoral acts. The evidence of a child victim is rarely required at this hearing. Minors who do testify are those aged between 15 and 18 who are capable of expressing themselves in public and where the accused is not related to the child. In cases of incest, and acts of paedophilia involving children under the age of 12, the victims do not testify in person. In terms of the statistics supplied by Hamon (1990:62), the 15th Chamber does not hear the evidence in person of more than 10 to 15 minors. Therefore, all necessary evidence in these cases is gathered by the *judge d'instruction* before the trial and is presented as part of the *instruction*.

Despite the fact that the *instruction* phase is separated from the hearing and thus saves the child victim from having to testify at the trial, Hamon (1990:62) nevertheless questions the effectiveness of this protection and argues that "it may be a matter of debate as to whether we are simply given the impression that the victim is protected". He is of the opinion that children still find the French legal system daunting because they have to undergo interrogations by the police, gynaecologist and psychiatrist. In addition, they must testify before the *judge d'instruction* in confrontation with the perpetrator, even though the child may be spared the court appearance. Hamon (1990:63) argues that this may be detrimental in itself since it may have the perverse effect that victims feel 'their' trial has been confiscated from them. He uses the following anecdote to explain the point:

"Hence whether the child should be present at the trial or not is a most important question. In fact one of my colleagues, a *judge des enfants*, reminded me of the following anecdote : a minor, a victim of incest, had not been present at the trial of her father because she had not been called upon to testify against him. The father had been convicted. The minor, however, asked for the trial to be restarted : it had been confiscated from her, stolen. This new fraud, as it appeared to her, was absolutely unbearable and almost constituted a supplementary wound, a rift, a gaping hole preventing her from rebuilding herself".

#### **4.3.2 The Role of the Expert**

It is submitted that special emphasis be accorded to the role of the expert in these proceedings, since the development of this field is receiving increased attention in the United Kingdom and the United States of America. In France each Court of Appeal has an official list of experts, appointed by a commission acting on applications received by individuals who have the requisite professional qualifications and at least five years' experience. The position is an honorary one, but carries certain obligations, for instance, the duty to undertake the tasks assigned to them and to carry them out within the times allotted (Bardet-Giraudon 1990:68).

Although the procedure in France used to involve the appointment of two experts, the position nowadays is only to appoint a single expert. The judge does, however, retain the right to nominate two experts if the complexity of the matter justifies it. Where an additional opinion is required, a second expert will be nominated, and sometimes even three. In a highly contentious case up to five experts may be nominated. However, the experts only submit one combined report, signed by all of them. If an expert refuses to agree with a report, the whole opinion will be annulled and the judge must nominate a new group of experts. Only in very rare cases can the defence call their own experts as witnesses, since this does not fall within the inquisitorial nature of proceedings and the courts do not wish to create an adversarial environment for experts to operate in (Bardet-Giraudon 1990:69).

Insofar as child witnesses are concerned, the expert must study the credibility of the child, namely whether it is possible for the child to relate the facts with a degree of correctness. This examination differs vastly from the assessment conducted in terms of statement validity analysis, as piloted in West Germany. In the former, for instance, credibility is grounded in psychological notions that are practical rather than experimental, like frankness and sincerity. The function of the expert in French law is not to make the child repeat again what has happened to him or investigate any further factual details, but rather to assess the credibility of the child (Bardet-Giraudon 1990:70).

The assessment of credibility takes the form of an interview, which does not deal with the facts of the case but with the child's personality, his home life, school life, friends and hobbies. Questions relating to the facts of the case will only take place at the end of the interview, and these questions will be brief, and curtailed if the child's reaction so requires. The expert has to establish the abilities of the child to tell the truth and to testify, and a written report must be submitted which would then be available if any difficulties regarding credibility should arise during the trial (Bardet-Giraudon 1990:71-2).

## **4.4 Scandinavian Countries**

### **4.4.1 Introduction**

Although Denmark, Sweden and Norway are often referred to as a single entity, namely the Scandinavian countries, the individual countries themselves have substantial differences in procedures. Generally speaking, the Scandinavian countries have a mixture of inquisitorial and accusatorial procedure. For instance, Denmark and Norway make use of the jury system in criminal cases whereas Sweden uses professional judges and lay assessors (Andenaes 1990:9).

The Scandinavian countries have the following inquisitorial features : the trial is less technical and less formal since there are fewer rules of evidence; all relevant evidence may be presented and the trial court assesses the weight to be accorded to the evidence; and rules of hearsay and corroboration are not applicable. The use of experts by the court also follows an inquisitorial format, in that experts are appointed by the court at public expense. This prevents the "so-called battle of experts" (Andenaes 1990:9).

On the other hand, certain features of the procedure are accusatorial in nature. The parties themselves must present their evidence. Witnesses are examined and cross-examined by prosecution and defence, although there is no clear distinction between examination-in-chief and cross-examination. The method of giving evidence does not follow the same format as that conducted in other accusatorial systems. The witness must be given an opportunity to give a coherent account before more specific questions are asked (Andenaes 1990:9-10).

As far as the oath is concerned, the oath has been abolished altogether in Denmark. In Norway the oath has been replaced by a solemn declaration that the witness is going to tell the truth, except in the case of children under the age of 14. Sweden has retained the oath, although children under the age of 15 are not heard on oath (Andenaes 1990:10).

#### 4.4.2 Norway

Statutory rules relating to child witnesses first appeared in Norway in 1926 in response to a call for reform from the National Association of Women who were concerned about the negative effects children experienced as a result of court appearances. The new rules enabled children under the age of 16 to undergo a judicial interview by an examining magistrate. This interview is not regarded as a court session and, therefore, parties have no right to be present. The magistrate who conducts the interview must write a report on the child's testimony, giving his personal impression of the child with respect to the latter's maturity and trustworthiness. At the trial the examining magistrate's report will be read as a substitute for the child's appearance in court. The child will then only have to appear in court if there is a special reason for so doing, where, for instance, identification of the perpetrator is an issue. If the child does have to appear in court, all examination will then be conducted by the presiding judge and not the parties involved (Andenaes 1990:10).

Although this procedure is not in accordance with the ordinary rules of criminal procedure since the court does not see and hear the witness and the parties involved do not have an opportunity to cross-examine, it was felt that the primary purpose of the reform was to protect the child and that it produced better evidence, as explained by Andenaes (1990:11):

"The primary purpose of the reform was to protect the child, but other considerations played a role as well. The memory of a child is short, and the overwhelming experience of the courtroom may be paralysing, especially in the solemn atmosphere of a jury trial. Judges and state attorneys expressed the opinion that the first testimony of the child is more reliable than what it is able to tell at the trial, perhaps many months later. The feeling was that the reform was not only to the advantage of the child, but also gave a better basis for the verdict".

In 1981 certain changes relating to children were introduced and in 1985 more detailed rules were given by a royal decree. The age limit was reduced from 16 to 14 years, since it was felt that children between the ages of 14 and 16 would be capable of giving evidence in court if the accused and the public were excluded during the examination. A further change was introduced in the sense that judicial interviews conducted out of court could also be used in cases other than those relating to sexual offences if the interests of the child demanded it (Andenaes 1990:11).

In terms of the new rules, an examining magistrate is given the power to call for a qualified person to assist in the interview, and if he thinks fit he may allow this person to conduct the whole interview while he simply controls the fairness of the questioning and writes the report. In Oslo, Norway's capital, the judges usually prefer to leave the assistant to conduct the interview while the judge sits behind a one-way mirror and monitors the questioning. The assistant, who could be a psychologist, a social worker or a policewoman, will often have to give evidence in court to supplement the report. Of particular interest is the fact that the assistant is required to become acquainted with the child before the interview, although the case may not be discussed at this stage. Where possible, the new rules require that the interview be videotaped, and the videotape will then be used as evidence, thus giving the court a better opportunity to assess the value of the evidence (Andenaes 1990:11). Andenaes (1990:14) reports that studies have mentioned a problem insofar as psychologists and psychiatrists, acting as assistants, are concerned, namely the use of leading questions. For this reason the courts seem to prefer using the assistance of female police officers who have experience in this field.

The judicial interview usually takes place in the magistrate's chambers, although in the case of very young children it is recommended that the interview be conducted in domestic surroundings if possible or any other place where the child may feel comfortable. In Oslo the judicial interview takes place in a specially furnished room for interviewing children which is situated at the police headquarters. The parents or person, in whose charge the child is, have the right to be present at the interview, unless the person is the alleged perpetrator. In the latter case the magistrate will have to appoint a substitute guardian to represent the child at the interview (Andenaes 1990:12-13).

When the 1981 reforms were being prepared, the drafting Commission proposed that the defence counsel be allowed to be present at the judicial interview since the latter was in effect a substitute for the court appearance, and it seemed fair to allow the defence counsel and prosecution to be present. This proposal did not extend to the accused. The Commission proposed that, in addition to allowing the parties to be present, they be allowed to submit supplementary questions to the magistrate afterwards. This proposal was not accepted since it was felt that the presence of the parties at the judicial interview would change the atmosphere of the interview and since the interview was videotaped the parties would have the opportunity to ask for an additional interview if they felt there were supplementary questions that needed to be asked (Andenaes 1990:12).

In Norway there is no specific competency requirement. In each case it will have to be determined whether the child has sufficient understanding and ability to express himself. The fact that the child's evidence is given at the judicial interview often enables much younger children to give evidence since the whole situation is more informal. However, even if a child is unable to express himself sufficiently, evidence from a parent, or police officer about what the child said will be admissible since there is no hearsay rule (Andenaes 1990:12).

#### **4.4.3 Denmark**

Although the general rules of criminal procedure in Norway and Denmark are very similar, the judicial interview of child witnesses is not known in Danish law. The rules relating to child witnesses are more flexible in Denmark and the method adopted is something in between a police hearing and a judicial hearing (Andenaes 1990:14-15).

The Code of Procedure in Denmark gives the court a discretionary power in certain circumstances to accept previously recorded testimony as a substitute for the court appearance. This provision is especially used in the case of children, since the Chief Prosecutor has recommended that children under the age of 15 should be spared a court appearance. In practice the child will be heard as a witness by the local court as soon as possible. The report of this hearing and the tape, if the hearing has been recorded, will be introduced in court in lieu of the child appearing, although the child can be summoned to appear at the trial and be required to answer questions of a neutral kind to assist the court in gaining an impression of the child (Andenaes 1990:15).

At the initial hearing, both the prosecution and the defence will be present and are entitled to examine the child. The accused can also be present, although he will be removed if necessary to get the child to speak. An attempt is made to ensure that proceedings are not too formal, and they will usually take place in the judge's chambers rather than in the courtroom. A new development has arisen whereby the actual interrogation is conducted by a qualified police officer and is video-recorded. The judge, prosecution, defence and accused watch the interrogation on a television monitor in another room, after which the defence may put additional questions. The police and court may, in terms of the rules of procedure, apply for the assistance of a psychologist or psychiatrist during the hearing, although this provision is rarely used (Andenaes 1990:15).

#### 4.4.4 Sweden

There are certain guidelines laid down as to the manner in which police are to conduct an interview with a child witness in Sweden. The questioning must be conducted in such a way that the child is not harmed. Repeated interviews should also be avoided as far as possible. The interview must be conducted by a person experienced in this task and, where possible, female policemen should conduct the interviews of girls and young children (Andenaes 1990:16).

It has become the common practice to videotape this interview and show the videotape in court to replace the child's evidence. This was introduced to spare the child the strain of going to court and having to give details of intimate and embarrassing experiences. As in the United Kingdom, the interview is conducted by a police officer, so there is the danger that leading questions may be asked, but in Sweden the defending counsel do not have very many objections to the system since they can attack the quality of the videotape in court (Smith 1990:22-3).

The general rule of procedure in criminal courts is that all witnesses give evidence in court, although the Code does provide that if a witness is under the age of 15 the trial court has a discretion in this regard. With the introduction of videotaped police interviews and the fact that the Code allows the court to accept statements to the police where warranted by special circumstances, it has become the common practice to use this videotaped interview at the trial instead of hearing the child (Andenaes 1990:16).



## 4.5 Israel

### 4.5.1 Introduction

When the State of Israel was founded in 1948, the British Mandate in Palestine was terminated. However, Laws of the State of Israel provided that the law in force at the time of independence would remain valid until replaced or amended by the Israeli parliament. In the field of criminal procedure and evidence very few changes have taken place and the law applicable is very much the English common law (Harnon 1990:81).

The courts in Israel are organised in a hierarchy of Supreme Court, district courts and magistrate courts. Cases are heard by professional judges and the jury system does not exist. Trials are usually open to the public and the procedure adopted is of accusatorial nature. (Harnon 1990:81). The accused has the right to be confronted with the witnesses testifying against him and to cross-examine them (Harnon 1988:263).

### 4.5.2 The Law of 1955

Following a number of cases in Israel where children were exhaustively interrogated, concern about the harm inflicted upon child victims by court appearances led the Israeli legislature to promulgate legislation that would protect these children (Harnon 1988:264). This is further explained by Harnon (1990:82):

"Special harm may be caused by calling the victim to give testimony in court. When a child is required to give, in a public place, a detailed and accurate description of intimate abuses inflicted upon him, he re-lives the shocking experience he encountered over and over again. This often irreversible harm greatly increases if the child becomes subject to cross-examination, including doubt cast on the nature of his behaviour during the occurrence, or being suspected of untruthfulness".

The aim of the new legislation was to protect the mental well-being of child victims while at the same time causing as little disruption to the administration of justice as possible. This was encapsulated in the Law of Evidence Revision (Protection of Children) Law, 5715 of 1955. This law set out to protect children under the age of 14 from the negative effects of a court appearance, and created the role of youth interrogator who was given the power to decide whether, and under what conditions, the interrogation of a child in court would be permitted. Generally the power relates to children who are victims, but can also be applied where the child is a suspect or an eyewitness (Harnon 1988:264). In the words of Hava David (1990:99) "[t]his Law gave birth to a new and unique professional creature- the youth interrogator- who became a central figure invested with enormous powers, privileges and responsibilities".

### 4.5.3 The Role of a Youth Interrogator

The youth interrogator is the central figure in cases involving children. Section 2(a) of the Law of Evidence Revision Law *supra* provides as follows:

"Save with the permission of a youth interrogator, a child shall not be heard as a witness as to any offence against morality committed upon his person or in his presence, or of which he is suspected, and a statement by a child as to such an offence shall not be admitted as evidence".

In terms of this section the youth interrogator is the person who decides whether the child will appear in court. According to statistics supplied by Harnon (1988:266), youth interrogators do not allow the child to make a court appearance in approximately 85 percent of the cases. While conducting the interview, the youth interrogator has the opportunity to observe the child which assists him in coming to a decision as to whether he will allow the child to testify in court or not. This is explained by David (1990:103) as follows:

"All along I form my opinion about the girl's personality, which in the end will help me to come to the vital decision I have to make as youth interrogator, i.e. whether to permit the girl's appearance in court or not."

This implies that the taking of evidence in the cases where the child does not appear in court will become the task of the youth interrogator. He is then, according to Harnon (1990:88), fulfilling the function of the prosecution, defence and judge. He decides what to ask, and how, and he also has the power to reject a judge's request to put additional questions to the child. He will also determine whether a child may take part in an identification parade and, if so, to what extent. He will arrange the identification parade and accompany the child to "see to it that everything takes place so as to cause the least possible harm" to the child (David 1990:104).

David (1990:105-6) discusses the factors which have to be taken into account when deciding whether the child will appear in court or not. Firstly, it must be determined whether the court appearance will in fact be traumatic for the child. If the offence did not leave any traumatic traces or was not of a very serious nature, a court appearance may be more beneficial. Secondly, the possibility of any advantage in the making of a court appearance must be investigated. This is very rarely advantageous to a child, since the trial will usually take place a year after the interrogation by which stage the child may have forgotten the whole experience. This means that the court appearance will force the child to relive the experience and be confronted with authoritative figures "who will ask her provocative questions in a strange language". In addition to this the setting of the courtroom itself does not engender an inviting atmosphere. Thirdly, the protection of the public interest is an important consideration. The fact that a particular child may be harmed by a court appearance must be weighed up against the need to protect society. Fourthly, the youth interrogator will assess the other available evidence to determine whether there is any corroborating evidence. If there is no corroborating evidence, it will become essential for the child to appear in court. Lastly, the youth interrogator must weigh up a comprehensive report recorded by himself as opposed to obtaining a first-hand story from the child which may lack many vital facts. This will, of course, depend on the age of the child and the possibility of getting the child to give evidence in a court environment.

If the youth interrogator decides against the child giving evidence in court, he himself will have to appear in court and take the witness stand. He will then read aloud the evidence contained in the report compiled by himself. The judge will then inquire whether the youth interrogator grants his permission for the child's appearance or not. The youth interrogator will then read out his reasons for deciding against the child appearing in court (David 1990:107).

If the youth interrogator is of the opinion that the child should attend the court appearance, he will then revisit the family and prepare the child for the court appearance by re-reading the latter's evidence to him, and explaining the court setting, the procedure and the roles of the parties involved. On the day of the trial, the youth interrogator ensures that the child does not have to wait for too long before testifying, and he will stand close to the child while the latter gives evidence. The youth interrogator does not have the power to interfere in the hearing, although he does have the power to ask the judge to discontinue the trial if he is of the opinion that the continuance of the trial may cause mental harm to the child in terms of s1(c) of the Law of Evidence Revision (Protection of Children) Law (hereinafter referred to as "the Act"). The final decision, however, remains with the judge (David 1990:108).

Before the trial begins, the youth interrogator sees that no unauthorised person is present in the courtroom. Section 2(b) of the Act provides that no person other than the parties may be present at the trial (David 1990:108).

Youth interrogators themselves believe that their function is dual in nature. They are not only responsible for gathering evidence for trial but also have to provide initial care for the child and his family, although there is no reference to this function in the statute (Harnon 1990:84). This can be seen in David's (1990:103) explanation of her role as a youth interrogator:

"Up to this stage I have acted solely as proscribed by law. I have conducted a police interrogation which includes all the necessary legal elements. Once I am satisfied that I have got the whole story and things are clear to me, and will also be clear to the police and the court, I switch over and act in my professional capacity. I become a social worker dealing with a case of crisis intervention of a special kind, in one single session. I see it as my professional duty to help the girl and her parents, and the family unit in general, to cope with this situation so as to leave the least possible negative traces."

It is also in the discretion of the youth interrogator to decide whether a child must undergo a medical examination. Although the Israeli law used to provide that in every case of a moral offence committed against a child there had to be a medical examination, this has now changed and the discretion has been placed in the hands of the youth interrogator, since it was felt that this examination is often the most traumatic experience of all. In making this decision, the youth interrogator will look at the nature of each offence, whether there was penetration or an attempt to do so, or whether any physical contact has taken place which may have left traces. If the youth interrogator decides that a medical examination is necessary, he will accompany the child to the examination and explain the details of the offence so that the child does not have to answer any further embarrassing questions (David 1990:104).

The youth interrogator can determine the outcome of a trial as a whole, since the impression which he gains of the child is relevant evidence and may determine the way in which the court assesses the child's evidence. The role of the youth interrogator then is "to reveal the truth, without harming the child's well-being, but yet safeguarding the rights of the accused" (Harnon 1990:88). This has often given rise to the criticism that the youth interrogator is "second to God" (Harnon 1990:88).

#### **4.5.4 Procedure in Terms of the 1955 Legislation**

In the vast majority of cases involving children, neither the police nor the court will have any personal contact with the child. Both the police and the court in these instances will have to rely completely on the youth interrogator's report. The youth interrogator has to provide the police with a detailed description of the perpetrator and the report, which must include the following: the child's evidence which must be written down exactly as the child gives it; a description of the child's behaviour while giving evidence; a general description of the child's behaviour while giving evidence; a general description of the child's personality; and the youth interrogator's impression of the truthfulness of the child's evidence (David 1990:99).

Since a child may only be examined by a youth interrogator in terms of s4 of the above legislation, the police will then request the youth interrogator to examine the child. Once the police have made contact with the youth interrogator, the latter will contact the child's parents and arrange to meet the child. It often happens that this interview takes place in the home of the child, although recently with the introduction of tape- and video-recording this has become difficult.

In terms of s5 no person shall be present when the child is examined by the youth interrogator, unless the latter gives permission that such other person be present. David (1990:100), a youth interrogator, explains that only in the few cases where the children are very young does she allow the mother to remain behind, and then she lets the child sit in such a way that she does not make eye contact with the mother.

The evidence which has been taken down by the youth interrogator will become admissible in terms of s9 of the Act which provides:

"Evidence as to an offence against morality taken and recorded by a youth interrogator and any minutes or report of an examination as to such an offence prepared by a youth interrogator during or after the examination, are admissible as evidence in court."

This section, therefore, creates an exception to the hearsay rule.

As mentioned above, the report must contain information relating to a number of aspects, such as the child's behaviour and personality. David (1990:103) explains how this is done:

"...I do take notice of her behaviour throughout: when does she hesitate to go on? when does she get excited? when does she not want to go on talking at all? when does she stammer or weep etc? All this I note down, in brackets, the moment it happens and include it in the report I pass on to the police (s8). This report also must include my impression of the truthfulness of the girl's testimony."

The youth interrogator does have the authority to allow the child to give evidence, although according to Harnon (1990:83) this only happens in a few cases. Even where the youth interrogator has given permission that a child be heard as a witness, s2(b) of the Act provides that no person shall be present at the taking of the evidence except the prosecutor, the accused, the accused's legal representative, the youth interrogator and any person whom the

court has permitted to be present. Even in these cases, the court can in terms of s2(c) of the Act order that the taking of evidence be discontinued where, after hearing the youth interrogator, the court is of the opinion that the continuance thereof may cause psychological harm to the child.

Section 10 enables a judge to order the youth interrogator, on the request of the prosecution or the defence, to re-examine the child where the youth interrogator has submitted a report in lieu of the child's appearance in court or where, in terms of s2(c) of the Act *supra*, the taking of evidence has been discontinued. The re-examination may entail the asking of a particular question, but the youth interrogator still has the power to refuse to ask all or any questions if he is of the opinion that asking them is likely to cause physical harm to the child.

A contentious issue relates to the youth interrogator's impression of the child's credibility. After the Law first came into force, the Court did not admit the youth interrogator's opinion regarding the child's credibility, since they believed that this would usurp the court's function (Harnon 1988:267). But in *Bashiri* (1978) (III)34 PD 393 the court held that in regular proceedings the court alone has to decide whether to believe a witness or not, since this question is based on the witness's behaviour in the witness box and how he reacts to cross-examination. The problem arises, however, when the child does not give evidence in court and the court is, therefore, unable to form an impression of the child. Harnon (1990:86) suggests that the best solution in this instance would be for the youth interrogator to give the court an expert opinion on his impression of the child's credibility. This question came before the court in *Hajaj* (1977) (I)32 PD 548 where the Supreme Court held that the youth interrogator's opinions were not binding on the court since the latter has the final decision on the child's credibility. However, the court accepted that they could be assisted by the youth interrogator's opinion since this was relevant evidence. At 550 the court explained the reason as being the fact that "there is no stronger or more important evidence than the impression gained by the youth interrogator and his opinion as to the child's abilities both to discriminate and to observe, as to his imagination and his general intellectual development". This decision has been followed in later cases. In *Danino* (1983) (IV)40 PD 249 at 259 the court held that the youth interrogator's impression of the minor constitutes relevant evidence which the court can refer to, together with other evidence, although it is not bound to accept this evidence.

A further issue that has arisen in relation to the procedure introduced by the 1955 Act, is the admissibility of the evidence taken down by a youth interrogator as opposed to the evidence given by the child in court. A situation could arise where the statement recorded by the youth interrogator and the child himself will be before the date of the trial, for instance where a youth interrogator initially objected to a child giving evidence and interviewed the child, and then at a later stage allowed the child to give evidence. Another example would be where a child is under the age of 14 when examined by the youth interrogator but by the time of the trial, the child is 14 and therefore no longer a child in terms of the statute. In both the above instances the later evidence would be admissible, but how is the earlier evidence given to the youth interrogator to be evaluated (Harnon 1990:86-7). In *Mimran* (1972) (I)26 PD 281 a thirteen-and-a-half year old girl alleged that the accused had raped her. The youth interrogator decided against the girl giving evidence in court and examined her himself. By the time of the trial the girl was 14 and the accused called her as a witness. The girl changed her version and denied the whole story. The Supreme Court held that the earlier evidence she had given to the youth interrogator was still

admissible. In fact, the court went so far as to prefer the witness's first version, even though the second version was given in court and was subject to cross-examination. Harnon (1990:87-8) agrees with the reasoning behind this decision, giving the following explanation:

"In many cases, the inconsistent statement is more likely to be true than the testimony of the witness at the trial since it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to the litigation (in this case intimidation of witnesses). In any event, the trial court has the declarant before it and can observe her demeanour and the nature of her testimony as she denies or tries to explain away the inconsistency."

#### **4.5.5 Appointment of the Youth Interrogator**

Section 3 of the Law of Evidence Revision (Protection of Children) Law, 5715 of 1955 governs the appointment of the youth interrogator. It provides as follows:

- "3. a)The Minister of Justice shall appoint youth interrogators for the purpose of this law.  
 b)A youth interrogator may be appointed only after consultation with the Committee.  
 c)The Committee shall consist of five members, namely:  
     1) a judge of a Magistrate Court currently serving as a judge for the purposes of the Juvenile Offenders Ordinance, 1937, appointed by the Minister of Justice;  
     2) a mental hygiene expert appointed by the Minister of Health;  
     3) an educator appointed by the Minister of Education and Culture;  
     4) a child and youth care expert appointed by the Minister of Social Welfare;  
     5) a superior officer of police appointed by the Minister of Police.  
 d)The judge shall act as chairman of the Committee.  
 e)The Committee shall prescribe the rules for its deliberations and work in so far as they have not been prescribed by regulations."

According to Harnon (1988:269), when the Minister of Justice presented the draft law to the Knesset he remarked that "the ideal would be for a youth interrogator to combine in his personality a psychologist and a lawyer" but that "this is an unattainable ideal". Some members of the Knesset argued that the youth interrogator should have legal knowledge, but the general opinion was that they should be qualified psychologists or social workers who had experience working with children. However, when the Law was passed in 1955, the section was silent as to what qualifications were required before a person could be appointed as a youth interrogator. In the regulations that accompany the statute it is provided that a youth interrogator should not interview the child while wearing a police uniform. It must therefore have been assumed that police officers could fulfill this function, and this is in fact what happened in the early years. Soon after that youth interrogators were taken from psychologists, educational advisers, social workers or youth probation officers. At present almost all the youth interrogators are juvenile probation officers with at least a B.A. degree, and are almost all graduates in social work (Harnon 1990:89).

Criticism has on occasion been levelled at the quality of the youth interrogator's work, and this has often been based on the fact that many of them do not have the necessary legal or practical qualifications. There have been instances where even the judges have expressed criticism of youth interrogators, although in the vast majority of cases their opinions have been positive (Harnon 1990:89). In *Dadun* (1987) (III) Psakim Mehoziim (Law Reports of the District Courts) 127 the accused was charged with committing an indecent act with force. The main evidence in

the case was the testimony of a young child which had been taken down by the youth interrogator. This evidence was very superficial and did not take account of the main issues. Consequently the accused was acquitted, although there was strong corroborative evidence.

Police have criticised the qualifications and skills of youth interrogators, arguing that they lack experience and legal knowledge. Evidence is sometimes not taken properly, and this hampers the police investigation. It is further argued that youth interrogators do not have enough experience with court appearances which has the result that when they are exposed to intensive cross-examination they are incapable of defending their reports in court (Harnon 1988:270). In response to these criticisms a Committee of Sexual Offences Against Minors was set up, headed by Judge A. Malamute. The Committee recommended in 1987 that the expertise of youth interrogators be increased, with special focus on the following: their legal knowledge, their proficiency in interrogation and matters relating to the development and mental health of the child (Harnon 1990:90).

Although there have been the beginnings of training programmes for youth interrogators, the latter are nevertheless appointed without there being any requirement that they have to undergo any prior training. Harnon (1990:90) suggests that there should be a statutory amendment laying down what qualifications a youth interrogator must have before he can be appointed as such. He argues further that the qualification should place more emphasis on legal and investigational requirements, since the intention of the legislature in creating the office of the youth interrogator was not to provide psychological aid for the victims but rather to establish a method for obtaining evidence from child victims for trial purposes. Training of youth interrogators should focus on the relevant branches of law, namely criminal law, procedure and evidence, and on methods of interviewing witnesses with special emphasis on children. He adds further that youth interrogators should serve a period of articles, which would be a period spent working under the supervision of an experienced youth interrogator before being allowed to interview children themselves (Harnon 1990:90-1).

#### **4.5.6 Rights of the Accused**

Since the introduction of the Law of Evidence Revision (Protection of Children) Law, it is evident that the law gives preference to the well-being of the child as against formal legal procedure in court, such as the rules of evidence in a criminal trial and the right which the accused has to a fair trial (David 1990:99).

Although the Israeli Supreme Court has on a number of occasions stated that the best way to determine credibility of a witness is by observing his demeanour and behaviour on the witness stand, the court has nevertheless sanctioned the absence of child witnesses at a trial (see *Danino supra*). In addition to this, the youth interrogator's report can be admitted in lieu of the child's presence, thus introducing hearsay evidence which cannot be cross-examined by the accused. In an attempt then to balance any harm to the rights of the accused, section 11 of the Law of Evidence Revision (Protection of Children) Law provides that no person may be convicted on the recorded evidence of an interrogator unless it is corroborated by other evidence. Corroboration is required both with regard to the actual commission of the crime and the identity of the offender (Harnon 1990:84).

The requirement of corroboration is essential in view of the fact that the evidence before the court is a hearsay report, and the accused will be entitled to an acquittal if the corroboration is not "sufficiently cogent or convincing" (Harnon 1990:84). The following are examples of corroborative evidence that have been accepted by the courts: a blood stain on the child's body was found to corroborate that the alleged act had taken place; an admission by the accused that he had been on the scene of the crime without a reasonable explanation was held to be corroboration of the perpetrator's identity. This requirement of corroboration is strictly observed by the courts since in these instances the courts have been deprived of an opportunity to gain an impression of the witness and the accused does not have an opportunity to cross-examine the witness. Since corroboration is an essential requirement "the widely accepted view is that implementation of the statute has apparently not brought about the conviction of innocent persons" (Harnon 1990:92). In *Yehudai* (1957) (II)11 PD 365 the court at 367 held that the requirement of corroboration must be scrupulously observed where the courts are dealing with the evidence of a child which was taken down by a youth interrogator.

#### 4.5.7 Recommendations

It has been argued that the introduction of the Law of Evidence Revision (Protection of Children) Law has gone a long way to ascertaining the truth, since a lot of information would not have been available to the court if it had not been obtained by the youth interrogators. This is based on the fact that many of these children, especially very young children, would not have been able to be interrogated in court. In addition, fewer parents would be prepared to lay complaints with the police if this statutory arrangement did not exist (Harnon 1990:92).

However, there are still criticisms that have been levelled at this statute. It has been argued *supra* that the accused's rights are not adequately protected since the statute admits hearsay evidence which has the effect that the accused is deprived of his right to cross-examine evidence which is being led against him.

Another criticism, also addressed *supra*, is the fact that the statute does not require any qualification for the appointment of a youth interrogator. It has therefore been recommended that minimum prerequisites must be determined for youth interrogators. The statute must require a minimum legal knowledge and some skill in interviewing before a person can be appointed as a youth interrogator. There is a need to ensure that all youth interrogators are of a high professional standard (Harnon 1990:92).

David (1990:108) explains that the majority of youth interrogators have over the years been chosen from the social work discipline, and she argues that this is rightly so:

"Social workers have the most useful professional background for this task. They are conversant with crisis intervention and short-term therapy. Social workers mostly deal with the 'normal', whereas psychologists, for instance, mainly deal with the 'deviant'. Social workers have a certain knowledge of interviewing techniques which of course have to be applied differently when acting as a youth interrogator: the youth interrogator has to get at the objective truth as quickly as possible - as therapists we can go along with the subjective truth of our clients."

Although David (1990:109) agrees that it is necessary for the youth interrogator to have some knowledge about police and court procedures, she believes that this can be learnt in a comparatively short course of lectures as opposed to the acquisition of the practical skills involved in interviewing children. But a balance should be maintained between the two functions of the youth interrogator, namely that of police officer and that of crisis intervention, and the youth interrogator should not be allowed to become too much of a therapist.

The youth interrogator is required to write down everything the child says in full and as accurately as possible. In April 1989 a new regulation was issued which provided that every youth interrogator has to tape-record the interview procedure, unless there are special reasons for not doing so. Since improving the quality of hearsay evidence is of primary importance, Harnon (1990:91) argues that the next step in this direction would be the adoption of a system of video-recording the interviews. This, he argues, would contribute to overcoming the objections to hearsay since the court would be able both to see and hear the child and thus gain an impression of the witness. This would create a balanced procedure which would cater for the protection of the accused's rights as well.

Despite the above criticisms, Harnon (1990:92) argues that drastic changes to the procedures introduced by the 1955 statute are not to be expected. In fact, in Israel there has recently been a growing tendency to narrow exclusionary rules of evidence, moving in the direction of credibility tests rather than admissibility tests. In fact, he is of the opinion that "it is desirable that the law of evidence, like the legal system as a whole, should adapt itself to the ever-changing social requirements and attitudes, but with caution, without overlooking countervailing interests" (Harnon 1990:92).



## **5. PROCEDURES ADOPTED IN SOUTH AFRICA WITH RESPECT TO CHILD WITNESSES**

### **5.1 Accusatorial System of Evidence**

The South African rules of procedure are based on the accusatorial system which implies that criminal trials consist of two parties placing evidence before a passive judge who, having heard the examination-in-chief and observed the cross-examination, makes a decision as to the guilt of the accused. The position has been summarised as follows by the South African Law Commission (1989:2):

"A criminal proceeding is in effect aimed at comparing the two contradictory versions, that of the State and that of the defence, against one another and to put both to the test of harsh cross-examination."

#### **5.1.1 Passive Presiding Officer**

In this system the presiding officer plays a passive role, and is compared to "an umpire in a cricket match" (South African Law Commission 1989:2). His function is to listen to the evidence presented by both parties and to ensure that the rules of evidence and procedure are adhered to. Once all the evidence has been presented, he must make a finding of fact and apply the law to the facts. His role is a neutral one, and best described in the Report of the Commission of Enquiry, Criminal Procedure and Evidence, as quoted by Lansdown and Campbell (1982:490):

"The judicial officer is not concerned with the investigation of the facts which led to the accused's appearance in court. The procedure in both the trial and the preliminary hearing is characterised by a confrontation between the prosecutor and the accused at which the judicial officer acts more or less as an arbiter, and according to the evidence adduced, ensures that the rules prescribed for the trial are observed."

The presiding officer must remain neutral throughout the trial, and "must keep a perfectly open mind on the question of the guilt or innocence of the accused until the conclusion of the whole case" (Lansdown and Campbell 1982:491). Although it is often said that the presiding judge must not descend into the arena, he must nevertheless see that justice is done and for that reason has been given the authority to have witnesses subpoenaed if the evidence would appear to be essential to the case. This has been provided for by s186 of the Criminal Procedure Act no.51 of 1977:

"The court may at any stage of criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such proceedings, and that the court shall so subpoena a witness or so cause a witness to be subpoenaed if the evidence of such witness appears to the court essential to the just decision of the case."

A presiding officer also has the authority to examine any witness and to recall and re-examine any person already

examined if such evidence would appear to be essential to a just decision. This is also provided for by s167 of the Criminal Procedure Act of 1977. The presiding officer will be allowed to examine witnesses where evidence is in any way ambiguous or incomplete (Lansdown and Campbell 1982:491). Section 167 provides:

"The court may at any stage of criminal proceedings examine any person, other than an accused, who has been subpoenaed to attend such proceedings or who is in attendance at such proceedings, and may recall and re-examine any person, including an accused, already examined at the proceedings, and the court shall examine, or recall and re-examine, the person concerned if his evidence appears to the court essential to the just decision of the case."

The fact that the presiding officer must remain neutral and not descend into the arena means that he may not interfere with the accused's right to cross-examination unless it is offensive, humiliating, misleading or tormenting. He may not interfere where the cross-examination is merely harsh or aggressive or "which consists of leading questions or suggestions, or which is prolonged" (SA Law Commission 1989:3). Since there is a very fine line between cross-examination which is admissible and that which is not, presiding officers are wary of interfering and being seen as entering the contest.

### **5.1.2 Two Opposing Parties**

Since the presiding officer must remain passive, all evidence is then placed before the court by the two parties involved. The existence of two opposing parties is an essential feature of the accusatorial system and creates the perception of a fight. In fact, Lansdown and Campbell (1982:491-2), in discussing the neutrality of judges and magistrates, refer to the trial as "the arena of conflict" and caution presiding officers not to allow their vision to become "obscured by the dust of conflict".

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. The purpose of the latter technique being to destroy witnesses by attacking their credibility or by proving that they are unreliable.

### **5.1.3 Cross-examination**

The right to cross-examine an opposing party's witnesses is an essential feature of the accusatorial system, and is therefore a fundamental right of an accused in the South African law of procedure. A party is entitled to cross-examine all witnesses who give evidence for the opposing party, and any refusal to allow such cross-examination would amount to an irregularity. For this reason the presiding officer is very wary of interfering with cross-examination, especially that of the defence, "to avoid any suspicion that the defence is being muzzled" (Lansdown and Campbell 1982:494). The discretion to control undue or improper cross-examination must be exercised with caution and "with a full awareness of the vital role that cross-examination plays in our system of evidence" (Lansdown and Campbell 1982:495).

#### **5.1.4 Rules of Evidence**

The accusatorial system is characterised by a very formalistic and rigid adherence to rules of evidence. This too then is the position in South Africa where the law of evidence is based on strict rules of admissibility. Evidence that does not fall within the parameters of these rules will not be admissible in court. The general rule is that hearsay evidence is inadmissible except in certain limited situations as set out in s3 of the Law of Evidence Amendment Act 45 of 1988. Of particular relevance to this study will be the rules relating to competency, previous consistent statements, hearsay and the cautionary rule.

#### **5.1.5 Inquisitorial Features**

Despite the fact that the South African legal system is based on the accusatorial model, there are a number of features which have been incorporated into this system which are of an inquisitorial nature.

In terms of s115(2) of the Criminal Procedure Act 1977 a presiding officer is authorised to question an accused at the beginning of a trial to give the latter an opportunity to indicate the basis of his defence. Section 18 of the Criminal Law Second Amendment Act of 1992 enables the Attorney-General to issue a certificate designating certain offences to be 'special offences'. These must entail murder, robbery with aggravating circumstances, violence or intimidation. In any trial dealing with a special offence, the presiding officer is empowered to enter the accusatorial mode of questioning an accused who pleads not guilty as to the basis of his defence, and may draw an unfavourable inference from a failure to give an explanation (Milton et al 1994:413).

There are instances where inquisitorial features have been incorporated into the accusatorial model, and serve to show that it is possible to introduce amendments to legislation that have an inquisitorial flavour. Since the accusatorial system in South Africa already has some inquisitorial features, the mere fact that certain suggested amendments to legislation involving child witnesses are of an inquisitorial nature should not serve as a deterrent.

#### **5.1.6 The Constitutional Position**

The Constitution of the Republic of South Africa Act 108 of 1996 was adopted on the 8 May 1996, and entrenches certain aspects of the accusatorial system. Section 35(3) grants an accused a right to a fair trial, which includes the right to a public trial; the right to be present when being tried; and the right to adduce and challenge evidence. These rights strengthen the accusatorial features of criminal procedure by insisting on confrontation and cross-examination, although none of the rights are absolute. The impact of the Constitution will be discussed under the relevant sections when evaluating available options and any possible reforms.

## 5.2 Confrontation

### 5.2.1 Introduction

Section 35(3)(e) of the Constitution provides that an accused has the right to be present when he is being tried. Although the wording of the section does not specifically contain the terms 'confront' or 'face-to-face', Joubert (1995:522) has argued that this right encompasses more than simply requiring that the trial and the decision of the court take place in his presence. It would also include confrontation in the sense of being able to see witnesses and to observe their demeanour.

Even before the introduction of the Constitution, it has always been a basic principle of the South African criminal procedure that accusations had to be made face-to-face (Zieff 1991:35). This is supported by the South African Law Commission (1989:4) which accords an accused the right to be present during his trial and to hear all evidence that is led against him. He is entitled "to demand that accusations against him be made face to face with him". This principle is contained in s158 of the Criminal Procedure Act 1977, which reads:

"Except as otherwise expressly provided by this Act or any other law, all criminal proceedings in any court shall take place in the presence of the accused."

In discussing s156(1) of the Criminal Procedure and Evidence Act 56 of 1955, the precursor to this section, Colman J in *S v Motlatla supra* explained at 815F that:

"[t]here must be confrontation; he must see them as they depose against him so that he can observe their demeanour. And they for their part must give their evidence in the face of a present accused".

The denial of the right to confrontation would amount to an irregularity, providing a ground for the overturning of a conviction, as happened in *S v Motlatla supra* when a witness gave evidence in the absence of an accused.

Although an accused is given a right to be present at his trial in terms of statutory law, common law and the Constitution, the right is nevertheless not absolute. There are certain statutory provisions which specifically exclude confrontation. For instance, provision is made in certain cases for the accused to be removed from the courtroom. This is governed by s159(1) of the Criminal Procedure Act 1977 which reads:

"(1) If an accused at criminal proceedings conducts himself in a manner which makes the continuance of the proceedings in his presence impracticable, the court may direct that he be removed and that the proceedings continue in his absence."

The Criminal Procedure Act 1977 contains further exceptions to an accused's right to be present at his trial, which were discussed *supra* and which would include evidence given via closed-circuit television (s170A) and evidence given on commission (s171). In *Klink v Regional Court Magistrate NO and Others* 1996(3) BCLR 402 (SE) the applicant wanted to know whether s170A had not resulted in a limitation of his fundamental right to a fair trial. However, it emerges from the applicant's argument that his main concern was not the physical separation of the

child witness from the accused. He accepted that some form of separation was applied in other countries and did not press this issue (at 408D-E).

### 5.2.2 Effect of Confrontation on Child Witnesses

Since the accused is entitled to be present in court at his trial, a child witness would have to give evidence in court in the presence of the accused (SA Law Commission 1989:4). This creates untold difficulties for the child who has, in most cases, to be faced with the very person who assaulted him or whom he witnessed assaulting another. In addition to this, the child has to tell his story in a formal courtroom which will be alien to anything he has thus far experienced (Hammond and Hammond 1987:9).

The traumatic effect of courtroom confrontation on children has been accepted by a number of South African courts. In *Horsford v De Jager and Another* 1959(2) SA 152 (N) a ten-and-a-half year old girl was called to give evidence in an application brought by her mother to enforce an order of custody. Fannin J commented as follows at 157D-E regarding the girl's experience in court:

"The elder daughter was called to give evidence. After a short time she broke down and wept in the witness box and, with the consent of the parties, her evidence was heard by me in Chambers in the presence of counsel only."

In *R v S* 1948(4) SA 419 (GW) the court, in assessing a ten year old's evidence, remarked at 422 that "[i]t must be remembered that he was a child of tender years, was kept in the witness-box for a considerable time, the strain of which, it could be seen, told on him". And in *Jabaar v South African Railways and Harbours* 1982(4) SA 552 (C) King AJ made the following observations at 555E-G regarding the evidence of a twelve year old boy:

"Having regard to the various factors which must be taken into account, his demeanour in the witness-box was that of a young child; he was obviously nervous, unsure of himself, ill-at-ease and reluctant to be giving evidence (it will be remembered that he was called as a witness by the defendant); it will also be remembered that he was testifying to incidents which had occurred several years previously, a long time ago in his young life; it was to me quite natural that he should have forgotten much of that unhappy occurrence."

Key (1988:54) refers to a case where a twelve year old boy had been sodomised by his father over a protracted period of time. As far as confrontation was concerned, Key had the following to say:

"Throughout the hearing the boy demonstrated signs of severe anxiety. He held his hand against his face to blinker out the sight of his father. When asked why he was so upset he said that his father had, on numerous occasions, produced a knife and threatened to kill him if he ever told anyone about what his father had done to him."

These conclusions regarding the effect of confrontation on children were reinforced in the decision *S v Basil Simons* DCLD 84/88, 13 June 1988, (unreported) where Wilson J had the following to say about child witnesses:

"I propose for a moment to digress and to state that it appears to me that it is time that urgent consideration is given to a change in the manner of conducting criminal trials arising out of the

sexual abuse of young children. I do not suggest that there should be any substantial changes made to our criminal procedure as such, but it appears to me that it would be eminently desirable to evolve a system that when a child is called upon to give evidence that child is not required to do so in a large austere looking court room before judicial officers sitting on a bench above them. In other words in circumstances that are completely strange to the child, and must cause a great deal of stress and tension. It would in my view be far fairer, both to the State and the defence, if arrangements could be made in cases of this nature for the child to give evidence in circumstances which are not strange to her, so that he or she, depending on the sex of the child, is not subjected to more traumatic experiences than are absolutely necessary."

In response to these criticisms, the South African Law Commission undertook an investigation into the plight of the child witness.

### **5.2.3 South African Law Commission**

In 1989 the SA Law Commission produced a working paper, entitled Protection of the Child Witness, which focused on the position of the abused child as a witness in court. The Commission (1989:3) accepted that courtrooms are spartan and severe in appearance, thereby creating a forbidding experience for a witness. They further accepted that the juxtaposition of the presiding officer, the accused and his legal representative as well as the prosecutor in the courtroom, clad in black robes, caused a child to become "afraid, uncertain and confused" (SA Law Commission 1989:14). Zieff (1991:21) goes further and says that, not only do children suffer serious psychological and emotional damage as a result of abuse, but this psychological harm is often perpetuated when they are required to give evidence in court. Being forced to confront an attacker in person can result in the child refusing to testify or not being able to give evidence effectively (Avery 1983:47).

Zieff (1991:35) argues that having to give evidence in the presence of the accused is more harrowing for a child witness than having to undergo cross-examination. The SA Law Commission (1989:14) accepted the contributions of researchers, both national and international, who argued that forcing the child to confront the accused while giving evidence could result in the child "watering down" evidence or recanting in an attempt to escape an unpleasant experience.

In response to publicity regarding the difficulties experienced by child witnesses, the then Minister of Justice, Mr HJ Coetsee, released a press statement on 8 November 1988, which has been quoted by the SA Law Commission (1989:18). The statement set out a summary of numerous investigations which had already been undertaken and which had a bearing on family law and related topics. Particular attention was accorded to the protection of the child. In view of further representations made, the following project was submitted to the SA Law Commission (1989:19-20):

"That an investigation be instituted into the giving of evidence by children in litigation involving allegations of indecent acts and that in particular consideration be given to the following possible protective measures and procedures:

1. That a child giving evidence in a trial be assisted by a representative.
2. That the identification of a suspect by a child ought not to take place in an open court, but from behind a one-way mirror.
3. That the evidence of a child be heard in an informal atmosphere, which includes the

- hearing of such evidence in a room other than a court of law, and which also includes the possibility of hearing the child's evidence whilst the child is screened off by a one-way mirror or in the absence of the accused.
4. That a pre-trial questioning of the child be carried out by a psychologist appointed by the court, who must be entitled to express his opinion in court regarding the child's credibility; such questioning to take place in consultation with the accused, the prosecution and the presiding officer.
  5. That videotapes relating to interviews between the child and a social worker during the investigation stages of the case ought to be admissible in court and ought to be made available to the accused before the trial."

In an attempt to address these problems, the Commission looked at a number of possible solutions which had been suggested both nationally and internationally.

### **5.2.3.1 A Child Investigator**

The Commission considered the implications involved in the creation of a post such as that of a child investigator, referring to the position in Israel. A child investigator, they thought, could be taken from the ranks of psychiatrists, psychologists or social workers and would function to protect the child against interference and intimidation, to evaluate the trustworthiness of the child and to testify and be cross-examined on behalf of the child where a decision was made that the child should not testify personally (SA Law Commission 1989:20). Hammond and Hammond (1987:6) summarise of the advantages and disadvantages of the Israeli system. Firstly, an advantage would be a reduction in the number of interviews a child witness would have to undergo, since a single investigator would deal with the case throughout. In addition, the child would be spared a court appearance and be represented by a well-trained professional. On the other hand, the disadvantages would include the fact that corroboration of a child's evidence would still be required, and the accused would be deprived of his right to confront and cross-examine a witness who would be giving evidence against him.

In evaluating this proposal, the SA Law Commission (1989:28-9) emphasised that the crux of the matter was that the child investigator would give evidence and be cross-examined on behalf of the child, and found that it conflicted with a number of the fundamental premises of our law, namely that a witness must give evidence in person and also be cross-examined personally, as well as the fact that hearsay evidence is inadmissible. A danger inherent in this procedure, it was argued, was that the child investigator would instinctively "colour the child's story and give it a rational image, something which the child would not be able to do himself". It was accepted by the Commission that the trustworthiness and reliability of the child's evidence could not be tested in this way. They added, however, that the mere fact that the solution proposed was of such a drastic nature would not on its own stand in the way of reform if it was in the interests of the entire community, and this would include the interests of both the child and the accused. In conclusion, the Commission found that, since the proposal conflicted with fundamental principles of our law and since the possible dangers would be immense for both defence and prosecution, the proposal could not be supported. The only aspect of the proposal which the Commission accepted was that the child witness be supported by a qualified child psychologist throughout the trial. In accepting this part of the proposal, the court suggested that this psychological support be available for "the abused child and the child witness". This would appear to include all children who give evidence, and would, therefore, not be limited to a child who is the

victim of an offence.

### 5.2.3.2 Special Courtrooms and "translated" Cross-examination

This proposal involved two issues: the provision of special courtrooms for child witnesses, and the appointment of a person through whom cross-examination could be conducted. The latter part of the proposal will only be discussed briefly here since it will be covered in more depth in the section dealing with cross-examination *infra*.

The essence of this proposal, as outlined by the SA Law Commission (1989:21-23), is that a child witness should be allowed to testify in a special courtroom, such as a playroom, from behind a one-way mirror with the assistance of a trained official. Although the people in the courtroom would be allowed to see the child, the latter will not be aware of their presence. The official accompanying the child will be linked to the court by means of earphones. This person will hear questions put by the defence in the course of cross-examination and will relay them to the child in "an objective and non-aggressive manner". The court personnel and defence will hear both the question put by the official and the child's reply. An alternative procedure would be to put all questions to the presiding officer, who would then put them to the official who would in turn convey them to the child.

The Commission also referred to the children's courtroom suggested by Libai (SA Law Commission 1989:22). Libai (1969:1014ff) urged that the State should not ignore the opinions of psychological experts who argue that "legal proceedings are not geared to protect the victim's emotions and may be exceptionally traumatic". At the same time, however, an accused's right to a fair trial should be protected. Libai, (1969:1017) however, is of the opinion that the price of protecting the child does not have to infringe the constitutional rights of the accused. He refers to his proposal as the 'Child-Courtroom' and describes it as follows:

"The Child-Courtroom is designed to take a victim's testimony in an informal and relaxed manner, while the child can see only four persons around him: the judge, the prosecutor, the defense counsel, and the child examiner who will all be seated in a 'judge's room', arranged in a way which contributes to the security and psychological comfort of the child. The accused, the jury and the audience should be seated behind a one-way glass, separating them from the judge's room, but enabling them to observe everything which occurs there. In this manner the defendant's right to trial by jury is secured and the jury can view the accused's demeanour while the child is testifying. In addition, the accused will have microphone and earphones by means of which he and his counsel, who is in the judge's room, will be able to communicate with each other. The proceedings are transmitted to the accused's box by suitable electronic methods which would not interfere with the accused's capacity to communicate with his counsel."

The SA Law Commission (1989:22) also referred to the use of the videolink in the United Kingdom as well as the United States of America which has "the advantage of keeping the child out of the formal atmosphere of the courtroom which many child witnesses find extremely daunting". It should also be noted that the majority of the Pigot Committee in England in their report favoured the use of a single intermediary who would question the child on behalf of both parties, but unanimity was not reached. The intermediary, it was suggested in their report, would be equipped with an earpiece micro-receiver to receive questions from counsel and the judge (Davies 1991:189).

The Commission wished it to be placed officially on record that their provisional impression was that this proposal had merit since it protected the child both against a court appearance and against "aggressive and intimidating cross-examination" while at the same time preserving the fundamental principles of confrontation and cross-examination (SA Law commission 1989:29). The only question that remained was whether in practice this proposal could be implemented by the Department of Justice. This would involve making a room available which had an informal appearance and which was situated next to the courtroom. A one-way mirror would have to be fitted through which the court would be able to observe the child, and earphones would have to be installed for the use of the child investigator. Despite the financial sacrifices involved, the Commission (1989:30) felt that the interests of society demanded such a solution.

A further potential problem raised by the Commission (1989:30) was whether there would be sufficient child investigators, preferably educational psychologists, available. Hammond and Hammond (1987:6) did not consider this objection as valid, but explained that the focus was actually on reassessing priorities. The Department of Health and Welfare had offered manpower from its own officers and there were enough trained clinical psychologists available. The Commission (1989:31) accepted this argument, conceding that the child investigator did not necessarily have to be an educational psychologist. A clinical psychologist or a welfare officer could also serve as child investigators, thereby erasing the objection that sufficient manpower did not exist. In conclusion, the Commission (1989:31) "strongly recommended" this proposal and suggested that a legislative provision be drafted as soon as the Department of Justice provided proposals regarding the practical implementation of the facilities.

### **5.2.3.3 Legal Representation for Child Witnesses**

The position at present is that, because the prosecution of an offence remains the responsibility of the State, the child witness will not be entitled to be assisted in court by his own legal representative in regard to the presentation of his evidence and any objections that may arise out of cross-examination. A private legal representative of a child witness in a criminal case would be the equivalent of a spectator (SA Law Commission 1989:6).

In *R v De Kock* 1914 EDL 348 the court strongly condemned the appointment of a private legal representative by the complainant to assist the prosecutor, and in *R v Adam Effendi* 1917 EDL 267 the Supreme Court went so far as to set the conviction aside because a private practitioner assisted the prosecutor by addressing the court without the permission of the Attorney-General. The procedure was found to be irregular since there was the danger that the accused could have been prejudiced. At 353-4 Graham JP explained the situation as follows:

"I have noticed for some time past that the practice of employing legal advisers to assist the prosecution in criminal cases... is becoming quite common ... I am convinced that the practice is one which should not be tolerated in the interests of justice. A prosecutor appointed by the Crown approaches a case in a different frame of mind from that of an attorney or agent appointed by and remunerated by the complainant in the case. The Crown prosecutor should have no other interest in the case than to lay before the court such facts as may assist the court in arriving at the truth. This is his sole and only duty. If private practitioners are permitted at the instance of a complainant to take part in a prosecution, the whole object of the enquiry, which,

I repeat again, is only to elicit the truth, may be lost sight of".

In *Salisbury v R* 1934 (1)PH H83 (T) the court allowed a private practitioner, who had been appointed by an interested party, to provide informal assistance. This would entitle such a practitioner to suggest questions to a public prosecutor, but he would not be allowed to address the court or take part in the cross-examination of the accused.

However, despite the court's objection to the appointment of legal assistance for a witness, the Commission accepted (1989:15-6) that various researchers were of the opinion that the appointment of a legal representative for an abused child was necessary. It would assist children by giving them a better understanding of what was expected of them, they would be better prepared and also would be "protected against aggressive cross-examination and repeated remands".

Hammond and Hammond (1987:7), referring to Allwood, support the plea for an appointment of a child's advocate, who is described as the "friend of the child in legal proceedings". The child's advocate should be equipped with knowledge of both legal and psychosocial concepts to facilitate communication. This proposal was supported by Van der Byl (1986:250), a social worker, who recommended that a legal adviser with special knowledge about child abuse should be appointed to assist the child complainant. An alternative approach would be to have legal counsel present as part of a multi-disciplinary case conference.

The Commission (1989:16) also made reference to the proposal of the Hoexter Commission (1985), in its enquiry into family courts, that an office of children's friends be introduced who would have the power to arrange legal representation for the child at public expense. It should be noted, however, that this proposal was formulated with regard to the family courts and would include matters relating to custody and removal of children from the home. In the latter case, the child's best interests have to be determined, and the child is, therefore, a party to the proceedings. In evaluating this proposal, the Commission (1989:31) felt that the need for legal representation was no longer necessary in view of the fact that they had already recommended the appointment of a child investigator. They added further that the only real advantage in appointing a legal representative would be that "he would be able to object against aggressive and unfair cross-examination by the accused or his legal representative". This, they felt, did not introduce better protection for the child than the appointment of a person such as a child investigator.

#### **5.2.3.4 Preparation of the Child Witness**

The Commission (1989:5) accepted that there was in practice a vast difference between the preparation done by the prosecutor and that done by the defence. The latter, before appearing in court, prepares thoroughly by consulting with the accused, and his witnesses are generally well prepared for the trial. On the other hand, "the normal practice is that the prosecutor does not consult with the complainant or state witnesses; that he does not in any way prepare them for the trial at all; that he does not go over their evidence and clear up obscurities and contradictions where possible".

In crystallising the problem, the Commission (1989:15) accepted that prosecutors do not prepare the child witness for trial to the same extent as would the defence, which has the inevitable result that "the child witness is totally unprepared for what is expected of him or her and what he or she may expect". This leads to the witness appearing uncertain, which in turn creates the perception that the child is untrustworthy. The position of the unprepared child witness is described succinctly by the Commission (1989:15) as follows:

"The witness appears to be uncertain and thus untrustworthy. He or she cannot remember all the details of the experience about which evidence must be given and he or she has not had the benefit of a consultation to refresh his or her memory. There are therefore contradictions, lacunae and uncertainties which create the impression of untrustworthiness. As a result of his own neglect to consult beforehand, the prosecutor struggles from the outset to place the witness's version cogently before the court. The court immediately calls the value of the evidence into question. In practice it is not too difficult for the cross-examiner to 'break' the witness - and yet another guilty abuser goes scot free."

In conclusion, however, the Commission (1989:35) felt that, although the present position was unsatisfactory, it was not a matter which could be addressed through legislation since it concerned practical matters such as availability of prosecutors and adequate time for preparation. It was, nevertheless, suggested that the Department of Justice should supply prosecutors who were specially trained to deal with cases involving sexually abused children.

#### **5.2.3.5 Video Recording of Initial Statement**

The Commission (1989:24) received proposals that the initial statement of the child be recorded on video and used as evidence at the trial. Authority for the advantages of using video recordings is found in the decision of *S v Baleka and Others supra* where the court ruled that video recordings are real evidence and admissible. The court gave the following reasons therefore at 194-5:

"Having sat through two weeks of video viewing I am convinced that the video can be a very helpful tool to arrive at the truth. It does not suffer from fading memory as do witnesses. The camera may be selective, but so is the witness's recollection, even more so. The best word artist cannot draw his verbal picture as accurately and as clearly as does the cold eye of the camera. Not to mention the faltering witness who has difficulty in expressing himself. The tape records and retains for the benefit of the Court not only the words but also the intonation and emphasis of the speaker and the reaction of the audience. A tape sound and video recording can often be more reliable than the recollection of a witness."

In evaluating this proposal, the Commission (1989:32-3) found that it could not be supported since a video recording of a child's initial statement would be inadmissible because it would serve as self-corroboration, be a previous consistent statement, and be irrelevant as witnesses must testify in person in court. The Commission did not attempt to question any of these grounds of inadmissibility, but simply accepted that the video recording would be inadmissible according to our current rules of law. They did not address the issue, for instance, that, in the case of child witnesses, previous consistent statements should be admissible as self-corroboration to support the credibility of the child. The Law Commission did, however, acknowledge that such a video recording of the initial statement may be of informal and practical use to the police and prosecution.

Zieff (1991:41) argues that the Commission were short-sighted in their approach to alternative video proposals, since they did not examine proposals such as those which have been suggested by Williams and Spencer. The proposals suggested by the latter involved the child being interviewed by a specially trained examiner while the accused and his representative viewed the proceedings from behind a one-way mirror. The interview is conducted in terms of the ordinary rules of evidence, and the defence would be able to put specific questions to the child via the trained examiner. These proceedings would be recorded and the video recording would replace the child giving evidence personally at the trial.

Zieff (1991:41) argues that the Commission were further remiss in not considering the possibility of enacting a statute that would enable a child to testify via videotape or that would create a hearsay exception in terms of which the videotaped statements of children would become admissible. Zieff (1991:42) believes that these statutes are feasible provided the courts balance the competing interests of the child and the accused.

In October 1990 an attempt was made to allow a child witness to give evidence in a separate room. In *S v Jurgens* RC 653/90, 23 November 1990, Pietermaritzburg, (unreported) the prosecution applied to the Pietermaritzburg Regional Court for a seven year old girl, the victim of a kidnapping, to be allowed to testify by means of closed-circuit television from a room adjoining the court. The procedure adopted is described as follows by Schwikkard (1991:4):

"The arrangement was that the presiding officer, prosecutor and defence attorney were to be present in the courtroom together with the accused. There was a video camera in the witness room recording the interaction between the prosecutor's representative (hereafter referred to as the intermediary) and the witness. This record was immediately transmitted onto two television monitors in the courtroom, one facing the magistrate and the other aimed at the well of the court for the benefit of the officers of the court, the accused and the public. All sounds emanating from the witness room could be heard in the courtroom, but the sounds from the courtroom could only be heard by the intermediary who was equipped with earphones for this purpose. All questions would be put to the intermediary who would then relay the questions to the child."

This arrangement was very similar to the proposal forwarded by the Law Commission, the only difference being that closed-circuit television was used instead of a one-way mirror, and the intermediary was not a social worker or psychologist but a female prosecutor (Schwikkard 1991:45). The magistrate refused the application on the ground that it conflicted with s158 of the Criminal Procedure Act 1977 which provided that proceedings must take place in the presence of the accused. It was held that this right could not be waived since a denial of this right would amount to an irregularity. The court relied on *S v Motlatla supra* where Colman J held at 815F that this right included more than simply hearing what a witness had to say. It included confrontation in the sense that the accused be able to observe a witness's demeanour.

Schwikkard (1991:46) distinguished *Motlatla* from *Jurgens* on the facts. In the former the complainant gave evidence in the absence of the accused. When the accused appeared in court, the complainant's recorded evidence was played back to him. In *Jurgens*, however, the accused was in a position where he could monitor the proceedings in exactly the same way as he would if the child was present in the courtroom. The accused would be able to observe the child's demeanour as she testified. The court may perhaps have been influenced by the

defence's argument that it was important for the witness to see the accused on the ground that it was "easy for a person to make a statement concerning another behind his back, but will cower if he has to look the person concerning whom he is making the statement in the eye and to utter it" (at 52).

Schwikkard (1991:48) argues that the model adopted in the *Jurgen's* case does not prejudice the accused since the witness's demeanour can be observed and the truth of the evidence tested by cross-examination. In any effect, any prejudice that the accused may suffer will be outweighed in most cases by the probative value of the evidence. In view of the problems raised in the *Jurgen's* case, Schwikkard (1991:48) suggests that it would be more prudent if the Commission recommended that legislation be introduced with respect to any proposal made "to avoid the danger of conservative interpretation".

#### 5.2.4 Statutory Innovations

As a result of the above recommendations made by the Commission, the Criminal Law Amendment Act 135 of 1991 was introduced, which inserted s170A of the Criminal Procedure Act of 1977. The section provides as follows:

"Evidence through Intermediaries

- 170A. (1) Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the age of eighteen years to undue mental stress or suffering if he testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his evidence through that intermediary.
- (2) (a) No examination, cross-examination or re-examination of any witness in respect of whom a court has appointed an intermediary under subsection (1), except examination by the court, shall take place in any manner other than through that intermediary.  
 (b) The said intermediary may, unless the court directs otherwise, convey the general purport of any questions to the relevant witness.
- (3) If a court appoints an intermediary under subsection (1), the court may direct that the relevant witness shall give his evidence at any place -  
 (a) which is informally arranged to set the witness at ease;  
 (b) which is so situated that any person whose presence may upset that witness, is outside the sight and hearing of that witness; and  
 (c) which enables the court and any person whose presence is necessary at the relevant proceedings to see and hear, either directly or through the medium of any electronic or other devices, that intermediary as well as that witness during his testimony.
- (4) (a) The Minister may by notice in the Gazette determine the persons or the category or class of persons who are competent to be appointed as intermediaries.  
 (b) An intermediary who is not in the full time employment of the State shall be paid such travelling and subsistence and other allowances in respect of the services rendered by him as the Minister of Finance may determine."

#### 5.2.4.1 The Position in Court at Present

The general rule is that a child witness will give evidence in court, unless it appears that the child will be exposed to undue mental stress or suffering, in which case the court will invoke s170A *supra*. In terms of this section a child is entitled to give evidence in a place other than the courtroom. In practice the child witness gives evidence in a room separate from the courtroom. This room is usually, though not always, attached to the courtroom. In a number of instances, the room allocated to the magistrate for his entrance or where he was accustomed to wait, has been converted into the room for children to testify from.

The room is informally arranged and equipped with chairs for the child and the intermediary. In the various centres effort has been taken by a number of organisations to paint and furnish the room in a child-friendly manner that would set a child at ease. A video camera is mounted on the wall opposite the chairs and videotapes both the child and the intermediary when the child is giving evidence. No other person is allowed in the room with the child and the intermediary (Müller 1995:53).

The intermediary is provided with earphones in order to follow the proceedings in the courtroom. The intermediary hears the questions and relays these to the child. The child's answers will be captured on the live video link and relayed to the courtroom. The child does not see the courtroom or any person in the courtroom when giving evidence, neither does the child hear anyone from the court (Müller 1995:53).

The courtroom itself is provided with a television monitor on which the members of the court will be able to view the child and the intermediary and hear what is being said. The video is live, which means that the members of the court will see and hear the child and intermediary as they speak. A videotaped recording is not made of the child giving evidence. The evidence is, however, recorded using the normal electronic recording system employed in the courts.

Section 170A does not specifically refer to the use of cameras to shield the child. Subsection 3(c) sets out that the court must "see and hear, either directly or through the medium of any electronic or other devices". This would include a screen-type arrangement with one-way glass or a separate room linked with close-circuit television. In fact, s170A has been interpreted so widely that in 1995 a young child in East London gave evidence from home which was relayed to the court by means of a live video-link (Müller 1995:53). In practice the Department of Justice has set up a closed-circuit television system in most centres which operates from a room next to the courtroom.

#### 5.2.4.2 Evidentiary Aspects of the Section

This section applies to all children, male or female, under the age of eighteen. Section 170A(1) uses the phrase "any witness", and is not restricted to charges of sexual abuse or physical abuse. Neither is it limited to witnesses who are complainants. In theory, it would apply to a child who has witnessed an attack on a parent, and is not himself a victim of the crime.

##### 5.2.4.2.1 The Discretion of the Court

Section 170A(1) *supra* uses the phrase "the court may" which implies that the court has a discretion to allow the appointment of an intermediary, and that the appointment is not automatic. In practice this means that the prosecution will have to make an application to the court that an intermediary be appointed. In terms of subsection (3) the court still has a discretion, once it has appointed an intermediary, to allow the witness to give evidence in a separate room. In effect this means that the court must make two applications: an application to appoint the intermediary, and an application to use the informally arranged room. The two applications will normally be brought together (Müller 1995:53).

The manner in which this section is phrased, however, creates an anomaly. Subsection (1) provides that the court may appoint a competent person as an intermediary. Subsection (3) provides that if the court appoints an intermediary, the court may allow the witness to give evidence in a room other than the courtroom. This has the implication that an intermediary must be appointed in order for the witness to give evidence in another room. The informal room cannot be used without an intermediary. This creates the situation that a witness, who does not necessarily require the services of an intermediary (where, for instance, the witness may be sixteen or seventeen years old), but is afraid to give evidence in court, will not be allowed to use the room.

The effect of this anomaly was mentioned by the court in *Klink v Regional Court Magistrate NO and Others supra* at 407J-408 A-B:

"The effect is that a witness who reasonably needs to give evidence in a separate room will also have to be examined and cross-examined through an intermediary although he may not be exposed to undue mental stress and suffering if he testifies without the intermediary's assistance".

The Regional Court magistrate in this case came to the conclusion on the facts that the complainant would experience undue stress if she testified in open court. It was not contended that the complainant would endure undue stress if she gave evidence without the aid of an intermediary. It was for this reason that Melunsky J commented at 408B that "[i]t remains to say that the section may well require revision having regard to possible anomalies that may arise in its application".

#### 5.2.4.2.2 Undue Mental Stress or Suffering

The court has a discretion to grant an application for the appointment of an intermediary where it believes that the child will be exposed to undue mental stress or suffering. The term 'undue' was used to qualify the phrase 'mental stress or suffering'. The choice of this term seems to imply that it refers to something more than simply mental stress or suffering. According to the Concise Oxford Dictionary (Allen 1990) 'undue' is defined as 'excessive' or 'disproportionate'. The question to be asked then is how acute must the mental stress or suffering be before it can be classified as 'undue'? It would seem from the wording that the mental stress or suffering experienced by the child will have to be more than the ordinary stress experienced.

The American equivalent of undue mental stress or suffering is worded more strongly and reads as "unreasonable and serious mental and emotional harm or trauma (Gembala 1992:19). The American Constitution has had a dramatic effect on the interpretation of what is meant by the phrase 'emotional harm or trauma' and has led to decisions such as *Coy v Iowa supra* where it was held that the court must find that the child will be traumatised not simply by giving evidence in court but by giving evidence in the presence of the accused. The trauma suffered by the child must also be more than mere nervousness or excitement or a reluctance to testify. In *Warren v United States supra* a psychiatrist gave evidence that the victim would experience greater mental anguish than normally accompanies giving evidence in court, and a court appearance would lead to severe psychosis and perhaps even suicide (at 828).

The problem that arises here in relation to children is the determination of when a child's fear of giving evidence has reached the stage where he would be psychologically unavailable and, therefore, unable to give evidence in the presence of the accused. The fear experienced by the child must be "substantially greater" than the fear the child normally experiences when giving evidence. In coming to such a decision, the court must take into account the following factors: the psychological history of the child, the nature of the crime, the degree of violence involved, any psychological harm that might arise if the child gives evidence in court, and the importance of the evidence to the state's case (Myers 1987:311).

In practice the South African courts have not interpreted this phrase as strictly as have the American courts. In terms of s17OA it would appear that if the witness is going to suffer any mental stress that is beyond the norm, then the application to use the live-link will be granted. In fact, the younger the child, the more likely it will be assumed that the child will be exposed to stress or suffering by testifying in an open court in the presence of the accused (Müller 1995:54).

In terms of the *Coy v Iowa* decision *supra* the US court must find that the child will experience trauma. In contradistinction the South African courts do not have to find that the child will in fact experience undue mental stress or trauma. It is sufficient if it appears that the child will be exposed to mental stress or suffering. The term 'exposed' has been employed in this section and suggests a much wider application than its American counterpart, which requires that trauma must be suffered by testifying in the presence of the accused.

An illustration of what the courts understand by the phrase 'undue mental stress or suffering' is found in *S v Klink* 1995 case no. RC 6/68/95 (E) (unreported) where the State brought an application to make use of an intermediary and the live link. This was opposed by the defence. A clinical psychologist was called to give evidence as to whether a sixteen year old girl would be exposed to undue mental stress or suffering if she testified in the presence of the accused. The girl was the complainant in an alleged charge of rape:

"State: I see you testified to the fact that she should give evidence in the little room. Could you tell us what W's reaction could be or the effects could be of her receiving cross-examination without an intermediary or the court questioning her without an intermediary?"

Witness: I think this is going to place an enormous amount of undue stress on her that she will not be able to tolerate at this stage given her very fragile state. I fear it might precipitate a breakdown and that she won't be able to give evidence satisfactorily. That is going to be too emotionally taxing for her, and basically what is going to happen if she appears in open court, it is going to be a re-traumatisation. I think it will also hamper the prognosis in this case and it is going to set her back a great deal. She is a suicidal person and I am frightened for her.

State: Is it then your option that she shall suffer mental stress if she was due to testify?

Witness: Yes, it is."

The application to use the intermediary and the live-link was granted in this case. In the course of conducting research, interviews were conducted with two magistrates in Port Elizabeth. Although the small number of magistrates interviewed seriously affects the statistical validity of the research and the information can, therefore, not be used in any conclusive way, the replies themselves are of particular interest on a qualitative basis since they confirm a number of the arguments forwarded. The reason why only two magistrates were interviewed was simply because only two magistrates in the Port Elizabeth Magistrate's and Regional Courts had been involved in cases where intermediaries had been appointed, the one magistrate having dealt with ten such cases while the other magistrate had only been involved in one such trial. One of the questions posed in the interview was what the particular magistrate understood by the term 'undue stress'. The one magistrate believed that it equated to "excessive emotional stress, intimidation" and depended on the type of evidence that had to be given. The second magistrate's interpretation was given as follows: "stressful circumstances in which a minor has to testify amongst strangers in an intimidatory environment like a court of law and reveal intimate or violent conduct against her".

Despite the fact that only two magistrates were involved in the interviews, the replies are particularly revealing. The standard employed between these two magistrates differs vastly. The first magistrate requires that there must be "excessive" emotional stress, even intimidation. This interpretation seems to be even stricter than that required by section 170A itself which only mentions 'undue'. Excessive implies something more than 'undue' the second magistrate employed a standard that seems to be lower than that suggested by the section. In terms of his interpretation, any court appearance would amount to 'undue stress' since it would involve a minor testifying amongst strangers in an intimidatory environment. Another interesting feature is found in the second magistrate's reply - he limits 'undue stress' to complainants. He defines it as being where a child has to reveal the details of intimate or violent conduct against her. Although the sample size is too small to make findings, the dramatic differences in approach between these two magistrates indicates the difficulties that the discretionary nature of this section gives rise to.

In practice, it would appear that an intermediary will be appointed without any undue stress having to be shown where the defence does not object. In *S v Els* 1995, SH6/29/95, Port Elizabeth (unreported) the prosecutor at the beginning of the trial announced to the court that "die klaagster in hierdie aangeleentheid is 'n minderjarige dogter en die Staat is van plan om gebruik te maak van 'n tussenganger - fasiliteite wat beskikbaar is. Ek verstaan dat die verdediging het geen beswaar daarteen nie". The court asked the defence whether they objected, and when no objection was made, the intermediary was appointed. From the above exchange it would appear that the intermediary was appointed simply because the complainant was a minor (aged thirteen). There was no attempt to show undue mental stress and suffering. Interestingly, the State did not apply for the appointment of an intermediary in the case of the second witness, who was only ten. Was this based on the fact that the first witness, although older, was the complainant in the case?

Kriegler (1993 :433) argues that youth alone is not sufficient to necessitate the use of an intermediary. The court has to take into account factors such as intelligence, age, sex, personality of the witness, nature of the evidence and other factors.

In *S v Mathebula* [1996]4 ALLSA 168 (T) the court came to a different conclusion, based perhaps on the fact that the accused in this case was unrepresented. The application to appoint an intermediary went as follows:

"Aanklaer: Edelagbare, op hierdie stadium wil die Staat aansoek doen vir die aanstelling van 'n tussen-ganger. Die rede daarvoor is hierin twee dogters betrokke, die een is 10 jaar oud die een teen wie die beweerde onsedelike aanranding plaasgevind het. Die beskuldigde is aan beide die dogters bekend. Hy is 'n sogenaamde buurman van hulle, hulle ken sy gesig. Die klaer se vader sal ook getuig dat hy bekend is met die beskuldigde.

Hof: Die hof sal dit toestaan." (170 H-J)

The court held at 171D that the trial court, in appointing intermediary, had not heeded the requirement of "undue mental stress and suffering" as required by s170A. There was evidence that the complainant was allowed to sit in court after the State had closed its case, and Stafford J argued that it was difficult to allege in these circumstances that the accused's mere presence would have upset her to such an extent as to cause undue mental stress (171E) In addition, the court found that the accused was unrepresented and had not been given an opportunity to give input on this important aspect (181C).

Section 170A requires that the child be exposed to mental stress or suffering, and does not extend to the language difficulties a child may experience. This would mean that if a child experienced no trauma or stress from testifying in court, but was unable to understand the language of the court due to the child's age, this section would not be applicable and the child would not be able to make use of an intermediary. Language is the medium of the court, and the language that is used in court falls outside the normal repertoire of a child (Brennan and Brennan 1988:3). Since s170A(2) (b) gives the intermediary the right to convey 'the general purport' of the question to the child, it seems safe to deduce that the legislature were aware of the difficulties that a child witness can experience in understanding questions addressed to him (Müller 1995:54). According to the proposal recommended by the Law

Commission, the intermediary was seen as offering a method of removing any hostility and aggression from the questions asked of the child, the Commission must also have foreseen the language problems experienced by children since it gave the intermediary the role of interpreting the questions to the child. However, it seems illogical that a court cannot make use of such an intermediary where the child is too young to understand properly the questions that are being addressed to him.

#### 5.2.4.2.3 Expert Witnesses

In order to grant an application in terms of s170A, the court must be satisfied that the child witness will be exposed to undue mental stress or suffering. Does this necessitate the calling of an expert witness to give evidence regarding the possible effect of a court appearance on the child, or would the evidence of a parent be sufficient? It is submitted that, in view of the fact that the mental suffering experienced by the child must be undue (i.e. more than that ordinarily experienced), the evidence of an expert would be required. A parent of the child may not be well equipped in the eyes of the court to offer an independent opinion as to what would amount to 'undue' since he or she is not an expert in the relevant field of child psychology. Relevant experts such as psychologists, psychiatrists and social workers would be better able to testify as to whether the child will experience undue mental stress (Müller 1995:54).

It would appear from the American position that only expert witnesses can be called to give evidence on whether a child will suffer emotional trauma. Evidence given by lay persons or parents will not be sufficient to establish unavailability. In *State v Gollon supra* a mother gave evidence that her six year old child was too frightened to testify. The court held that this evidence, unsupported by expert evidence, would not be sufficient to establish unavailability. The following people have been regarded as experts in the field: in the *Craig* case *supra* evidence was heard from a counsellor who had a degree in child behaviour and a Masters Degree in counselling psychology as well as from a psychologist who had a Ph.D. in counselling psychology (Gembala 1992:19). In *People v Guce supra* the expert was a social worker who specialised in working with sexually abused children, whereas in *State v Self supra* the court relied on the evidence of a psychotherapist. It would seem then that any professional expert trained in counselling and treating victims of abuse would qualify as an expert.

In the interviews conducted with the Port Elizabeth magistrates (referred to *supra*), a further question put to them was whether expert evidence had to be led to prove 'undue stress'. The one magistrate replied that expert evidence would have to be led if the application to use the intermediary was opposed, although he felt that evidence of a family member could in certain instances be sufficient to convince the court that there was undue stress. The other magistrate felt that expert evidence was not necessary and that the evidence of a family member would be sufficient.

#### 5.2.4.2.4 Application to Use s170A

The party wishing to make use of the intermediary will have to make an application to court, and evidence will have to be led to show that the child will experience undue mental stress or suffering if forced to appear in court. In most

instances this burden will fall upon the prosecution. Since the court has an inherent discretion to protect the interests of witnesses, it is submitted that the court could, in appropriate circumstances, suggest that an application be brought in terms of this section. In the interviews conducted with the magistrates (referred to above), both magistrates admitted that there had been instances where they had suggested to the prosecution that an intermediary be appointed. It had been suggested in a case where a young girl was called to testify and it became apparent to the court that the girl had a very low intelligence factor, and also in a case where the child was five years old and had been molested by a member of the household.

When must this application be brought? In *S v Klink supra* the State brought an application in terms of s170A. The defence, in opposing the application, submitted that the application could not be brought until the charge had been put to the accused. The defence argued that the application would affect the manner in which the actual trial was going to be heard i.e. evidence was being led before a plea had been entered. The application, it was argued, was an integral part of the actual trial and could not be heard separately.

The magistrate, in making his decision, explained that s170A(1) used the phrase "whenever criminal proceedings are pending before any court". He compared this to s241(8) of the Interim Constitution which had similar wording, namely "were pending before any court of law". The issue before the court, therefore, was what the true meaning of the phrase "criminal proceedings pending before a court of law" was. The court referred to the decision in *S v SAIB* 1994 SACR 517 (D) where it was held that criminal proceedings in the Supreme Court commence with the service of an indictment on the accused and the lodging of it with the registrar. Therefore, proceedings are pending before an accused has pleaded. The magistrate went on to explain that the proceedings in a summary trial commence when the charge sheet is lodged with the clerk of the court. The court held that for the purposes of s170A(1) criminal proceedings are pending even before an accused has pleaded, once the charge sheet has been lodged with the clerk of the court. An intermediary can, therefore, be appointed before the accused has pleaded.

#### **5.2.4.3 Criticisms of s170A**

- i. The first criticism levelled against this section has already been discussed fully *supra*, and relates to the anomaly created by the fact that the court must appoint an intermediary before it can allow a child to give evidence in a room other than a courtroom. In this way the court's discretion has been limited. It does not have the power to allow a child to use the separate room without an intermediary. It is submitted that this section be amended to enable a court to allow a child to give evidence in a separate room without the appointment of an intermediary, if circumstances so require.
- ii. The meaning of the phrase 'undue mental stress or suffering' is not defined. What will amount to undue mental stress or suffering has, therefore, been left to the discretion of the court. This gives rise to the danger of inconsistency. Unless there are well-defined guidelines, one court may find that x factors amount to undue mental stress or suffering while another court may not find the same. It was for this reason that the Scottish Law Commission (1990:46) insisted that their version of mental stress be quantified in some way. The Draft Bill on Children and Other Witnesses contained a section which suggested guidelines as

to what factors the court should take into account i.e. the age and maturity of the child; the nature of the alleged offence; the nature of the evidence which the child may have to give; and the relationship between the accused and the child.

- iii. It is submitted that the grounds on which an application to use s170A is based needs to be extended to include language or communication difficulties experienced by children. As argued earlier, there are situations where children, especially young children, have difficulty in communicating but do not experience undue mental stress or suffering. These children would, therefore, not be able to make use of this section. This may give rise to a situation where the State may be forced to contrive grounds to show that a child will experience undue stress in order to enable a young child to make use of an intermediary.
- iv. Schwikkard (1996:148) argues that the discretionary nature of s170A as a whole will give rise to problems, and appears to be to the detriment of children. The discretionary nature of s170A means that those children who give evidence via an intermediary must be viewed as the exception rather than the norm. Since research indicates that in the majority of cases child witnesses suffer significant trauma in testifying in an 'adult' adversarial environment, Schwikkard (1996:148) argues that this section would be more effective if subsection (1) was amended to require a court to use an intermediary in all cases where a child complainant has to testify. Schwikkard limits this to children who are complainants. I submit that there does not appear to be a justification for limiting s170A to complainants. Section 170A itself, in its present form, does not limit its application to complainants but makes it available to "any witness". A child who has viewed the murder of a family member, although not a complainant in a case, will experience the same traumatic effect of giving evidence in an adversarial environment. Nevertheless, the proposal that all child witnesses be allowed to give evidence automatically in terms of s170A is recommended. The court would, according to Schwikkard (1996:160), only be excused from allowing a child witness to make use of this section "where it was clear that the child would not be traumatised or where it was impossible to do so".
- v. A further problem that has arisen from s170A is the practical implementation of closed-circuit television. Schwikkard (1996:159) comments that "[t]he use of intermediaries is by no means common, partly due to the fact that the vast majority of courts do not have the necessary facilities". Since research has shown that children do suffer as a result of having to testify in court, it is imperative that "adequate facilities for young witnesses be made available on a country-wide basis" (Schwikkard 1996:159).
- vi. Schwikkard (1996:156) argues that, although this section has potentially succeeded in reducing the trauma suffered by child complainants, it is nevertheless criticised because it does not address the traumatic effect of the adversarial nature of the trial. Quoting McGough, Schwikkard (1990:162) explains that numerous studies have shown "that children are more accurate witnesses when their memories are skilfully elicited in a non-adversarial mode".

Section 170A has not succeeded in dealing effectively with those aspects of the adversarial system which cause the greatest problems for children. Cross-examination, despite the fact that it may be conducted

through an intermediary, is still a major hurdle for children, especially the very young. In fact, the Law Commission (1989:11) accepted that "[o]ne of the great repeated complaints against the present system is directed against the adversary system and everything it implies: aggressive cross-examination of the child witness and the neutral role of the presiding officer". Neither of these issues have been addressed successfully by the section 170A.

Another feature of the accusatorial trial is that evidence has to be given at the trial. In the vast majority of cases the trial will take place a long time after the alleged incident. This means that the child will again have to relive the unpleasant experience and the child's recovery is thus impeded. A delay in time will have a negative effect on a child's memory (Schwikkard 1991:48). This has been accepted by the courts in numerous decisions.

In *Jabaar v South African Railways & Harbours supra* a twelve year old had to give evidence about an incident that had occurred nearly four years previously. It is hardly to be wondered at that King AJ remarked at 553A that "[h]e could not remember how the accident happened...". This resulted in the child making a statement in court which differed in a material respect from the statement he made to the police nearly four years before. King AJ could therefore place no reliance on the evidence and remarked at 55H that "in view of the inconsistency between Zair's evidence and his previous statement, I placed no reliance on his evidence".

In *R v S supra* Bok J commented on certain inconsistencies in a ten year old boy's evidence when he was uncertain as to whether an alleged assault had taken place inside the barber shop or outside in the yard. At 424 he remarked that "in the circumstances it was not at all surprising that the boy was or had become somewhat hazy about that or where he was standing when he heard his father's knock on the door". In *Woji v Santam Insurance Co Ltd* 1980(2) SA 971 (SE) the court was concerned about the fact that two witnesses, both aged ten, gave evidence about an accident that had occurred five years previously (973A).

According to Schwikkard (1991:49) it is the adversarial nature of the proceedings that is at the core of the problem. Enabling a child to give evidence via closed-circuit television "will not prevent the child from being traumatized for as long as the trial is viewed as a contest and not as an inquiry into the truth".

- vii There are also a number of criticisms relating to the function and appointment of intermediaries, but these will be dealt with under the section pertaining to cross-examination.
- viii The use of s170A creates problems insofar as identification is concerned. Since the child will be giving evidence from another room and will not see the accused, identification of the perpetrator may give rise to difficulties. Does this imply that the child will be brought into court to identify the alleged perpetrator? In *S v Olckers*, 29 February 1996, A1507/95 (T) (unreported) the witness was an eight year old girl who gave evidence via an intermediary. The complainant alleged that she had been assaulted by a person called Attie. Roux J made the following statement: "Of cardinal importance is that the complainant never

identified the appellant, the person in the accused dock, as her assailant". In *S v Mathebula supra* identification became a key issue after the accused asked the witness if she knew him (172I-J):

"Dit is duidelik dat sy nie 'n instinkmatige vertrouwe in haar eie uitkenning het nie. Toe sy onder kruisondervraging deur die beskuldige gevra is 'wil u sê u ken my?' was haar antwoord 'nee'."

It is very difficult to determine without a context what the witness meant by her reply. Did she say she does not recognise the accused or does not know him? This, taken together with the fact that the witness was not afforded an opportunity to identify the accused, resulted in the conviction being set aside:

"Die gevare wat normaalweg ter sprake is by die identifikasie van 'n verdagte word in hierdie geval verhoog deur die feit dat die klaagster nie die geleentheid gebied is om die beskuldigde wat in die hof verskyn het aldaar te identifiseer nie." (173J).

Section 170A has, however, achieved one of its aims, namely to remove any confrontation between the child and the accused and thereby to reduce the trauma experienced by the child. In the interviews conducted with the two magistrates, they were asked if s170A had any advantages. Both believed that s170A reduced for children the stress of having to appear in a formal courtroom among strangers, with one explaining: "The biggest advantage is that young victims are isolated from alleged perpetrators, thus spared humiliation and possible intimidatory tactics." One magistrate even suggested that the section be amended to enable any witness to give evidence out of the sight of the alleged perpetrator, although not necessarily with the aid of an intermediary.

#### **5.2.4.4 Amendment of s158**

It seemed logical to extend the use of closed-circuit television to witnesses other than children, and in 1996 the Criminal Procedure Amendment Act 86 of 1996 amended s158 of the Criminal Procedure Act 1977. This section came into effect on 1 September 1997.

Section 158 (1) now provides that all criminal proceedings in court must take place in the presence of the accused, except where expressly provided for by any other law. This authorises statutory exceptions to an accused's rights to confrontation.

Subsection (2) provides that the court, on its own initiative or on application by the prosecution, may order a witness or an accused to give evidence via closed circuit television or similar electronic media. An application can also be brought by the witness and the accused himself (subsection 2(b)). In terms of this it is not only witnesses who may now give evidence via this medium, but the accused himself. In addition, the court may only order the use of this method of giving evidence if the witness or the accused consents to it.

The court can only make an order for a person to give evidence via closed circuit television if such facilities are readily available or obtainable, and if to do so would:

- prevent unreasonable delay;

- save costs;
- be in the interest of the security of the state or of public safety or in the interests of justice or the public; or
- prevent the likelihood that prejudice or harm might result to any person if he or she testifies or is present at such proceedings.

In addition, the court has been given a wide discretion to impose conditions on the giving of evidence in these circumstances in terms of subsection (4), provided that the prosecution and the defence are not deprived of their right to question a witness nor to observe a witness's demeanour. The discretion must be exercised in order to ensure a fair and just trial.

This section does not refer to s170A at all, nor does it mention child witnesses. It provides only for a witness or accused to give evidence via closed circuit television. Although s158 does not provide for the appointment of an intermediary, subsection (4) does give the court wide powers to impose conditions. However, it is submitted that where the appointment of an intermediary is required, the courts would proceed in terms of s170A.

Does this mean that it is possible for a child to give evidence in terms of either s158 or s170A, or is s170A limited to witnesses under eighteen whilst s158 caters for those excluded by s170A i.e. those over eighteen? Although s170A expressly limits its application to children under the age of eighteen, there is no similar limiting provision in s158. It is, therefore, assumed that a child may be allowed to give evidence in terms of s158 as well. This will be particularly useful for older children, perhaps aged fifteen or sixteen, who do not require the use of an intermediary. This resolves the anomaly created by s170A. An added advantage of this section is that an application can be brought by the witness himself if he wishes to make use of this provision.

A disconcerting fact, however, is that the test that must be complied with in order to make use of this section is not nearly as stringent as the test applied in s170A. In the latter section, the child must experience 'undue mental stress or suffering', whereas in s158 closed circuit television can be used where it would be convenient to do so, or where it would save costs. This distinction seems indefensible, since once again it makes it more difficult for a child to make use of these provisions than adults or even the accused.

Section 158 will not in practice be able to be used for young children, since they will not be able to give evidence via an intermediary. It would not be possible for a young child to give evidence alone from another room, not only because the child would be isolated and alone but it would also be very difficult, if not impossible, to capture a young child's attention this way. The witness, it is assumed, will be linked by earphones as in the present system. This would not assist a young child, and may necessitate the use of two-way monitors. For these reasons, it is assumed that the legislature did not intend s158 to be used for young children.

### 5.3 Cross-examination

#### 5.3.1 Introduction

The accused has a right to cross-examine witnesses who give evidence against him. This is provided for by the Constitution as well as the Criminal Procedure Act 51 of 1977. Section 166 of the latter reads as follows:

"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."

The SA Law Commission (1989:2) accepted that the right to cross-examine a State witness was a fundamental right of the accused, and went so far as to say that "[b]ut for this rule, many an accused would daily be wrongfully convicted". Failure to allow cross-examination to take place is a serious irregularity at common law since there will almost always be prejudice to a party (Hoffmann and Zeffertt 1988:456). In *R v Ndawo* 1961(1) SA 16 (N) an eight year old was called to give evidence. Having been warned by the court, he burst into tears and was then abandoned by the prosecutor as a witness. The magistrate did not consider it necessary for the accused to cross-examine the child as the latter had not given any evidence in connection with the case. On review the Supreme Court held that not allowing the accused to cross-examine the witness was an irregularity and the conviction and sentence were set aside.

Although the accused has a right to cross-examine witnesses who give evidence against him, this right is not absolute. According to Melunsky J in *Klink v Regional Court Magistrate NO and Others* supra at 410A the trial court retains a discretion to disallow questioning which is irrelevant, unduly repetitive, oppressive or otherwise improper. This is supported by the decision in *S v Gidi and Another* 1984(4) 537 (C) where the court at 539I-540B explained as follows:

"A proper cross-examination does not permit the gratuitous intimidation of an accused. A prosecutor should not bully an accused by insulting him, brow-beating him or adopting an overbearing attitude ... A prosecutor should not unnecessarily ridicule an accused or taunt him or offend his sensibilities or provoke him to anger, or play upon his emotions in order to place him at an unfair disadvantage and incapacitate him from answering questions to the best of his ability."

In addition, s166 of the Criminal Procedure Act 1977 has been amended by the Criminal Procedure Amendment Act 86 of 1996, and s166(3) now reads as follows:

"(a) If it appears to a 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 relevancy of any particular line of examination and may impose reasonable limits on the 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."

Although the courts have always had the discretion in terms of the common law to interfere in cross-examination which is being protracted unreasonably, the problem has always been that the courts have been wary to intervene lest it be thought they are descending into the arena and losing their objectivity. The courts have now been authorised to do so by legislation. The subsection focuses on two aspects of cross-examination only: the length and the relevancy. Of particular interest is the provision contained in subsection (3)(b) which allows argument regarding relevancy to be heard in the absence of the witness. This provision would provide protection for children who are often intimidated and confused by legal arguments that take place in the course of their giving evidence.

### **5.3.2 Effect of Cross-examination on Children**

Perhaps the most serious complaint to be levelled against the accusatorial system is the importance accorded to cross-examination, and the inability of children to deal therewith. The Law Commission (1989:11) accepted this complaint without any argument, commenting that "[t]he complaint is so often repeated that it is necessary to cite only a few witnesses". They added that nearly all the researchers referred to the "brutal cross-examination" children were forced to endure.

Key (1988:54) described the cross-examination of a twelve year old boy who had been sodomised by his father as follows:

"Had I known then what I know now I would have doubted the wisdom of laying charges which would result in this young boy being subjected to the horrendous secondary abuse he received in court... He was subjected to one and a half days of persistent and detailed cross-examination about the appalling sexual abuse to which he had been subjected by his father for as far back as he could remember... The case was remanded for two months and then remanded again because of a change in defence counsel. Finally in October 1986, fourteen months after the original charge was laid, this unfortunate child once again was required to stand in the witness box for hour upon hour of gruelling cross-examination. Within ten minutes on the first day he was in tears. As before he held his hand against his face to avoid seeing his father. He was bullied about details he could not remember. He was accused of being a liar and making up the whole story. At this stage he broke down completely and pleaded to know why the defence did not believe him."

To support his views, Key (1988:12) refers to a report compiled by Dr J Hammond, who was also in court with the child during his evidence, and reported that "in the 'cause of justice' he is being completely broken down again by the court procedure which is not only permitted but apparently demanded by our judicial system".

Hammond and Hammond (1987:10), in their report on research carried out on child witnesses, emphasise that in

the course of their work they "heard time and again from people who have been called to court in their professional capacities, (policemen, paediatricians, social workers and others), of the horrors of observing a child witness under cross-examination". They are of the opinion that the child's credibility is deliberately broken down in the course of cross-examination which is designed to confuse and upset. The Law Commission (1989:12), quoting from Key accept that "[t]he object of the cross-examination is to establish that the child is lying".

Since the presumption of innocence applies in South Africa, the accused is presumed not to be guilty until the contrary is proved. The burden rests on the State to prove the accused's guilt beyond a reasonable doubt. One method of showing reasonable doubt is to expose the State's evidence as defective, and this can be done by showing that the evidence of the witness called by the State is incomplete, illogical, contradictory or unconvincing. It therefore follows that "the object of cross-examination is to establish that the child is lying (Zieff 1991:34). The Law Commission (1989:4) in their report explained that the task of the defence was "aimed at destroying incriminating propositions, and showing its falsehood, to elicit contradictions and deficiencies, and exposing improbabilities".

The underlying assumption of the accusatorial system is that cross-examination of a witness in the presence of the accused is a guarantee of arriving at the truth. It is this assumption which must be attacked as being incorrect when applied to children (Zieff 1991:34). Children find the process of cross-examination traumatic and, in the case of children, it does not produce accurate evidence.

Cross-examination is stressful for witnesses, and even more so for children. In *R v S supra* the court mentioned at 422 that the defence had put the ten year old witness "through a lengthy and searching cross-examination which must have been very trying". 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 the course of the cross-examination "the child will be bullied for placing events, often months after they occurred, out of sequence and at times when they could not have occurred and for not being able to remember important details concerning an event" (SA Law Commission 1989:12). The adversarial nature of the trial places the child in a position where he finds himself under attack. The defence is obliged to attack the child's credibility in an attempt to highlight inconsistencies and discredit the child's evidence.

It is also alleged that cross-examination, insofar as child witnesses are concerned, does not produce accurate evidence. 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 (Brennan and Brennan 1988:31). 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 (Müller and Tait 1997:521). These would include the use of leading questions, hypothetical questions, age-inappropriate vocabulary, complex syntax, general ambiguity and a focus on peripheral detail. Many children, therefore, experience difficulties with communication, either because their language is not understood or because they cannot be heard. This inability of children to communicate has raised the issue of whether it would be possible for children to be assisted by an interpreter (Zieff 1991:43).

Robertson (1986) delivered a paper at which he commented on his experience of child abuse cases:

"I have watched with interest in the courtroom as the proceedings are interpreted for accused or witnesses, from the presiding language to the tongue of the accused or witness. I believe that until maturity, the child has an impaired or limited verbal ability, obviously more acute when the child is very young. It should be allowed that all addresses to the child be made through an interpreter who is qualified in the sphere of child counselling. Questions might be rephrased, under scrutiny and open to objection by the Court, the prosecutor or defence. The aim would not be to change the truth in any way but an endeavour would be made to enable the child to answer the questions asked of it more accurately and explicitly without the humiliation of a tirading lawyer's attack."

These factors will be discussed in greater detail when cross-examination, as an aspect of the accusatorial model, will be evaluated. At present it suffices to say that the use of these techniques make it impossible for child witnesses to communicate truthfully and effectively. This was accepted by Melunsky J in *Klink v Regional Court Magistrate NO and Others supra* at 411E:

"It is sufficient to say that I am quite convinced that a child witness may often find it traumatic and stressful to give evidence in the adversarial atmosphere of the court room and that the forceful cross-examination of a young person by skilled counsel may be more likely to obfuscate than to reveal the truth."

### **5.3.3 Proposals of the Law Commission**

When proposing that a child be allowed to give evidence in a special room through the medium of a child investigator, the Commission (1989:29) was of the opinion that any proposal would only be effective where the child was protected from having to appear in court and face the accused as well as being protected against aggressive and intimidating cross-examination.

The purpose of the child investigator would be to introduce a procedure of "translated" cross-examination, in terms of which the defence would put their questions in cross-examination to the child investigator by way of earphones and this person would in turn put the questions "tactfully" to the child. The purpose of this would not, according to the Law Commission (1989:29), be "to take the sting out of intelligent and even sharp cross-examination" but rather to limit aggressiveness and intimidation.

This proposal was justified on the basis that the interests of society need to be protected and this can only be done by ensuring that the guilty be convicted and the innocent acquitted. In order to do this the witness must be treated fairly to enable him to testify to the best of his ability. According to the Commission (1989:29) this proposal was necessary to ensure the above since "[a]ggression towards the witness, intimidation, eliciting contradictions, shrewd word-play and setting traps have in our practice got out of control, particularly as far as children are concerned". The Commission (1989:29) went so far as to say that the normal protection afforded witnesses in the form of objections by the presiding officer was of little use to child witnesses. This is supported by Hammond and Hammond (1987:10) who state that, although the court is entitled to intervene in cross-examination, "[t]here is seldom felt to be enough intervention from the court to suggest moderation from counsel".

The Commission (1989:36), therefore, recommended that the child witness be allowed to give evidence from a special room. The child would be accompanied only by the child investigator, whom they suggested could be an educational psychologist, a psychologist, a clinical psychologist or a welfare officer. Any questions from the prosecution, defence or court would be directed to the child investigator who would then relay the questions tactfully to the child. It was felt that ideally child investigators should be educational psychologists since the latter are trained in the techniques of interviewing children and extracting information from them. A practical problem that could create difficulties was felt to be the availability of child investigators, and whether there were sufficient appropriately trained persons available?

### 5.3.4 The Intermediary

Consequent to the recommendations of the Law Commission, the Criminal Law Amendment Act no.135 of 1991 was passed which introduced the *persona* of the intermediary in s170A. Although the Commission referred to this person as the child investigator, s170A used the term 'intermediary'. The term 'child investigator' is perhaps misleading and would account for the change to 'intermediary'. A child investigator suggests somebody who will be involved in the investigation, similar to the position of the youth interrogator in Israel. In fact, the role envisaged by the Commission was closer to that of an interpreter, and perhaps explains the choice of the term 'intermediary' in the section.

#### 5.3.4.1 Who can be an Intermediary?

In their report the Commission (1989:36) originally suggested that an intermediary would be an educational psychologist, a psychologist, a clinical psychologist or a welfare officer. Educational psychologists were regarded as being the ideal intermediary since they were trained in the techniques of interviewing children.

Section 170A(4)(a) provides that the Minister may by notice in the Gazette determine the persons or the category or class of persons who are competent to be appointed as intermediaries. The list of people who are able to be appointed as an intermediary was set out in the Government Gazette no. 15024, 30 July 1993. The following is a summary of the people who qualify:

- (a) medical practitioners who specialise in paediatrics;
- (b) medical practitioners who specialise in psychiatry;
- (c) family counsellors appointed in terms of s3 of the Mediation in Certain Divorce Matters Act, 1987 and who were registered as social workers or who were classified as teachers in category C to G or who were registered as clinical, educational or counselling psychologists;
- (d) child care workers who have successfully completed a two-year course in child and youth care;
- (e) registered social workers who have two years experience in social work;
- (f) teachers qualified in category C to G and who have four years experience in teaching and who have not been dismissed or suspended from teaching;
- (g) psychologists who are registered as clinical, educational or counselling psychologists.

In the interviews conducted with the two Port Elizabeth magistrates, the one believed that in order to be appointed as an intermediary a person had to fall within these categories set out in the Government Gazette. The second magistrate, on the other hand, believed that a suitably qualified person may be appointed even though they did not fall specifically within the listed categories. The actual wording used in the Government Gazette does not appear to suggest any discretion. It simply states: "I ... Minister of Justice, hereby determine the following categories or classes of persons to be competent to be appointed as intermediaries".

From the list of people who have been appointed as possible intermediaries, the emphasis appears to be on people who are presumed to be skilled at communicating with children. This is in line too with the comments of the Law Commission.

When the application to appoint an intermediary has been granted, the court must then appoint the specific intermediary. The following appointment is quoted from the unreported case *S v Els supra*:

"Hof: Mevrou wat is u volle naam?  
 Hester Susanna Nel, v.o.e.  
 Hof: Mevrou wat se kwalifikasies het u? ---  
 Ek is 'n geregistreerde maatskaplike werker met 10 jaar ondervinding. Ek het ook opleiding ontvang om as tussenganger op te tree.  
 Hoeveel ondervinding het u? --- 10 jaar.  
 10? --- Ja  
 Wat se kursus het u deurloop? --- Ek het 'n kursus deurloop wat die Departement van Justisie in samewerking met die Universiteit van Pretoria aangebied is in Februarie 1994. Ek het ook 'n opleidingkursus aangebied in Port Elizabeth in samewerking met Mnr Martin le Roux se personeel."

Both parties were offered an opportunity to cross-examine the intermediary, after which the magistrate found her competent to act as an intermediary.

#### **5.3.4.2 Functions of the Intermediary**

Section 170A(2)(b) provides that the said intermediary may, unless the court directs otherwise, convey the general purport of any questions to the relevant witness. It would seem then that the function of the intermediary is simply to convey the question of the prosecution or the defence to the child in a manner which is understandable to the child. The section is worded relatively widely. The intermediary is mandated to convey the general meaning of the question and is, therefore, not limited to repeat the exact words that the question was originally framed in. It is sufficient that the intermediary convey the meaning. In the interviews conducted with the magistrates *supra*, they were asked what they understood by the phrase 'to convey the general purport of a question'. The one was of the opinion that the intermediary must ask what the questioner actually seeks to know whereas the other said that the intermediary must relate the question to the witness in a manner that the witness will understand.

The intermediary must, therefore, convey the content and meaning of the question to the child in a manner that the child understands. In carrying out this duty, the intermediary has two very distinct functions. Firstly, he is able to

remove all hostility and aggression from the questions, as was recognised by the Law Commission in their report. This is especially important when conveying the questions of defence counsel, as these questions are often phrased in a manner which aims to intimidate and confuse the witness. (Müller and Tait 1997:526). This "ulterior" purpose of cross-examination was accepted by the courts in *S v Gidi and Another supra* where Judge Rose-Innes had the following to say at 540B:

"In the case of many a witness it calls for no skill to intimidate or confuse or distress a witness who does not have the resources of intellect, language or personality to defend himself against a bullying prosecutor."

The intermediary, therefore, can and does act as a form of protection for the child against any hostility implicit in certain questions. This has been accepted by the courts in the *Klink* case *supra* at 411I-J:

"It is true that it is not only the contents of the questions that forms part of the armoury of the cross-examiner. The successful cross-examiner may employ intonations of voice and nuances of expression to drive his point home and, perhaps to cause discomfort to the witness. It is therefore possible that the forcefulness and effect of cross-examination may, to some extent, be blunted when an intermediary is interposed between the questioner and the witness."

Secondly, the intermediary has in terms of s170A(1)(b) the power to change the question in such a way that the child understands what is being required. The meaning of the question may not be changed, as the parties will have the right to object that their question was not asked, and may put it to the witness again. This interpretation was accepted by the Supreme Court in *Klink's* case *supra* where it was argued that it was in the interests of justice that the child comprehend the question that was being put to him, so that he could answer it properly:

"There are sound reasons why the conveyance of the general purport of the question might enable a child witness to participate properly in the system. Questions should always be put in a form understandable to the witness so that he or she may answer them properly. Where the witness is a child, there is the possibility that he may not fully comprehend or appreciate the content of a question formulated by counsel. The danger of this happening is more real in the case of a very young child. By conveying 'the general purport' of the question, the intermediary is not permitted to alter the question. He must convey the content and meaning of what was asked in a language and form understandable to the witness."

The intermediary, as mentioned by the court in the above excerpt, may only convey the question in a way that the child understands. He may not change the meaning, nor may he comment on whether a child will be able to grasp a particular question or not (Müller and Tait 1997:527). He is, in fact, nothing more than an interpreter. This was accepted by the court in *Klink supra* where the court at 411I said: "The intermediary acts, in a sense, as an interpreter."

The function of the intermediary is therefore twofold: to protect the child against hostile cross-examination and to assist the child in understanding the questions posed. Since an intermediary has been compared to an interpreter, does this person have the necessary powers to carry out the above functions. Firstly, in respect of the function to protect the child against hostile or aggressive cross-examination, no additional powers would be required. In repeating or rephrasing the question, the intermediary will be able to remove any aggressive nuances that were in

the original question. Insofar as the intermediary's function in regard to rephrasing questions is concerned, the powers are limited. The court can, for instance, insist that the intermediary repeat the question exactly as it was phrased, since the relevant section makes provision for this. In *S v Klink supra* the defence addressed the following question to the court after the intermediary was appointed: whether the court was prepared to make a ruling as to whether the intermediary could convey the general import of the questions or whether she had to convey the exact questions as they were put to her. The magistrate replied that each and every question had to be decided on its own. He further explained:

"I do not know what the kind of questions will be, it might be a pertinent question that you do not want to be altered at all and then you can ask the court for an order on that point that the question not be altered through the intermediary."

Since, according to the *Klink* case *supra*, the intermediary is nothing more than an interpreter, the authority to rephrase questions is very limited. Although the intermediary does not have to use the exact words that the question was originally framed in and only has to convey the meaning, this might in certain circumstances give rise to certain problems. For instance, in order to convey a question to a child, especially a very young one, quite drastic changes to the question itself may be necessitated. The original question might have to be rephrased into two or three questions, but it is doubtful whether the intermediary would be allowed to go off on an examination of his own. If the defence were, for example, to put the following question to the child: 'I will put it to you that the accused is impotent?' In order for an intermediary to accomplish his task effectively, he would have to ask firstly whether the child understood the word 'impotent'. If not, he would have to attempt an explanation, find out whether the child understands the explanation before going on eventually to put the question to the child. It is doubtful whether the intermediary will be allowed to do this. This would depend on the context of the question and the discretion of the presiding officer.

The intermediary also does not have the authority to comment on a question and give his opinion as to whether a child understands a question or not. For instance, where the prosecution or defence ask a question that on the face of it appears to be simple, the intermediary will have to repeat the question. If a prosecutor were to ask a five year old child: 'Why did you do that?' the intermediary will not be able to point out that a five year old child cannot be expected to answer a 'why' question. In this way the powers of an intermediary are limited by the questions that are asked, and if prosecution and defence lawyers are not trained to interview children, then the intermediary will not be effective in assisting the child. A good illustration of this point would be the order in which questions are asked. In order to give evidence effectively young children need to tell their story in sequence from beginning to end. They become confused when questions dart from one occasion to another and then back again. This is one of the techniques employed in cross-examination, and the intermediary will be powerless to intervene and argue that questions should not be asked in a particular sequence, especially if the questions are phrased simply. The intermediary is not an expert witness, but only an interpreter.

The intermediary is also not seen as representing the child in a guardian *ad litem* capacity, and would therefore not be allowed to insist that the child be given a break. In the interviews conducted with the magistrates *supra*, they were asked whether an intermediary could inform the court that the child needs to take a break. One of the replies

given was that the intermediary would be allowed to inform the court, but the court would decide the matter itself after reasons were given and the defence was afforded an opportunity to address the court as well.

However, the intermediary can play a very important role in filtering difficult questions. In order to rephrase the question to the child, the intermediary himself must be able to understand the question. When the question is too long or involved, the intermediary can ask that the question be put again as he himself does not understand what is required. An example of this was found in *S v Els supra*:

"Prokureur: Nou maar ek gaan die polisieman roep indien nodig om te kom getuig hierso of jy het vir hom dit gegee en hy dit neergeskryf het en of hy vir jou geleentheid gegee het om dit self te lees en of hy dit neergeskryf het en jy kon self geles het voordat jy geteken het.  
Tussenganger: Kan u net die vraag 'n bietjie duideliker vra. Dit was nie 'n vraag nie."

And again later in the same case:

"Prokureur: Ek gaan dit aan jou stel, ek gaan dit bewys dat jy moes met jou maatjies gepraat het oor hierdie saak. Want in die eerste instansie, Jenny, ek wil hê jy moet dit verklaar, vir Sy Edelagbare sê hoekom jy belangrike goed uitgelaat het om aan die polisie te vertel onder andere.  
Tussenganger: Kan u net stukkie-vir-stukkie vra asseblief.  
Prokureur: Goed, ek wil hê u moet die volgende verklaar aan sy Edelagbare.  
Tussenganger: Kan u net daar stop asseblief."

From these exchanges it can be seen that the intermediary can effectively protect a child witness from a barrage of questions, especially those that are long and involved.

### **5.3.4.3 Qualifications of the Intermediary**

Neither s170A nor the Government Gazette, which sets out who may act as an intermediary, require any additional qualification in order for a person to act as an intermediary nor does it require that an intermediary undergo any training before being appointed as such.

In order for intermediaries to carry out their functions as described above, they would need to have a knowledge of the following disciplines. Firstly, they would need to have an understanding of the developmental stages through which children pass so that they would be able to deal with children at specific ages. Secondly, an intermediary would require knowledge of the critical framework of a child's ability to understand language so that he will be able to communicate with a child at a particular age in a manner which the child will understand. Thirdly, an intermediary requires training with respect to the psychological affects of testifying and the stress which the child is experiencing, in addition to the effects of abuse where the child witness is a victim of abuse. Fourthly, it is essential that an intermediary has some insight into the law. He would have to understand the features of a legal (investigative) interview as opposed to a therapeutic interview. For instance, he would have to know what leading questions are, how to guard against them, their effect in law, what suggestion is and the devastating effect it can have on a trial (Müller 1995:55).

From the list of persons who have been appointed by the Minister in the Government Gazette as being capable of acting as an intermediary, it would seem that they were chosen on the basis that they are people who come into contact with children. For instance, paediatricians, family counsellors, teachers and even some psychiatrists and psychologists are not trained to communicate with children, unless they specialise in this field. A paediatrician is a medical doctor. He is not qualified to interview children. Some social workers have no experience of working with children.

With respect to the knowledge and training that is required of an intermediary, none of these individuals comply with these requirements. None of the individuals who are listed in the Government Gazette have any legal training or would have knowledge of how to conduct a legal interview. In the interviews conducted with the two Regional Court magistrates in Port Elizabeth, both were of the opinion that intermediaries should have experience with children, some qualification in the social sciences and/or psychology and knowledge of the law and court proceedings. Many of the people, therefore, who are deemed competent to act as intermediaries do not, in fact, have this training or these skills and would not be able to carry out the functions assigned to them.

#### 5.3.4.4 Evaluation of the Intermediary

- i. The first problem relating to the intermediary is the lack of any training that is required. Intermediaries are not required to have any particular qualification or to undergo any training before they can be appointed as an intermediary. Consequently persons are appointed to act as intermediaries and they have no training or experience to carry out the functions required. This proved to be a problem as well in Israel with regard to the youth investigator (*supra*).

It is submitted that section 170A should set out the training which an intermediary must have undergone, namely knowledge of developmental psychology, acquisition of language by children, psychology of abuse, and a knowledge of law and procedure insofar as they are relevant to the conducting of a legal (investigative) interview.

- ii. The second criticism relates to the list of persons mentioned in the Government Gazette as being capable of acting as intermediaries. The fact that certain professions have been categorised as being competent to be intermediaries means that other persons who may be qualified will not be allowed to perform these functions. For instance, in the *Jurgens* case *supra* the intermediary was a prosecutor. In addition, the professions listed do not necessarily have the necessary training to carry out the functions of an intermediary. As mentioned above, none of these professionals have any training on how to conduct legal interviews and some of them do not necessarily have training to communicate with children. Because intermediaries are not trained, they have difficulty in performing the duties assigned to them. In the interviews conducted with the magistrates, they explained that in practice intermediaries were mostly just repeating the questions. Only with very young children were they prepared to go further. In workshops conducted with intermediaries by the author, the intermediaries complained that they were afraid to change questions as they had received no training and were unsure how much leeway they would be allowed.

Ordway (1981:139-140) also proposed the existence of an official like the intermediary and was of the opinion that this person should have dual qualifications: he should be qualified to deal with victims of child sexual abuse as well as be familiar with legal practices:

"In order to be truly helpful in this role, the expert should understand the importance of objectivity and be familiar with pretrial and trial procedures. Such training could be provided by court personnel or through experience. The expert must realize the dual purpose of the job: to aid the child and to help the trier of fact rationally decide whether to believe the child."

It is submitted that this list should be repealed. If the qualifications of an intermediary are set out in the section as suggested in (i) above, it is not necessary to list the persons who would qualify. At present, the court, when appointing an intermediary, has to determine whether the person before them can be appointed in terms of the list published in the Government Gazette. Instead, at this inquiry, the court can determine whether the person has the necessary qualifications. This would not result in the exclusion of persons who would otherwise comply.

- iii. An intermediary should perhaps, it is submitted, be seen as more of an expert than a mere interpreter. He should be given the power to offer an opinion as to whether a question can be understood by the child and also be allowed to represent the child's interests as to ensure that the child is given a break and taken care of. However, this will still not address the fundamental problem that, unless the prosecution and defence know how to conduct an interview with a child, the intermediary is unable to structure the interview in the way in which a child will best understand. The only way in which this can be addressed is by allowing the intermediary to conduct the entire interview under the watchful gaze of the Court.
- iv. Generally, there is confusion as to what the role of an intermediary encompasses. Is the intermediary allowed to meet the child before the court appearance to give the child an opportunity to become familiar with him? This may give rise to allegations by the defence that the child has been prepared and that there is the danger of suggestion. However, why should the child be prepared to speak to the intermediary if he is also a stranger. What difference does it make that the child is talking to the intermediary or the prosecutor? The idea was surely to enable the child to speak to someone whom the child felt at ease with. In order for this to happen, the child will have to meet the intermediary before the trial.

In fact, Spencer (1987b:447) argues that the insistence on courtroom questioning by strange adults is one of the many factors which combine to make it impossible for a young child's account of an incident to be placed before the court. As a possible recommendation he says that:

"...the prosecution must be given the option of putting questions through a person who has already gained the child's confidence."

In evaluating the appointment of a person such as an intermediary, Davies (1991:189) argues that the Pigot Committee foresaw that an intermediary "would be a person known to and trusted by the child" since this

would protect the child from having to be questioned by a variety of strangers. In order to rule out any confusion, it is suggested that rules of practice be formulated and implemented as to the procedure to be followed by intermediaries. It would have to address issues such as: whether the intermediary may meet with the child before the court appearance; whether this meeting can take place, for instance at the home of the child; whether the intermediary may take the child to court in preparation for the trial so that the child is not confronted with an alien environment on the day of the trial; and whether, the intermediary is responsible for taking care of the child during breaks and ensuring that the child gets something to drink etc.

- v. A further possible criticism was raised by one of the magistrates with whom an interview had been conducted. He was of the opinion that the use of an intermediary was time consuming and unnecessary in cases where the witness was not very young. He proposed that children twelve years and older should generally testify out of the accused's presence but without the aid of an intermediary. Intermediaries should only be used in exceptional cases of youngsters. He only found intermediaries to be beneficial in the case of very young witnesses or witnesses of very low intelligence.

### 5.3.5 Constitutional Implications of s170A

In *Jurgens supra* the magistrate refused the application to allow the child to give evidence from another room and to make use of an intermediary on the grounds that they conflicted with the accused's fundamental rights to confrontation and cross-examination and would amount to an irregularity. In Canada a trial judge in *R v H (B.C.)* (1990) 58 C.C.C. (3d)16 (Man. C.A.) allowed the use of closed-circuit television and appointed an intermediary to conduct the examination at the trial because the accused had insisted on representing himself. On appeal the court held that the trial judge erred in allowing the questions to be asked through an intermediary since the right to cross-examination was fundamental and that it was not only a right to frame questions but also to express them in a way which was consistent with the examiner's choice. Often the way in which a question is framed is as important as the question asked.

The constitutionality of s170A came before the court for decision in the *Klink* case *supra* where the applicant alleged that this section limited his right to a fair trial. In order to determine whether the applicant's right to a fair trial has been limited, it is necessary first to determine the scope and content of his right and then to ascertain whether section 170A interferes with this fundamental right (Cachalia et al 1994:107). This entails a balancing act between competing values, as explained by Chaskalson J in *S v Makwanyane* 1995(6) BCLR 665(CC) at 709C-F:

"The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality ... In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society, the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question."

In this process the right of the accused to a fair trial and the interests of the child witness must be balanced. But ultimately it is the interest of discovering the truth and the fundamental principle of justice for all that must be decisive.

The applicant in the *Klink* case *supra* alleged that s170A went too far in protecting child witnesses and resulted in an unreasonable and unnecessary limitation of the fundamental rights of an accused person to a fair trial. His main concern related to the appointment of an intermediary and he argued that this appointment limited, or even excluded, a proper cross-examination of the complainant and thus amounted to a violation of his right to a fair trial (408E-F).

The court at 409C referred to s25(3) of the Interim Constitution which guaranteed an accused the right to a fair trial. Although this section contained a list of specific rights, the list was not exhaustive but included in the concept of a fair trial other common law rights which were not included in the section. In *S v Rudman and Another; S v Mthwana* 1992(1) SA 343 (A) the Appellate Division at 377 held that the right to a fair trial involved an inquiry into:

"whether there has been an irregularity or illegality, that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted."

It must be determined whether a trial was fair in accordance with "the notions of basic fairness and justice" or with the "ideas underlying the concept of justice which are the basis of all civilised systems of criminal administration" (at 377).

Although s25(3)(d) of the Interim Constitution, in terms of which the *Klink* case had to be decided, and s35(3) of the final Constitution do not mention the right to cross-examination, the right to challenge evidence includes the right to cross-examine. At common law the right to cross-examine is regarded as a fundamental right, the denial of which will amount to an irregularity. This right is also enshrined in s166 of the Criminal Procedure Act of 1977.

The issue that had to be decided in *Klink* therefore was whether cross-examination by means of an intermediary was inconsistent with the right to a fair trial because it violated the right of an accused person to challenge or cross-examine a child witness. Section 170A does not exclude the right to cross-examine. In fact s170A(2)(a) expressly says that cross-examination must take place via an intermediary. The emphasis of this application was based on the fact that the cross-examination has to take place through the medium of the intermediary. It was the use of the intermediary which it was felt unduly fettered the right to cross-examination for "questioning through an intermediary may destroy the effectiveness of cross-examination" especially as the intermediary has the power to convey only the general purport of the question unless the court directs otherwise (at 409I).

Accepting that cross-examination was a powerful weapon which often plays an important part in a trial court's decision (409J), the court, however, emphasised that the object of cross-examination was twofold, namely to elicit information that was favourable to the party conducting the cross-examination, and also to cast doubt upon the

accuracy of evidence given against the party. The court is entitled to intervene to prevent counsel from "conducting a bullying or intimidating form of cross-examination" or if the questioning appears to be calculated at confusing the witness (410D-E). Therefore a determination whether a limitation of the accused's right to cross-examination has resulted in the denial of a fair trial will depend on the circumstances of the particular case.

This right which the accused has to a fair trial must be balanced with the protection of a child's interests. In examining the latter, the court accepted that the incidence of crimes involving the abuse of children had risen significantly in recent years. Other factors that had to be taken into account included the following: fear of investigation and trial seriously impeded the combating of these crimes; child witnesses experienced significant difficulties in dealing with the adversarial environment of a court room, especially the aspects of confrontation and cross-examination; and children experience great difficulty in understanding the language of legal proceedings and the role of the personnel involved (410G-H). The court accepted that children have difficulty in communicating in the court context where the manner in which questions are asked may distort the meaning attached to the child's language. The court experience amounts to a second victimisation, where the victim must relate in graphic detail the abusive acts perpetrated upon them. This all occurs in the presence of the alleged perpetrator, after which the victim is subjected to intensive, often protracted and aggressive, cross-examination by the accused or his representative. This secondary victimisation may be as traumatic and as damaging to the emotional well-being of the child as the original assault was. Having dealt with the effect of confrontation and cross-examination on child witnesses, the court at 411D-E came to the following conclusion:

"It is sufficient to say that I am quite convinced that a child witness may often find it traumatic and stressful to give evidence in the adversarial atmosphere of the court room, and that the forceful cross-examination of a young person by skilled counsel may be more likely to obfuscate than to reveal the truth. Moreover, criminal prosecutions may be thwarted because of the unwillingness of young witnesses to subject themselves to the ordeal of the court hearing, even if the proceedings are *in camera*. From these remarks it seems to me to be obvious that the ordinary procedures of the criminal justice system are inadequate to meet the needs and requirements of the child witness."

The court accepted that s170A was designed to address the imbalance and to provide protection for the young witness. This question raised in this case, therefore, was whether in protecting the child in this way an accused person's right to a fair trial was violated. In evaluating s170A the Court highlighted the fact that the section did not preclude an accused from representing himself or from being represented by counsel. The accused also is not prevented from asking questions in cross-examination either personally or through his representative. The cross-examiner's questions are put to the witness by the intermediary. The court at 411I held:

"This does not appear to me to be a limitation of the right to cross-examine. The intermediary acts, in a sense, as an interpreter; and interpreters are widely used in all of the trial courts in this country."

The court further accepted at 411J-412A that it was not only the content of a question that was important in cross-examination but also the "intonations of voice and nuances of expression". It was therefore possible that the forcefulness and effect of cross-examination could be blunted when an intermediary was used, but this did not mean

that the accused would be denied the right to a fair trial, since the court also had to take into account the interests of the child witness.

An important point raised by Melunsky J at 412B-C was that, although criminal proceedings should be "scrupulously fair", it did not follow by implication that a modification to the accepted rules of evidence and procedure would automatically be open to objection. He used the Canadian decision in *R v Levogiannis* (1993)18 CRR (2d) 242 to support this point. Judge L'Heureux-Dubé explained at 250 that the criminal process must enable a presiding officer to get at the truth of a case while simultaneously providing the accused with an opportunity to present a proper defence. Rules of evidence and procedure were evolving rules and the trend in Canadian courts was to remove those procedures which created barriers to ascertaining the truth. This was supported by the decision in *Regina v Toten* (1993)16 CRR (2d) 49 (Ontario C.A.) where Doherty JA explained at 58:

"The public adversarial process is, however, a means to an end - the ascertainment of truth - and has virtue only to the extent that it serves that end. Where the established process hinders the search for truth, it should be modified unless due process or resource-based considerations preclude such modification."

Applying these principles, Melunsky J at 412E-F held that the use of an intermediary did not affect the fundamental fairness of the judicial process, since the witness could be questioned on all aspects of his evidence while at the same time the intermediary could play a role in balancing the interests of the accused with those of the child witness "by allowing the latter to be integrated into the criminal justice system without disturbing the fundamental fairness of the process". In fact, Melunsky J held at 415G-H:

"A proper balance between the protection of a child witness and the rights of the accused to a fair trial can, in my view, be achieved by permitting the witness to testify in congenial surroundings and out of sight of the accused."

A further issue which the court had to address was whether the authority given to an intermediary to convey the "general purport" of any question resulted in such unfairness to an accused that it interfered with his fundamental rights. The applicant argued (at 412G-H) that this right of the intermediary unreasonably restricted the accused's right to cross-examination. A cross-examiner, he argued, had the right to decide how he wished to phrase his questions and, by allowing the intermediary to "filter" the questions, the planned line of cross-examination could be completely frustrated and derailed.

The court held at 412H-J that there were sound reasons why the intermediary was entitled to convey only the general purport of the question since it enabled a child witness to participate properly in the system. According to *S v Gidi and Another supra* at 540E, questions should always be put in a form that is understandable to the witness. There is the danger that a child, especially a very young one, may not understand or appreciate the content of a question. It is, therefore, in the interests of justice for questions to be posed to children in a way appropriate to their development. This assists the court in their function of establishing the truth without depriving the accused of his right to cross-examine. In addition, the role of the intermediary is very limited. He is not permitted to change the question. He must convey the content and meaning of the question in a language and form that is understandable

to the child. A further control is provided by the presence of the presiding officer who monitors the proceedings and can see whether the intermediary carries out this function properly and without any prejudice to the accused. In terms of s170A the court has the power to intervene and insist that the intermediary should convey the actual question and not just its general purport.

It was accepted by the court that the application of this section could in certain instances give rise to unfairness to an accused person, but it was the duty of the presiding officer to guard against this (at 413E). Du Toit et al (1997:22-31) also emphasise that the court must ensure that the fundamental purpose of cross-examination is not frustrated. The accused must be given an opportunity to present his case by putting pertinent and probing questions to those who give evidence against him. The controlling factor should always be the right to a fair trial.

The final decision of the court at 413 G was that the provisions of section 170A did not violate the fundamental rights of the accused to a fair trial.

The applicant in the *Klink* case, an eighteen year old male, was charged with the rape of a sixteen year old girl. He contended that "he was entitled to equal protection before the law and that the complainant (whom he submitted lived a life of a young adult) would be protected as if she was a child while he, a scholar, would be treated like an adult" (408D-H). The applicant did not pursue this contention in argument, but it will nevertheless be pursued here to determine whether it would have assisted him in any way.

The right to equality does not mean that all must be treated identically (Cachalia et al 1994:25). Most legal rules do differentiate between people - who may vote, who has to pay tax and what amount, who must go to school *et cetera*. The minimum content to be given to the phrase 'equal before the law' is that of equality of process, meaning that each person is to be accorded equal concern and respect in the formulation and application of the law. Differential treatment does not necessarily mean (unconstitutional) unequal treatment. Differentiation will be unjustified if it is based on a personal quality which has no relation to the purpose or object of the differentiation (Du Plessis and Corder 1994:141). This is supported by the comments made in the matter of *AK Entertainment CC v Minister of Safety and Security* 1995(1) SA 783 (E) at 789I-J:

"In my view, however, and where the application of a law is in issue a transgression of section 8(1) or (2) will arise only if the organ of State intends to apply the law unequally or if a law is enforced according to a principle which has a discriminatory effect due to some particular characteristic of the discriminatee."

This view is to be found in other jurisdictions as well. For instance, the European Court of Human Rights has found that a violation of the equality provisions arises if there is differential treatment in circumstances where there is no objective and reasonable justification therefore or, where there is such a justification, there is a lack of proportionality between the objective of the measure and the means employed. Based on this approach the court has found that a progressive tax system is not discriminatory, provided that the system is proportional and can contribute to a fairer distribution of income (Van Wyk et al 1994:201). The Indian Supreme Court has held that a classification of people must have a rational basis in terms of the object which the legislation seeks to achieve.

The equality provision in the Indian constitution does not forbid classification between citizens as long as the differentiation is intelligible and has a rational relation to the object sought to be achieved by the statute (Van Wyk et al 1994:203).

From the foregoing discussion on the reasons for the introduction of section 170A, it is clear that there is a sufficiently rational basis for the 'classification' contained in section 170A. It should furthermore be clear that there is a rational relationship between the 'classification' and the object sought. This contention of the applicant would, therefore, not have assisted him.

It is further submitted that the applicant's argument of a classification (discrimination) contained in s170A is fundamentally flawed, since an accused cannot compare himself with a witness for the purpose of determining discrimination or not. The applicant should rather have argued that he was treated differently to other accused, who are not subject to the prescriptions of section 170A and are not witnesses. The accused is not a witness and *vice versa*. Witnesses are treated in a particular way and accused are treated in a particular way and each is distinct from the other. Since s170A refers to "any witnesses under 18", it is therefore foreseeable that the accused, if he is under eighteen and assumes the role of a witness, must also be afforded the protection of s170A, as in the case where he gives evidence against a co-accused.

Although it has been argued that s170A does not interfere with the fundamental right of an accused person to a fair trial, this does not mean that the way in which the section is applied in a specific case cannot be unconstitutional. This could very well arise, but then there are available procedures to attack the application of the section. The presiding officer is always under a duty to ensure that the procedure is conducted fairly and that the intermediary performs his function properly and without prejudice to the accused, as explained in *Klink supra* at 413A-B.

## 5.4 Public Hearing

### 5.4.1 Basis of the Right to a Public Hearing

It is a general rule of South African criminal procedure that such proceedings take place in an open court (SA Law Commission 1989:3). Section 35(3)(c) of the Constitution Act of 1996 provides that an accused person has the right to a public trial in an ordinary court of law. The basis of this right is explained by Lord Diplock in *Harman v Home Office* [1983] AC 280 as follows at D:

"Publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity. It keeps the Judge himself, while trying, under trial."

Firstly, the reason for making judicial proceedings public is to ensure trustworthiness and completeness of evidence. This is further explained by Wigmore, as quoted in *S v Leepile and Others (I) supra* at 338D-F:

"Its operation in tending to improve the quality of testimony is two-fold. Subjectively, it produces in the witness's mind a disinclination to falsify; first, by stimulating the instinctive responsibility to public opinion, symbolised in the audience, and ready to scorn a demonstrated liar; and next, by inducing the fear of exposure of subsequent falsities through disclosure by informed persons who may chance to be present or to hear of the testimony from others present. Objectively, it secures the presence of those who by possibility may be able to furnish testimony in chief or to contradict falsifiers and yet may not have been known beforehand to the parties to possess any information...the same advantage gained and much relied on in modern times when the publicity given by newspaper reports of trials is often the means of securing useful testimony."

Secondly, Wigmore lists the following further advantages of having a public hearing, as quoted in *S v Leepile and Others (I) supra* at 338 H-J: the court, in acting under the public eye, is forced to "a strict conscientiousness in the performance of duty"; persons who, although not parties in a dispute, may be affected by litigation and should be afforded an opportunity to find out what is going on; by allowing the public to be present at a trial the respect for law is increased and a strong confidence in judicial remedies is gained. This was explained by Brennan J in *Richmond Newspapers Inc. supra* at 1001:

"Secrecy is profoundly inimical to this demonstrative purpose of the trial process. Open trials assure the public that procedural rights are respected and that justice is afforded equally. Closed trials breed suspicion of prejudice and arbitrariness which in turn spawns disrespect for law. Public access is essential, therefore, if trial adjudication is to achieve the objective of maintaining public confidence in the administration of justice."

This requirement that a trial must be public amounts to the constitutionalisation of a long-recognised principle of transparency in criminal proceedings. The purpose of insisting on a public trial is to enable the public to be fully informed of the evidence so that they are properly able to evaluate the judgment (Du Plessis and Corder 1994:176). The enshrinement of this right ensures that secret trials employed by totalitarian states will not be acceptable under the Constitution. In *Klink v Regional Court Magistrate NO supra* Melunsky J pointed out at 414H that "it is of the essence of a democratic society that the criminal law should be administered publicly and openly".

This principle is enshrined in s152 of the Criminal Procedure Act 1977 which provides that criminal proceedings must be conducted in open court except where otherwise expressly provided. Section 16 of the Supreme Court Act 59 of 1959 also provides that all proceedings take place in open court unless the court orders otherwise.

#### **5.4.2 Exceptions to the Right to a Public Hearing**

Although an accused person has a right to a public trial, this right is not absolute and exceptions to this right are to be found in s153 of the Criminal Procedure Act of 1977. The first exception relates to the interests of the state. If it appears to the court that it would be in the interests of the security of the state or of good order or of public morals or of the administration of justice that proceedings be held behind closed doors, the court may so direct (*Botha v Minister van Wet en Orde en Andere* 1990(3) SA 937 (W)). The second exception relates to witnesses

generally, and provides that if it appears to the court that there is a likelihood that a person may be harmed if he testifies in public, the court can direct that evidence be given behind closed doors and that the identity of such person not be revealed. In *S v Leepile and Others(1) supra* the court explained at 340A that this section presupposed an enquiry which would "involve[s] a careful weighing up of all the factors in the two scales, namely those favouring the open trial and those favouring the protection of the witness against harm". In *S v Baleka and Others (2) supra* the court held that, when exercising its discretion in an application for a witness to give evidence *in camera*, the guiding principle was that the courts are open to the public and should always be so, except in exceptional circumstances. The greater principle, however, is that justice must be done, and, therefore, when the right to public trial conflicts with justice being done, the former will have to yield to the latter.

The third exception in terms of s153(3) grants the court the discretion to allow a complainant to give evidence behind closed doors where the charge relates to an act of indecency or extortion. This exception has relevance to children who are the complainants in cases of indecency. The final exception relates to children and is provided for by s153(5) of the Criminal Procedure Act 1977 which reads:

"(5) Where a witness at criminal proceedings before any court is under the age of eighteen years, the court may direct that no person, other than such witness and his parent or guardian or a person *in loco parentis*, shall be present at such proceedings, unless such person's presence is necessary in connection with such proceedings or is authorised by the court."

A trial *in camera* means that all spectators are excluded from the courtroom. This would not include the accused, his legal representative, the court personnel and the child's parent or guardian, who are permitted to be present (SA Law Commission 1989:7). Minors automatically give evidence *in camera*. In *S v Els supra* the magistrate, after conducting the competency examination of a thirteen year old girl, made the following order:

"Aangesien die getuie minderjarig is word alle persone wat nie teenwoordig hoef te wees nie aangesê om die hofsaal te verlaat. Die getuie sal *in camera* getuig."

The attorney thereafter applied for permission to allow the accused's wife to remain behind as well as the attorney's articulated clerk. The court granted permission.

In *Klink v Regional Court Magistrate NO and Others supra* the physical separation of the complainant was raised in support of the contention that the applicant was denied the right to a public trial. He contended that s170A violated his right to a fair trial since it deprived him of his right to a public trial (408G-H). This argument was based on the submission that the applicant would be deprived of his right to a public trial if the complainant gave evidence in a separate room. He argued that if an accused and the witness are not in the same room there is no public trial (413I-J).

The court was referred to three US Supreme Court decisions: *Richmond Newspaper Inc v Commonwealth of Virginia supra*; *Coy v Iowa supra*; and *Maryland v Craig supra*. The latter two cases had to decide issues of confrontation rather than a right to a public hearing, but the *Richmond Newspaper Inc* case was concerned with

the rights of the public and the press to observe judicial proceedings. The American court held that a blanket order which closed the criminal trial to the public violated the First Amendment to the US Constitution. The applicant's argument here appears to be fundamentally flawed. He appears to have confused the right to a public trial with the right to confrontation. The right to a public trial ensures that trials are held openly, in the sense that the public have access to the trial and the proceedings. Confrontation, however, is the right to face the person who is accusing you. In the *Klink* case the applicant argued that he was deprived of his right to a public trial on the basis that the witness was not in the same room as him. Melunsky J addressed the issue of a public trial, although he did in passing refer to confrontation. He accepted that the right to a public trial was enshrined in the Constitution, but held that this did not guarantee the right of the accused and the witness to be physically present in the same room (414G). In coming to this decision, Melunsky J referred to *R v Levogiannis supra* where the court had to determine whether a section of the Canadian Criminal Code violated the Charter of Rights and Freedoms. This particular section allowed a judge, in certain instances, to permit a complainant under the age of eighteen to give evidence out of the presence of the accused if the judge was of the opinion that this was necessary to obtain a full and candid account of the acts complained of by the complainant. It was argued that this section violated an accused's rights to be presumed innocent until proven guilty in a fair and public hearing by an independent and impartial tribunal. The Supreme Court of Canada rejected both of these arguments. As far as confrontation was concerned, they held that this section did not deprive an accused of his right to face accusers, rather it limited the right. The second contention, that the use of the screen undermined the presumption of innocence, was also rejected since a jury could follow judicial instructions and would not be biased by a screen. In the *Klink* judgment at 415E Melunsky J noted that in *R v Levogiannis* "there was no suggestion that the use of a screen deprived the trial of its public character". In holding that s170A of the Criminal Procedure Act was not unconstitutional, Melunsky J held as follows at 415G-H:

"For the reasons which I have given I am convinced that the accused's right to a public trial is not violated merely because the complainant gives evidence in a separate room."

Since s170A does not apply automatically to all children, there are still many instances of children giving evidence in court. These sections will still have an important role to play in protecting those children from the embarrassment and humiliation of having to reveal intimate details to a room full of strangers. Despite this, the SA Law Commission (1989:16) was of the opinion that the present rules relating to trials *in camera* do not sufficiently protect the child witness because the accused and his counsel are still present "and it is indeed their presence and conduct which, as far as the child witness is concerned, lie at the root of the evil".

### 5.4.3 Restrictions on Publicity

Section 154 of the Criminal Procedure Act 1977 provides that where a court has excluded the public in terms of s153, the court may also further direct that no information relating to the proceedings held behind closed doors may be published. Section 154 goes even further and provides that insofar as complainants in cases of indecency are concerned, no information which might reveal the identity of the complainant may be published. In addition s154(3) provides:

- "(3) No person shall publish in any manner whatever any information which reveals or may reveal the identity of an accused under the age of eighteen years or of a witness at criminal proceedings who is under the age of eighteen years."

Section 154 provides three possible restrictions on the right to a public trial: firstly, a presiding officer may order that any information relating to a trial held *in camera* may not be published; secondly, no information which may reveal the identity of a witness under the age of eighteen years may be published. This section makes it an offence to publish any such material and provides that any person who contravenes this offence can be liable to a fine or a sentence of imprisonment.

The constitutionality of s154 will have to be addressed. To what extent does s15(1) of the Constitution afford the public and the media a right of access to judicial proceedings in the context of freedom of expression? According to Chaskalson et al (1996:20-34) access to the courts may be inherent in the freedom of speech and expression enshrined in the Constitution, as well as being a component of the right of access to information protected by s23, and a separately protected right under s22. The probable effect of these sections of the Constitution is that, although restrictions on access may be based upon reasonable grounds, these will no longer be assumed. These restrictions will then require justification through a balancing of the various interests involved. For instance, in *Canadian Newspapers Co v Canada (A-G)* [1988]2 SCR 122, 52 DLR (4th) 690 the court held that a mandatory ban on the publication of the names of complainants in sexual assault cases violated the relevant section of the Freedom Charter, but did constitute a reasonable limit in furthering the interest of having complaints reported by allowing the identities of complainants to be protected.

## **5.5 The Competency Requirement relating to Child Witnesses**

### **5.5.1 Introduction**

A witness is regarded as competent if he is lawfully allowed to give evidence. The general rule, contained in s192 of the Criminal Procedure Act of 1977, is that everyone is presumed to be a competent and compellable witness. The section reads:

"Every person not expressly excluded by this Act from giving evidence shall, subject to the provisions of s206, be competent and compellable to give evidence in criminal proceedings."

To determine whether a witness is competent or not, a trial-within-a-trial will have to be held at which witnesses may be called to give evidence as to the competency of the witness whose competency is in question. The latter may himself be questioned by the judge and the parties (Hoffmann and Zeffertt 1988:372).

### 5.5.2 The Competency Requirement for Children

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 (Zieff 1991:22). Section 162(1) of the Criminal Procedure Act 1977 sets out the general rule, namely that every witness must give evidence under oath or admonition. The section reads as follows:

"(1) Subject to the provisions of section 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 I shall give, shall be the truth, the whole truth and nothing but the truth, so help me God.'"

The first step then is for the presiding officer to determine whether the child witness understands the nature of the oath. According to Hoffmann and Zeffertt (1988:376), the child must understand "the meaning and religious sanction of the oath". This understanding is tested by questioning the child. The questioning is usually done by the judge or the magistrate, but could also be done by counsel.

It used to be the position that children, who did not understand the nature of the oath, were incompetent witnesses. However, in 1861 s12 of Act 4 of 1861 was introduced which enabled children to give unsworn evidence. This provision was echoed in s164 of the Criminal Procedure Act 1977, which provides:

"Any person who, from ignorance arising from youth, 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: Provided that such person shall, in lieu of the oath of affirmation, be admonished by the presiding judge or judicial officer to speak the truth, the whole truth and nothing but the truth."

In terms of this section a witness may nevertheless be competent even if he does not understand the nature of the oath, provided that he has been admonished or warned by the court to speak the truth. In *De Beer v Rex* 1933 NP 30 the complainant, a six year old girl, did not understand the nature of the oath and was, therefore, warned to speak the truth. Grindley-Ferris J at 33 held the following:

"It is clear, I think, that the complainant was a competent witness if she understood the nature of the warning or admonition given her by the magistrate..."

In *S v Eli* 1978(1) SA 451 (E) an eleven year old boy was considered too young to understand the implications of taking the oath and was therefore admonished to speak the truth (452G). Also, in *R v Dikant and Others* 1948(1) SA 693 (O) the Supreme Court had the following to say about a twelve year old witness at 696:

"... the witness was a child of such tender years that he was admonished to speak the truth and not sworn, thereby showing that in the opinion of the presiding officer he did not appreciate the moral and legal sanctions of the oath ..."

In practice the presiding officer will question the child to determine whether the child understands the nature of the oath. If the presiding officer is not satisfied that the child understands the nature of the oath, he must then inquire

whether the child is competent to give unsworn evidence (Zieff 1991:22). He does this by satisfying himself that the child understands what it means to speak the truth. In *Rex v Bell* 1929 CPD 478 Gardiner JP explained at 478 that "the law may allow the testimony of a child of 4½ years to be taken if the magistrate is satisfied that she is competent to tell the truth". The child must, therefore, have the ability to distinguish between the truth and lies and must be able "to recognise the danger and wickedness of lying" in order to be able to be competent to give unsworn evidence (Hoffmann and Zeffertt 1988:376).

In *S v T* 1973(3) SA 794 (A) the Appellate Division found that a five year old child was incompetent to give evidence since she did not have the ability to distinguish between the truth and lies (at 796C). This decision was based on the fact that, after the trial judge allowed the child to testify, it became apparent in the course of her evidence that the child was afraid and therefore unwilling to speak. The child spoke so softly that eventually her mother was approached to assist. The child then whispered the answers to her mother, who in turn repeated them to the court. The conviction was set aside on the grounds that an irregularity had occurred in allowing the mother to repeat the child's evidence since the mother had not been sworn to repeat correctly and she was herself a witness with a substantial interest in the case. Of particular interest is the fact that the child's competency (or lack thereof) was based on her fear and her inability to speak loudly. No cognisance was taken of the content of her replies (although whispered) and whether she was able to answer them adequately.

In *Chaimowitz v Chaimowitz (I)* 1960(4) SA 818 (C) the court accepted at 820A that the test for competency was whether the child "knows the difference between right and wrong and truth and untruth". The court accepted this test as the basis of competency even after quoting the more detailed test set out by Scoble at 820A:

"Obviously, a child whose intellect is so immature that he is incapable of giving any rational or coherent account of his observations, or is unable to appreciate the distinction between fact and fancy, or cannot realise the necessity of telling the truth, must be regarded as an incompetent witness."

The test, according to Scoble, requires more than a simple distinction between truth and lies. In fact, it requires that a child should be capable of making observations and giving a coherent account of these observations. In addition, the child must be able to distinguish between fact and fantasy and understand the obligation to tell the truth.

Although, in terms of the statutory requirement, the inquiry into whether a child understands the nature of the oath is still obligatory, it has, according to Hoffmann and Zeffertt (1988:376), lost much of its importance. There is no difference between sworn and unsworn evidence, the latter not necessarily regarded as being any less trustworthy than sworn evidence. In *R v Manda* 1951(3) SA 158 (A) at 163A-B Schreiner JA explained that the court is empowered:

"to admit the unsworn evidence of a child where it 'is found not to understand the nature, or to recognise the religious obligation, of an oath or affirmation', but it would be difficult, in the face of the silence of the statute on the subject, to insist on corroboration in all cases where the court considers that the child should be admonished to speak the truth rather than be sworn. A child

may not understand the nature or recognise the obligation of an oath of affirmation and yet may appear to the court to be more than ordinarily intelligent, observant and honest."

There is no fixed age at which children become competent witnesses. Rather, the courts deal with each case on its merits. For instance, in *S v T supra* the court found a five year old to be incompetent, whereas in *S v Manda supra* a three year old was found to be competent and in *Rex v Bell supra* a four-and-a-half year old girl was the principal witness in the case. In *R v J* 1958(3) SA 699 (SR) the court found a four year old girl to be competent, and remarked at 701A that "the complainant was a bright little girl who gave her evidence readily without prompting or leading."

It would appear that the age of a child is relevant to credibility rather than competency. In *De Beer v Rex supra* the court referred to the unreported Transvaal case of *Rex v George* which was decided in 1921. In the latter case Wessels JP remarked:

"To convict upon the uncorroborated testimony of a child of three years is such a dangerous thing that I cannot imagine any magistrate doing it under any circumstances ..."

In *Rex v Sideropoulos* [1910] CPD 15 Laurence J said that, in regard to the evidence of a five year old, it was unsafe to convict upon the mere evidence of a child of that age. From these cases it would seem that age has more effect on credibility than competence. In a number of these cases the child was found to be competent, but not credible without the assistance of corroboration.

### 5.5.3 The Inquiry

In each case the presiding officer must determine whether a child has the intelligence 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 himself or by holding a trial-within-a-trial at which witnesses can give evidence regarding the child's mental capacity (Hoffmann and Zeffertt 1988:376-7).

It is the duty of a presiding officer to conduct an inquiry into whether a child understands the duty to tell the truth. If this inquiry is not carried out, it may amount to an irregularity and the conviction being set aside. This is precisely what happened in *S v L* 1973(1) SA 344 (C) where the appellant was convicted of indecently assaulting a six year old girl. He appealed on the grounds that the magistrate had erred in not inquiring whether the child could distinguish between the truth and lies and that he had not warned her to speak the truth in terms of s222 of the Criminal Procedure Act 56 of 1955. It was argued on behalf of the State that it was not necessary for a presiding officer to determine whether a child can distinguish between the truth and a lie before the child gives evidence. They argued that if it became apparent in the course of giving evidence that the child is unable to make such a distinction, then it would be the duty of the magistrate to ignore the evidence or to attach very little weight to it (at 346 G-H). Van Winsen J, in giving judgement, explained that, since it is the duty of a judicial officer to determine whether a child can distinguish between truth and lies in order for him to decide competency, there would therefore be a duty upon him to inquire whether the child does have the capacity to understand the distinction (at

349 G-H). Since such an inquiry did not take place, the conviction and sentence were accordingly set aside.

There are no rules relating to the content of this inquiry. The presiding officer must determine whether the child witness is able to understand the distinction between the truth and lies. The content of the inquiry remains in the discretion of the presiding officer. In *S v T supra* the court, in determining the competency of a five year old girl, conducted the following examination at 796A-C:

"Hof: Jy moenie bang wees nie. Jy moet net praat wat jy weet wat gedoen is en wat jy gesien het. Kan jy verstaan, J? Kan jy verstaan jy moet net praat wat die waarheid is wat iemand gedoen het wat jy gesien het en wat gesê word. Ek kry die indruk dat sy nie verstaan wat die aard van haar getuienis is nie.

Staatsaanklaer: Op hierdie stadium deel ek daardie indruk.

Hof: Ons kan maar sien wat sy antwoord maar ek dink sy het nie 'n begrip wat bedoel word deur die waarheid of enigiets van die aard, sy is te jonk. Is dit nie u indruk ook nie?

Staatsaanklaer: Die is die indruk wat ek ook kry."

Based on this exchange, the Appellate Division found that, since the child did not have the ability to distinguish between the truth and lies, she was not a competent witness.

The following competency examination was conducted on the thirteen year old complainant in *S v Els supra*:

"Hof: Hoe oud is jy Jenny? --- 13.

Weet jy wat is dit om die waarheid te praat? --- Ja.

As iemand nou vir jou sê jy en mev. Nel sit alleen in 'n kamer, is dit die waarheid of is dit leuens? --- Waarheid.

Weet jy waar jy nou is en wat die doel is waarvoor jy hier is? --- Ja.

Waarvoor is jy hier? --- Omdat ek verkrag is.

Goed, ek bevind dat die getuie bevoeg is om getuienis af te lê. Jenny jy moet net die waarheid te praat wat jy self ondervind het en nie wat ander mense vir jou vertel het nie. Kan jy dit doen? --- Ja."

The court decided that the girl was competent to give evidence under oath. However, in the case of the second witness, a girl of ten, the court only warned her to tell the truth:

"Hof: Hoe oud is jy Desirè? --- 10.

Desirè weet jy wat is dit om die waarheid te praat en weet jy wat is dit om leuens te vertel? Weet jy nie wat is dit om te jok nie? --- Ja.

Weet jy? --- Ja.

As iemand vir jou sê dat hierdie ligte dood is, is dit die waarheid of is dit leuens? --- Waarheid.

Kyk na die lig? --- Leuens.

Jy moet net vertel wat die waarheid is wat jy self ondervind het, nie wat ander mense jou vertel het om te sê nie. Kan jy dit doen? --- Ja."

The third witness called in this case was a thirteen year old girl, and the court found her competent to give unsworn evidence:

"Hof: Wat is u naam? --- Jo-anne.

Jo-anne? --- Jennings.

Jo-anne gaan jy skool? --- Ja.

Watter standerd is jy? --- 4.

St 4. In watter skool is dit? --- Diaz.

Jo-anne weet jy wat is dit om die waarheid te praat en weet jy wat is dit om leuens te vertel, wanneer 'n mens jok? As iemand vir jou sê hierdie ligte is dood. Kyk maar na die ligte. Wat is dit? Die waarheid of jok hy? --- Jok.

Dit is 'n hof die. In die hof moet ons die waarheid praat wat jy self gesien het en gehoor het, nie wat ander mense vir jou vertel het wat gebeur het nie. Sal jy dit kan doen? --- (Geen hoorbare antwoord)."

Of the three competency examinations conducted in this case, one resulted in the girl (aged 13) being allowed to give evidence under oath, while the other two girls (aged 10 and 13 respectively) were allowed to give unsworn evidence. No reasons for these distinctions were given.

In *S v Nozakuzaku* 1995 case number SH 6/84/95 (E) (unreported) the following examination of a thirteen year old girl was conducted:

"Court: How old are you at present? --- 13 years of age.

Are you a scholar? --- I am a scholar.

What standard are you? --- Standard IV.

Do you know what it means to tell the truth or don't you know? --- I know.

Do you know what it means to take the oath or don't you know? --- I do know.

You are now warned to tell the truth, the whole truth and nothing but the truth. --- Yes."

Here again the court warned the witness to tell the truth, thereby enabling her to give unsworn evidence.

Four boys, aged between eight and eleven, gave evidence relating to alleged indecent assaults in *S v Cilliers*, 1991, SH2/334/91 (E) (unreported). The following competency examinations were held: An eight year old was warned to tell the truth after the following examination:

"Hof: Voor ons nou begin, kan jy net vir my sê hoe oud is jy? --- 8.

In watter skool is jy? --- Summerwood.

In watter standerd is jy? --- Standerd 1."

The other eight year old witness was also warned to tell the truth after the following examination:

"Hof: Hoe noem die mense jou, Frans of Nicolas? --- Frans.

En hoe oud is jy nou Frans? --- 8.

Is jy 8 jaar oud? --- Ja.

Gaan jy al skool? --- Ja.

Watter standerd is jy? --- Sub B."

The eleven year old was found to be competent to take the oath after the following examination:

"Hof: Hoe oud is jy nou? --- 11.

Standerd 3? --- Ja."

#### 5.5.4 Evaluation of the Competency Requirement

In evaluating competency, there are two components which need to be separated. The first component is the 'eyewitness ability' i.e. the ability to report the details of an observed event accurately and completely. This relates to the cognitive development of the child which includes not only the individual abilities of a particular witness but also to general factors which influence the acquisition, retention, retrieval and verbal communication of information. The second component of competency relates to the witness's willingness to tell the truth i.e. the motivational aspect. This component concerns the truthfulness of the statements made (Undeutsch 1984:51).

##### 5.5.4.1 Cognitive Aspects of Competency

In order for a witness to give evidence effectively, the witness must have adequate cognitive skills both to comprehend the event witnessed and to be able to communicate his memories of the event (Melton 1981:75). Therefore, if a child is to be an effective witness, he must have the cognitive ability to observe the event, the ability to remember, the ability to communicate and the capacity to understand the distinction between truth and lies (Stafford 1962:313).

In *Woji v Santam Insurance Co Ltd* 1981(1) SA 1021 (A) the court accepted these principles, although they found them to be indicative of trustworthiness and therefore relevant to credibility rather than competency:

"Trustworthiness ... depends on factors such as the child's power of observation, his power of recollection, and his power of narration on the specific matter to be testified. In each instance the capacity of the particular child is to be investigated. His capacity of observation will depend on whether he appears 'intelligent enough to observe'. Whether he has the capacity of recollection will depend again on whether he has sufficient years of discretion 'to remember what occurs' while the capacity of narration or communication raises the question whether the child has 'the capacity to understand the questions put, and to frame and express intelligent answers'." (1028B-D).

Using this information to evaluate the competency examinations set out above, it becomes clear that the courts only focus on one aspect of competency, namely the distinction between truth and falsehood. The questions are not aimed at discovering the capacity of the child to observe, remember and relate an event. In the case of a young child, simple questions aimed at enquiring what the child got for Christmas or a birthday will assist the court in discovering whether the child can remember an event and relate information regarding the event. Instead, the focus of our competency examination is aimed at discovering whether the child can distinguish between truth and falsehood. In the competency examination conducted in *S v T supra* the magistrate made the following comment: "ek dink sy het nie 'n begrip wat bedoel word deur die waarheid of enigiets".

The first criticism levelled against the competency examination then is that it does not test the real basis of competency, namely the child's ability to observe, remember and communicate. The examination is aimed at only one aspect, the ability to distinguish between truth and lies.

The second criticism relates to the manner in which the competency examination is conducted. Children have great difficulty in understanding abstract concepts, and would be unable to answer questions framed in the abstract. It would be difficult for an adult to answer the question 'what is truth?', how much more then for a young child. In *S v T supra* the magistrate explained to a five year old child "jy moet net praat wat die waarheid is". The Appellate Division found the child to be incompetent, but was she, in fact, incompetent. The competency examination did not attempt to discover what the child's ability was. The examination was cursory, statements were put to the child without framing them in a manner that a five year old would understand as a question, and abstract concepts were used without an attempt to explain them.

In *S v Els supra* the magistrate, in conducting the competency examination of the thirteen year old girl transcribed above, attempted to explain abstract concepts in concrete terms. For instance, after asking the girl whether she knew what it meant to tell the truth, he then asked her the following question: "As iemand nou vir jou sê jy en mev. Nel sit alleen in 'n kamer, is dit die waarheid of is dit leuens?" This is quite an effective method of giving the child an opportunity to demonstrate an understanding of the truth. If this technique had been adopted in *S v T supra*, would the finding regarding competency not perhaps have been different.

In the *Els* case the magistrate used the same technique with the other child witnesses, namely framing abstract concepts in concrete terms. However, the one question he asked appeared to cause some confusion: "As iemand vir jou sê dat hierdie ligte dood is, is dit die waarheid of is dit leuens?" The child, aged ten, did not seem to understand the question. When he came to conduct the next competency examination, the magistrate rephrased the question in simpler segments: "As iemand vir jou sê hierdie ligte is dood. Kyk maar na die ligte. Wat is dit? Die waarheid of jok hy?"

In *S v Nozakuzaku supra* the presiding officer simply asked the child whether she knew what it meant to tell the truth and what it meant to tell an untruth. The child, also thirteen, replied that she did know, and this was accepted as sufficient to show competency. No test was conducted to determine whether she really understood the concepts. The competency examinations conducted in *S v Cilliers supra* did not refer to the concepts of truth and lies at all. It simply consisted of questions determining the child's age and whether the child was at school.

The third criticism relates to the language employed by the person conducting the competency examination. 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. For instance, in *S v Els supra* the magistrate asked a ten year old girl: "weet jy wat is dit om leuens te vertel?" When this question elicited no response, he quickly rephrased the question to: "weet jy nie wat is dit om te jok nie?" The child was able to answer the latter question.

Questions should be as simple as possible. In *S v T* in the competency examination of the five year old the following question was put to her: "Kan jy verstaan jy moet net praat wat die waarheid is wat iemand gedoen het wat jy gesien het en wat gesê word." It would take a very intelligent five year old to understand what that question meant.

#### 5.5.4.2 Willingness to Tell the Truth

The second component of competency relates to the witness's willingness to tell the truth. If a child is judged to have the cognitive capacity to testify, the next concern is whether the child will do so truthfully (Melton 1981:79). This gives rise to a further criticism of the competency examination. This examination is aimed at determining whether the child understands the distinction between truth and lies. However, even if a child does understand this distinction, this is not a guarantee that the child will be truthful. This is a moral concept, as explained by Melton (1981:79):

"Similarly, asking a child to tell the meaning of 'truth', 'oath', or 'God' probably tells more about his or her intellectual development than about the child's propensity to tell the truth".

In *Woji v Santam Insurance Co Ltd* 1981(1) SA 1021 (A) Diedmont JA at 1028D explained:

"There are other factors as well which the Court will take into account in assessing the child's trustworthiness in the witness-box. Does he appear to be honest - is there a consciousness of the duty to speak the truth?"

The present competency examination does not address this issue and since, according to Melton (1981:79), a child's behaviour is influenced primarily by the rewards, punishments and models available in a given situation, the gravity of speaking the truth will have to be impressed upon the child. The competency examinations transcribed earlier from American and British cases included questions aimed at trying to discover the importance to the child of telling the truth e.g. 'What happens if you tell a lie'.

#### 5.5.4.3 Distinction between Sworn and Unsworn Evidence

Section 164 of the Criminal Procedure Act 1977 enables a child to give evidence without taking the oath, provided the court has warned the child to speak the truth. As mentioned *supra*, Hoffmann and Zeffertt (1988:376) argue that the distinction between sworn and unsworn evidence has lost much of its importance. Unsworn evidence is not necessarily regarded as being any less trustworthy than sworn evidence. There are also no statutory provisions requiring corroboration in the case of unsworn evidence as was the case in the United Kingdom.

The only possible effect of giving unsworn, as opposed to sworn evidence, would perhaps relate to credibility. There is the implication that a child who is capable of understanding the oath will be developmentally more advanced (and therefore a better witness) than a child who does not understand what it means to give evidence under oath. This may not necessarily be true, as was pointed out in *R v Manda supra* where Schreiner JA at 163B explained that a child may not be able to understand what is meant by the oath, but may nevertheless "appear to the court to be more than ordinarily intelligent, observant and honest." However, this perception can be created, as can be seen from the case *R v Dikant and Others supra* where on appeal it was argued at 696 that:

"the witness was a child of such tender years that he was admonished to speak the truth and not

sworn, thereby showing that in the opinion of the presiding officer he did not appreciate the moral and legal sanctions of the oath and that such evidence could only be acted upon if corroborated;"

If there is no distinction between sworn and unsworn evidence in the case of children witnesses, it is submitted that all child witnesses then be allowed to give evidence unsworn. This will remove any confusion as to what weight is to be accorded to sworn, as opposed to unsworn, evidence.

On what basis does a presiding officer decide that a child will give sworn rather than unsworn evidence? In order to give sworn evidence, a witness must be able to understand the nature of the oath and the obligation to tell the truth. To give unsworn evidence the witness must be warned of the duty to tell the truth. The difference between the two would appear to be that sworn evidence requires an understanding of the nature of the oath. How is this determined? In the competency examinations transcribed above, none of the presiding officers asked questions about the oath. For instance, in *S v Els supra* the magistrate used almost identical examinations for the three witnesses and found one witness (aged thirteen) to be competent to give sworn evidence while the other two (aged ten and thirteen respectively) were allowed to give unsworn evidence. On the face of the examinations conducted, there appears to be no reason why the one thirteen year old was allowed to give sworn evidence while the other thirteen year old was warned. None of the questions used in the examination related to the oath. They all focused on the distinction between truth and lies.

The competency examinations conducted in *S v Cilliers supra* illustrate this problem very well. The two boys, aged eight, were asked the same questions (and even more) than the eleven year old. All the answers were correct yet the eight year olds were warned to tell the truth while the eleven year old was allowed to take the oath.

As can be seen from the above arguments, there are a number of difficulties with the competency examination presently used in the courts which need to be addressed.

## **5.6 The Cautionary Rule relating to Child Witnesses**

### **5.6.1 The Common Law Position**

Traditionally there have been certain types of evidence which the courts have approached with caution. These included single witnesses, accomplices, complainants in sexual cases and young children. According to Hoffmann and Zeffertt (1988:572) the purpose of the cautionary rule "is to assist the court in deciding whether or not guilt has been proved beyond reasonable doubt". The cautionary rule functions as a warning to the court that it must be careful in evaluating the evidence before it. If the evidence proves guilt beyond a reasonable doubt, then the court may convict. The warning itself does not assist the court in making the actual evaluation, but simply serves as a reminder of the dangers involved. As Hoffmann and Zeffertt (1988:579) explain: "[t]he cautionary rule is not an inflexible rule of evidence, but a practice, tested by time and experience, that is aimed at avoiding a possible injustice to the innocent".

The cautionary rule, according to Hoffmann and Zeffertt (1988:580), lays down how a court should approach evidence. They caution that it should never be applied "in a rigid and formalistic manner". The rule itself works as follows: in certain cases where falsehood or untrustworthiness is, according to general human experience extremely great, the court must warn itself of the dangers inherent in the evidence (SA Law Commission 1989:7). Once the court has cautioned itself against the dangers of accepting the evidence, it may convict on the evidence if it is satisfied that the witness is reliable. However, if the court is still not satisfied with the evidence once it has warned itself, then the court must find corroboration before it can convict (Hoffmann and Zeffertt 1989:572).

This study will look at the effect of the cautionary rule on child witnesses as well as on complainants in sexual offences, since child witnesses are very often complainants in sexual offences.

### 5.6.2 Young Children

The courts have frequently emphasised that the evidence of children should be scrutinised with great care. This rule was explained in *S v Eli supra* at 453F:

"Evidence of such young children, it has been pointed out, must be 'accepted with great caution' and must be scrutinised with care amounting, perhaps, to suspicion."

There is no particular age below which the cautionary rule applies, although in *S v Artman* 1968(3) SA 339 (A) the cautionary rule was held inapplicable to a sixteen year old girl. In *R v Sikurlite* 1964(3) SA 151 (SR) Fieldsend J mentioned that he had referred to a number of cases to determine what was meant by the phrase 'tender years', but had found little assistance. It would appear to be a question of fact in each case. He concluded at 155H by saying that he had found no authority dealing directly with the evidence of children as old as the ones in the present appeal (aged fourteen and fifteen), and held that the common sense approach would be to decide the matter on the facts of each particular case.

However, the younger the child, the greater the danger. According to Hoffmann and Zeffertt (1988:581), the courts have usually required "substantial confirmation when very young children were concerned". In *R v Bell supra* Gardiner JP at 478 held that:

"while the law may allow the testimony of a child of 4 ½ years to be taken if the magistrate is satisfied that she is competent to tell the truth, it is exceedingly dangerous to convict upon such evidence unless strong corroboration is supplied."

Although corroboration is not essential, the younger the child, the more likely the court is to find corroboration necessary. For instance, in the *Bell* case *supra* the Supreme Court overturned a conviction based on the evidence of a four-and-a-half year old because there was no corroboration, despite the fact that the trial magistrate was impressed by the child's demeanour and was a magistrate of considerable experience. This is supported by the unreported case of *R v George* where Wessels JP remarked that convicting upon the uncorroborated evidence of a three year old was so dangerous that he could not imagine any magistrate doing it under any circumstances. Also

in *R v Sideropoulos supra* Laurence J at 15 said that it would be unsafe to convict upon the evidence of a five year old unless the evidence was corroborated.

This approach has given rise to confusion since it has been interpreted to mean that the evidence of a young child must be corroborated. In *De Beer v R supra* the appellant appealed against a conviction of indecent assault, alleging that he should not have been convicted on the evidence of the complainant unless it was corroborated. Grindley-Ferris J held at 33 that there is no statutory requirement that the evidence of a child must be corroborated. However, referring to the above cases, he came to the conclusion that the *ratio decidendi* of these cases was that because of their tender age the children could not be regarded as credible witnesses. He, therefore, held that in the present case the evidence of a six year old should not be regarded as credible, and corroboration was therefore necessary. In *R v S supra* Bok J also confirmed at 422 that it was dangerous to convict only on the evidence of a child of tender years and it was, therefore, the established practice to require corroboration.

In *R v W* 1949(3) SA 772 (A) the accused was convicted of statutory rape in that he had sexual intercourse with a fourteen year old girl. The trial magistrate approached the problem on the basis that a conviction could not be based upon the evidence of the complainant alone because she was only fourteen. Her evidence could, therefore, not be accepted unless it was corroborated. He nevertheless found the girl to be a satisfactory witness, and was impressed by her manner of giving evidence, going so far as to say he believed her evidence. The Appellate Division admitted at 779 that the question whether a woman's testimony against a man in seduction and paternity cases required corroboration was an old problem which had been dealt with by the courts in a long line of cases. Watermeyer CJ held at 780 that the rule did not require that there had to be corroboration. He explained the position as follows:

"I am satisfied that in criminal cases of the kind now in question the true rule does not insist that there must be corroboration of the complainant's evidence before the accused can be legally convicted."

This is supported by the decision in *R v J supra* where Young J held that corroboration of the evidence of children of tender years is not required by any positive provision of the law. Their evidence must simply be treated with great caution (701E-F). In *R v Sikurlite supra* the court upheld a conviction based on the evidence of three boys, although in this case they were aged fourteen and fifteen. The court found that in such a case there was no scope for youthful fantasy and the boys were intelligent and remained unshaken during cross-examination.

In *R v J* 1966(1) SA 88 (SR) the court went further and said that, where there was no possibility of conscious or unconscious fabrication, the presiding officer should not allow his judgement to be swayed by fanciful and unrealistic fears (90F). Once the court has warned itself of the dangers, it may convict if it is satisfied with the witness's evidence. According to Holmes JA in *S v Artman supra* at 341B, all that is required for the court to be satisfied with a witness is that the testimony should be clear and satisfactory in all material respects. In *S v Gandu* 1981(1) SA 997 (Tk), for instance, the Supreme Court accepted the evidence of a ten year old boy, who two years previously had been the sole witness of his mother's murder. Munnik CJ commented as follows at 998H with respect to the boy's evidence:

"we are satisfied that this young boy, although young in years, is an extremely intelligent witness and was telling us the truth. We are aware of the fact that he is a single witness and that he is a child and yet, even if there had been certain features corroborating his evidence and discrediting evidence of the accused, which in itself constituted corroboration of some of his evidence, we would still have believed him."

In criminal cases the court must be satisfied beyond a reasonable of the accused's guilt, whereas in a civil case the guilt must be proved on a balance of probabilities. In *Woji v Santam Insurance Co Ltd* 1980(2) SA 971 (SE) the court had to decide the effect of the cautionary rule relating to child witnesses in civil proceedings. Kannemeyer J held at 974H that a similar cautionary rule had to be applied in civil cases, although the difference in onus had always to be borne in mind. This would have the effect that in criminal cases a court may come to the conclusion that the guilt of an accused has not been proved beyond a reasonable doubt when the evidence relied upon is that of young children. In civil cases such evidence may be sufficient when evaluated on a balance of probabilities. The judge, appreciating the dangers inherent in the uncorroborated evidence of the two young children in this case, came to the conclusion that he could not rely on their evidence. His decision was heavily influenced by the fact that the two children, both aged ten, were testifying about events that had taken place five years previously. This matter came before the court on appeal in *Woji v Santam Insurance Co Ltd* 1981(1) SA 1021 (A). The Appellate Division found the evidence of the two boys to be clear, simple and straightforward. The court looked at the record of the children's evidence and remarked as follows at 1026D:

"Again this is not evidence which is contrived or imagined; it is simple, direct and sounds truthful."

Diedmont J, examining the trial judge's reasons for finding he could not accept the children's evidence on a balance of probabilities, came to a different conclusion. He argued that there was no statutory requirement demanding corroboration, nor was there any rigid common law rule requiring that corroboration had to be present before a child's evidence could be accepted (1028A). He held further that where an action was a civil one in which the burden of proof was not so onerous, there was even less cause to insist that the child's evidence be corroborated. All that was required was that the witness's evidence be trustworthy. This did not mean that the danger of believing a child should be underrated, however. In conclusion, the Appellate Division held that they were satisfied with the boys' evidence, finding it to be trustworthy and that the trial judge had erred in rejecting it on the grounds that he could find no corroboration of their evidence (1029B).

The most recent case dealing with the evidence of children is *S v S* 1995(1) SACR 50 (ZS) where the court remarked that a new and more specific approach to cases involving children was called for. One of the grounds of appeal alleged that the magistrate had failed to observe the cautionary rule in respect of the eleven year complainant. The court at 54D accepted that it was a well-established principle that it is advisable to require corroboration of the evidence of young children since their youth indicated an "immature mind which may cause them to give ill-considered or misleading evidence". The court summarised the cautionary rule, explaining that the court had to be fully appreciative of the risks involved in the evidence of children. In attempting to discover precisely what risks are involved, Ebrahim JA listed six of the main objections to relying on children's evidence at 54H-I:

- "(a) children's memories are unreliable;
- (b) children are egocentric;
- (c) children are highly suggestible;
- (d) children have difficulty distinguishing fact from fantasy;
- (e) children make false allegations, particularly of sexual assault; and
- (f) children do not understand the duty to tell the truth."

Ebrahim JA then proceeded to evaluate the complainant's evidence in terms of these categories, and held at 60B that a rational decision as to the credibility of a witness (especially a child witness) can only be arrived at after a proper analysis of the evidence by means of testing it against the shortcomings as outlined above. In order to reach an intelligent conclusion, the court held that it was necessary to apply a certain amount of psychology and to be aware of recent advances in this field. It was accepted that this would mean an increase in a judicial officer's workload, but "it is the price to be paid for professionally administering justice in an increasingly complex society" (60C).

This judgement, it is submitted, is extremely progressive. Instead of focusing on what courts have previously had to say about the risks involved in accepting the evidence of a child, the court looked for a scientifically acceptable basis from which to examine these risks. Of special importance is the court's decision that it was necessary to apply a certain amount of psychology in these cases and that courts had to be aware of recent advances in psychology. This is one of the first decisions to emphasise the need to integrate psychology and law where child witnesses are concerned. This judgement was described as "refreshingly pragmatic" by Schwikkard (1995:93) and will provide useful guidelines for South African courts in the evaluation of children's evidence. The sensitivity of this judgment is evident in the criticism directed at the manner in which the trial had been conducted, namely that all personnel involved were male. Ebrahim JA emphasised that attention had to be given to the fact that embarrassment was likely to be experienced by a little girl when relating the details of rape.

The facts of the case themselves highlight the progressive nature of the judgment. The accused was charged with raping a nine year old girl. There were a number of difficulties in the case. The complainant did not report the incident at the first available opportunity. When she did tell her mother, she simply said that the accused had touched her breasts, her buttocks and the front of her body. Several months after the alleged rape it was discovered that the complainant was no longer a virgin when she was examined by her aunt to whom she had been sent for instruction in sexual matters. When questioned by her mother, the complainant initially remained silent and only gave details about the rape after her mother threatened to report her to the police. Despite these difficulties the accused was convicted of rape.

The judgment in *S v S supra* comes as a welcome alternative to the approach currently adopted by the South African courts and is an illustration that the time has come to re-evaluate our existing notions about the unreliability of child witnesses. As Combrinck (1995:330) argues, it is not suggested that children will always be reliable and accurate witnesses. It is submitted that children sometimes are inadequate witnesses in the same way that adults sometimes are inadequate witnesses. In such cases convictions will obviously not follow. Rather, what is advocated is that the courts be aware of the recent advances in psychology in order to reach "an intelligent conclusion" insofar as the evidence of children is concerned (at 60B-C).

In giving judgment Ebrahim JA explained at 59H-I that he adopted this method of analysing the child witness's evidence because he believed that a new and more specific approach to cases involving children was called for. It was not that there was anything intrinsically wrong with the present approach of looking for corroboration of a child's evidence. In most cases the approach was correct, but the problem arose where courts, in approaching these cases with a "single-minded eye towards corroboration", tended to lose sight of the reason for seeking it.

This danger was also highlighted in *S v Mupfudza* 1982(1) ZLR 271 (SC) where Baron ACJ explained the position as follows at 273E:

"But - perhaps precisely because of the search for corroboration - trial courts frequently forget that the court must decide whether the witness is credible ... If (he is) not, the matter is at an end, and the question of corroboration of, or support for, his testimony does not arise ..."

#### 5.6.2.1 Basis of the Cautionary Rule

Hoffmann and Zeffertt (1988:581) explain that the dangers involved in the evidence of children are twofold: children are highly imaginative and very susceptible to suggestion. In *R v Bell supra* the court explained at 478-9 the reasons why the courts need to employ the cautionary rule when evaluating the evidence of children:

"One knows from experience that children of that age are apt to be imaginative, and apt to be persuaded by people, and apt to give answers to questions sometimes on the lines on which the questions are put ..."

It is frequently alleged that children make up stories or fantasise, and are generally categorised as being 'highly imaginative'. In *Bell supra* at 480 Gardiner JP was of the opinion that children might make up allegations of sexual acts:

"there remains the possibility that the child might make up the story. Children see animals having connection with one another: they sometimes mix with children badly brought up and are apt to hear such things talked about, and it is not uncommon for children, even of this age, to imitate, or have some knowledge of sexual acts".

Bok J in *R v S supra* held that the court had to warn itself of the dangers of suggestion where child witnesses were concerned, although he found at 422 on the particular facts before him that there was not the slightest suggestion that the child's parents might have prompted him to tell the story he did. This danger was highlighted in *Woji v Santam Insurance Co Ltd* 1980(2) SA 971 (SE) where Kannemeyer J at 975H explained that the temptation to implicate an innocent person may relate not only to the child, but also to a parent. It is then that the suggestibility of children becomes particularly important. In *S v Manda supra* the Appellate Division cautioned at 163C that reliance upon the uncorroborated evidence of a young child must not be underrated:

"The imaginativeness and suggestibility of children are only two of a number of elements that require their evidence to be scrutinised with care amounting, perhaps, to suspicion."

*R v J supra* supported this perception of children, finding that the tendency of a child to romance was so marked that corroboration was in practice essential. Lewis AJA in *R v J* 1966(1) SA 88 (SR) held at 92D that the main purpose of applying the cautionary rule in cases involving young children was to guard against the danger of invention. In *S v B* 1976(2) SA 54 (C) the court was faced with the evidence of three boys, aged thirteen and fourteen, who were the complainants of alleged indecent assaults. The trial court held that the cautionary rule needed to be applied since boys of that age were subject to influences by other people, they lived in a world of their own, they imagined things and suffered from hallucinations (57H).

The South African Law Commission (1989:34) was of the opinion that there was no justification for changing the existing position relating to the cautionary rule and corroboration, since it had been developed over many decades and was founded on the practical experience of generations of legal professionals. They based this decision on the fact that children are often unreliable witnesses and are unable to interpret events, even though they may be good observers. Furthermore, they can easily be manipulated and intimidated and are frequently influenced during cross-examination.

The dangers inherent in a child's evidence were summarised in *S v S supra*. The first allegation is that a child's memory is unreliable. In looking at the available research, Ebrahim JA explains at 55B-E that children generally have a good recall of central events but their memory is poorer with respect to peripheral details. This principle was then applied to the facts of the case with which he was dealing where the complainant gave a clear account of the alleged assault but was unsure when questioned about who was in the next-door classroom when the assault occurred.

Secondly, children are accused of being egocentric. Preschool children, it is argued, may be so concerned with themselves that they may be unable to be objective about the truth. The ability to infer what others are feeling or thinking develops at ages four to five. As far as the argument that a child may pay disproportionate attention to evidence which relates to himself is concerned, this is not regarded as being a characteristic peculiar only to children. All witnesses do so in differing degrees (55F-G).

Thirdly, children are alleged to be suggestible. Research has shown that this is certainly true, but not only of children. Adults are also suggestible. Courts will have to scrutinise the evidence of witnesses to see whether there is any evidence that a witness may have been influenced in some way (55I-56I).

The fourth accusation is that children have difficulty in distinguishing fact from fantasy and are therefore liable to tell the court of their fantasies rather than give a factual account of what happened. The court, however, emphasised that children do not fantasise over things that are beyond their own direct or indirect experience (57B).

The fifth allegation suggests that complaints of rape, especially by children, are fundamentally suspect. Ebrahim JA held at 57I that the over-emphasis of possible fantasy was not justified. In each case it remained a question of the credibility of the specific witness.

The last objection to children as witnesses is that they do not understand the duty to tell the truth. This, it is argued, is a sweeping statement which ignores differences in age, intelligence and morality between children (59F).

### 5.6.2.2 Criticism of the Cautionary Rule

Despite the criticisms that have been levelled against children as witnesses, there are a number of cases where the courts have praised young witnesses. In *R v S supra* Bok J commented on the evidence of the complainant, a ten year old boy, as being favourable. He believed that the boy stood up to cross-examination "exceptionally well, never giving the impression that he was trying to fabricate stories." At 422 the court said:

"I hardly think that a child of his age could, on the spur of the moment, make up the story he told his mother on the 12th June and then come into court and tell the same story in detail ..."

In *R v J* 1958(3) SA 699 (SR) the trial judge found a four year old girl to be "a bright little girl who gave her evidence readily without prompting or leading" (701A). In *R v W supra* the trial judge was very impressed with the detailed evidence of a ten year old girl, especially the observation she made that she could not see the church door because the wall was higher than she was, but later she saw the complainant coming out of the doorway because she had in the meanwhile moved her position and was standing higher up where the wall was not so high. The trial judge remarked that it was "[m]erkwaardige getuienis van 'n kind van 10 jaar" (777). Ironically, this was the very reason that the Appellate Division found the child's evidence to be suspicious:

"The magistrate was impressed by the fact that Caroline Muggles was able to give a detailed account of what was supposed to have happened, down to her precise changes of position while the complainant was in the church ... But it seems to me that the claim made by this little girl of 10 to be able to remember all these details, to her so utterly unimportant, after an interval of seven or eight months should have suggested to the magistrate doubts as to whether she was really speaking to what she could remember and whether therefore she was a reliable witness."

It would seem that the perception of children as being unsatisfactory witnesses is so ingrained that when a child does give a detailed account of events this in itself is regarded as highly suspicious, even where no foundation has been laid for this suspicion. The standard, therefore, applied to the evidence of children is much higher than that applied to adult witnesses. This was expressly stated in *S v Manda supra* where the State's case was based on the evidence of three boys, who appeared to be aged eleven, five and three respectively. The one boy said that the appellant was wearing shoes while the others said he was not. At 164A Schreiner JA made the following comment in response to this:

"Such discrepancies might in other circumstances seem to be of little importance but where the evidence of young children is in question proved uncertainty of observation or recollection reinforces the generally accepted need for caution in relying upon their evidence".

In the same case the judge went so far as to say at 163D that the evidence of children should be scrutinised with care amounting to suspicion.

Even though the courts have accepted that corroboration is not essential, the standard employed in the case of children makes it almost impossible to convict where the only witnesses are children. In *R v J supra* it was alleged that the accused had indecently assaulted a four year old girl. The child gave evidence and created a very good impression on the trial judge. Her elder sister, aged eight, gave evidence that she had looked through the window and witnessed the assault. The feasibility of the alleged view was confirmed by a test. The elder sister's evidence supported the complainant's in all respects. Yet, the appeal court held that the state's case depended primarily on the evidence of the two girls and since children are imaginative and suggestible, the conviction could not stand without corroboration. This decision creates the impression that, although corroboration is not essential, the fact that the evidence of children is to be viewed as suspicious results in corroboration becoming necessary in every case.

A further criticism that can be levelled against the warning is the fact that it accepts the perceived dangers of child witnesses as being true in every case. For instance, in *R v J supra* the court does not warn itself that there is a possibility that a young child may be imaginative and suggestible, and then attempt to find evidence of this. Rather, the court assumes as fact that a child of four is imaginative and suggestible to such an extent that corroboration "is in practice essential" (702A).

The decision in *R v J* 1966(1) SA 88 (SR) cautions against this approach. MacDonald AJP stated at 90E-F that, although there was a need to scrutinise and weigh up the evidence of children, this should not be allowed to displace the exercise of common sense:

"If a judicial officer, having anxiously scrutinised such evidence with a view to discovering whether there is any reasonable possibility of conscious or unconscious fabrication, is satisfied that there is no such possibility and that the evidence of a single Crown witness may, due and proper weight being given to the whole of the evidence, be safely accepted as proving the guilt of the accused beyond reasonable doubt, he should not allow his judgment to be swayed by fanciful and unrealistic fears."

Although Lewis AJA explained that the main purpose of applying the cautionary rule in the case of child witnesses was to guard against the danger of invention (92D), he nevertheless went on at 94G to say that there was no basis for alleging that a child would imagine some other (innocent) person to be the perpetrator:

"I know of no authority which suggests that there is an inherent danger that a child, who has been wronged and injured in this way by a person known to her and who feels genuinely hurt and aggrieved by what has been done to her, will immediately thereafter either imagine that the wrongdoer is someone else or maliciously blame someone else for the wrong done to her. On the contrary, common sense and human experience suggest that the spontaneous reaction will be to name the real offender."

The emphasis on a common sense approach was again reiterated in *S v Artman supra* where Holmes JA warned against the dangers of formalism at 34B-C:

"I would add that, while there is always need for caution in such cases, the ultimate requirement is proof beyond reasonable doubt; and courts must guard against their reasoning tending to

become stifled by formalism. In other words, the exercise of caution must not be allowed to displace the exercise of common sense;"

Evidence of this approach is to be found in *Woji v Santam Insurance Co Ltd* 1981(1) SA 1021 (A) where the Appellate Division found the evidence of two ten year old boys to be clear, simple, straightforward and truthful, despite the fact that the boys were testifying about events that had happened five years before the trial. At 1025A Diedmont JA admitted that young children can give good evidence:

"Despite his youth - or perhaps because of his youth - Sibonde's evidence was clear, simple and straightforward."

The Appeal Court dealt with the fact that the children were giving evidence about an event that had taken place five years previously, and accepted that a child's memory was often reliable:

"A complicating factor in this case was, as was emphasised by the trial Judge, that these two children were speaking of an incident which had happened five years before and the question must be asked whether their capacity of recollection may not be wholly unreliable. I think not. It is well known that children often have a vivid memory of an unusual or exciting incident" (1028H-1029A).

In sharp contradiction, Smalberger J in *Damba v A A Mutual Insurance Association Ltd* 1981(3) SA 740 (E) found that a child of eleven could not give an accurate and reliable account of what took place three-and-a-half years earlier, and was therefore not prepared to accept his evidence without corroboration:

"I do not consider it likely that a child of his years can project back more than three and a half years and provide an accurate and reliable picture of his intelligence, knowledge and maturity at that time" (744H).

It has been argued that the cautionary rule has been based on common sense and experience, yet the above two cases indicate that these principles are not applied uniformly. In fact, other than ensuring that the evidence of children is treated with suspicion, these principles do not assist in any way in evaluating the reliability of this type of evidence. There is no scientific basis in terms of which evidence can be evaluated, and this task is left up to the discretion of individual judges, the opinions of whom differ vastly as to the reliability and accuracy of children's evidence.

In *Jabaar v South African Railways and Harbours supra*, for instance, King AJ hypothesised as to possible reasons why the child witness, aged twelve, could perhaps be open to suggestion. Although a court is not supposed to hypothesise as to probable causes without an evidentiary basis being laid, the courts nevertheless do so when applying the cautionary rule. In evaluating the evidence of a child, the courts do not look only at the evidence laid before them regarding possible dangers in the specific witness's evidence, but go further and look at any feasible influence that may perhaps have been exerted on the evidence. This can be seen from the following statement by King AJ at 555G-H:

"The fact that he was able to maintain in the witness-box that he and his brother had been sitting on the pavement could very well have been due, not to a deliberate attempt on his part to lie, but to the fact that he must have been susceptible, consciously or unconsciously, to the influence of the adults nearest and dearest to him who in their turn could, deliberately or otherwise, have influenced him in his recollection of the accident."

In *S v F* 1989(3) SA 847 (A) the court at 854I in fact stated that "[i]t is true that these possibilities are speculative and that a court is not usually required to speculate on possibilities having no foundation in the evidence placed before it."

The above criticisms relate to the arbitrary manner in which the cautionary rule is applied to children and the conflicting decisions it gives rise to. Other criticisms levelled against this rule relate to the basis upon which the principle rests and which was questioned in *S v S* by the Zimbabwean Supreme Court. Combrinck (1995:328) voices the problem succinctly as follows: the most urgent question to be addressed is whether the objections against the evidence of children can still be said to hold true. Recent research, accepted by the court in *S v S*, has concluded that children are no less credible than adults insofar as suggestibility, memory and the distinction between fact and fantasy is concerned (Hammond and Hammond 1987:3). Since there is strong empirical research available that children are no more unreliable than adults as witnesses, the South African Law Commission's (1989:34) vague belief in the cautionary rule as having been developed over many decades and having been founded on the practical experience of legal professionals will have to be re-assessed.

### **5.6.3 Complainants in Sexual Cases**

The cautionary rule must also be applied when evaluating the evidence of a complainant in a sexual offence. Sexual offences would include charges of rape, indecent assault, sodomy and criminal *injuria*. It is irrelevant whether the complainant is male or female. The court must warn itself of the dangers inherent in the evidence of a complainant of a sexual offence. If the court, despite the warning, is satisfied with the witness's evidence, the court may convict. Where, however, the court is still unsure, corroboration will be necessary (Hoffmann and Zeffertt 1988:579-580).

In *H v Rex* 1937 NPD 1 the accused was convicted of common assault in that he touched the breasts of a young girl travelling on a train. She was the only witness in the case and the court at 3 explained that "[t]his is obviously one of those cases in which a court must be very slow to convict on the uncorroborated evidence of the complainant." It would appear from this judgement that the standard to be applied to a complainant in a sexual matter is to be much higher than that applied to a complainant in an ordinary case. Feetham JP commented at 4 that the trial magistrate had accepted the evidence of the complainant and rejected the evidence of the accused and he had commented favourably on the demeanour of the former and unfavourably on the demeanour of the latter. In response to this Feetham JP made the following observation at 4:

"But, as I have said, this is a case in which we have to look critically at a conviction for an offence of this sort based solely on the evidence of the complainant without any corroboration, and, in considering whether we should accept the magistrate's conclusion and allow the conviction

to stand, we have to ask ourselves whether the story told by the girl is a story which, on the face of it, is a probable story."

The appeal court then looked at the facts of the case and found that the evidence was insufficient to support the conviction, since the girl should have left the compartment when assaulted and not simply moved to another seat and she had failed to report the matter to someone timeously. This decision was "based on the probabilities, coupled with the consideration that the Court must observe extreme caution in accepting uncorroborated evidence in cases of this nature."

In *R v M* 1947(4) SA 489 (N) the Supreme Court went so far as to hold that corroboration was essential. The defence argued at 492 that a court could not convict an accused person of indecent assault unless there was physical evidence of the act and there was corroboration of the complainant's evidence that such an indecent act was committed by the accused. Based on this, the court found that the accused could not be convicted of indecent assault since there was no corroboration of the indecent assault, despite the fact that the trial magistrate not only regarded the story of the state witnesses as being more probable than the story told by the accused, but that he also considered that the state witnesses gave their evidence in a straightforward and convincing manner whereas the accused's demeanour was not conducive to being believed. At 495 Milne AJ held:

"In the absence, therefore of corroboration ... it must be held that the charge of indecent assault was not proved beyond a reasonable doubt ..."

The court based this finding on the decision of Hawthorn JP in *Papla v Rex* 1946 NPD 308 where the court held the following at 310:

"There must be no conviction unless the evidence of the complainant is corroborated. The corroborative evidence must be of such a nature as to induce in the mind of the Court sufficient confidence in the complainant as a witness to enable it to conclude from his evidence that the deed was done and that the Appellant did it, is true".

However, the Appellate Division in *R v Rautenbach* 1949(1) SA 135(A) referred only to the fact that a warning must be given, and did not require corroboration. At 143 Schreiner JA held that it is the duty of the judge to warn the jury of the danger of convicting upon the uncorroborated evidence of the complainant. And in *R v W supra* the Appellate Division held that corroboration was not essential in cases of this nature. The rule is succinctly set out by Watermeyer CJ at 780:

"In rape cases, for instance, the established and proper practice is not to require that the complainant's evidence be corroborated before a conviction is competent. But what is required is that the trier of fact should have clearly in mind that these cases of sexual assaults require special treatment, that charges of the kind are generally difficult to disprove, and that various considerations may lead to their being falsely laid".

In *R v J* 1966(1) SA 88 (SR) the court went even further and said that the exercise of caution should not be allowed to displace the exercise of common sense:

"while there is always the need for special caution in scrutinising and weighing the evidence of young children, complainants in sexual cases, accomplices and, generally, the evidence of a single witness, the exercise of caution should not be allowed to displace the exercise of common sense" (at 90D).

Watermeyer CJ in *R v W supra* introduced a new aspect into the rule which gave rise to some difficulty in application. At 781 he explained that it is permissible for a court to convict in sexual cases where the complainant is not corroborated and even where the accused, having given evidence, has not been proved to be a lying witness. He went on to say that this would only be the position where the court was fully appreciative of the risks involved and where the merits of the complainant and the demerits of the accused as witnesses were beyond question.

Lewis AJA, however, in *R v J* 1966(1) SA 88 (SR) did not accept this approach, arguing that the difficulty in the above formula was determining precisely what Watermeyer CJ had in mind when he said that the merits of the complainant and the demerits of the accused as witnesses must be beyond question. Watermeyer CJ said that this formula was to be applied even where the accused was not found to be a lying witness. Demerits of the accused as a witness would, therefore, seem to include unsatisfactory features in his evidence other than those which prove him to be a lying witness. His comments could also be interpreted to mean that the merits of the complainant as a witness must be beyond reproach and that there are no material inconsistencies or defects in her evidence. Lewis AJA, however, did not believe this approach would assist the court in any way:

"It seems to me, with respect, that it is undesirable to lay down any fixed formula as to how the evidence must be approached at the verdict stage, apart from the general rule that the court, from the outset, must be fully conscious of the dangers inherent in such cases and treat them with special precaution" (94C-D).

At 94H he added that the special formula laid down by Watermeyer CJ *supra* would only be appropriate where the case was one that involved the complainant's word against that of the accused, where the surrounding circumstances offered no real assistance and where the danger of false identification had not been eliminated.

In *S v Snyman* 1968(2) SA 582 (A) the Appellate Division held that the cautionary rule requires, firstly, a warning by the Court of the dangers inherent in the evidence and, secondly, the existence of some safeguard which will reduce the risk of a wrong conviction. The latter could include corroboration implicating the accused or the absence of any evidence to the contrary from the accused or lying on the part of the accused.

Nevertheless, the standard employed in evaluating the evidence of a witness in a sexual case is higher than that used for other witnesses. This distinction was emphasised by the court's decision in *S v F supra* where the Appellate Division held that, although the trial magistrate had warned himself of the dangers involved in accepting the evidence of a complainant in a sexual case, he was simply paying lip-service to the cautionary rule and had not subjected the complainant's evidence to the requisite critical evaluation. Grosskopf AJ found that the trial magistrate had approached the case like any other criminal case. He had accepted the complainant's evidence and that of the State witnesses and had rejected the appellant's evidence and on that basis had come to the conclusion that the appellant was guilty of rape. If the magistrate, it was held at 853A-C, had applied the cautionary rule

properly, he would have approached the complainant's evidence critically and come to the conclusion that the complainant was not such a satisfactory witness. It would appear from this judgement that the complainant would have been a satisfactory witness in an ordinary criminal case, but applying the caution necessary for sexual complainants she no longer becomes a satisfactory witness.

This difference in standards was also referred to in *S v D* 1992(1) SA 513 (Nm) where Frank J, in applying the cautionary rule in a rape case, added that:

"Had the charge against the appellant been, for instance, one of theft, requiring no more than the ordinary high but not exceptional standard of careful scrutiny ... the verdict of guilty must have stood" (515A).

Despite these statements by the courts, S Du Toit AJ in *S v M* 1992(2) SACR 188 (W) simply stated that the onus of proof in sexual cases was not heavier and remained the same as in other criminal cases.

*S v D supra* severely criticised the use of the cautionary rule in sexual offences, holding that it served no purpose other than to discriminate against female complainants and was, therefore, contrary to article 10 of the Namibian Constitution which provides for the equality of all persons before the law regardless of sex (516F-G):

"To sum up, in my view, the cautionary rule evolved in cases of rape has no rational basis for its existence and should therefore not form part of our law and is probably contrary to the provisions of the Namibian Constitution."

The court did, however, add that this judgment did not mean that the nature and circumstances of the alleged offence need not be considered carefully. Where the court is faced with a single witness, the cautionary rule in this regard will obviously apply, and where any motive for a false charge is suggested by the accused or appears from the evidence, this will have to be carefully considered. The final test will always be that the accused's guilt must be proved beyond reasonable doubt, and this test must be the same whether the crime is theft or rape.

The judgment is applicable to Namibia, and is therefore not binding on our courts. In fact, this decision was almost immediately criticised in *S v M supra* and the court held that the cautionary rule in sexual offences is not a legal rule but is rather an admonition for the cautious application of common sense. The caution that is needed to guard against wrongful conviction is based upon "normal and sound logic" (188H), and its purpose is not to discriminate against women. The role of the cautionary rule, it was held, is to ensure that the accused is protected against a possible false charge and to remind the court that it is dealing with a situation that from experience carries the risk that a mistaken conclusion can be reached.

It is, however, the decision in *S v D supra* that has received much praise. Olckers (1992:428) finds the judgement encouraging for the following reasons: the judge considered the issue of the cautionary rule without it specifically being put to the court; the judge was not inhibited from confronting the issue despite the fact that it was potentially controversial; the court was prepared to look to new and critical sources and to evaluate these for their merit and worth; the court did not hesitate to deconstruct some of the myths relating to rape; and the judge's reliance on the

equality of outcome criteria in order to find discrimination shows progressiveness and enlightenment.

### 5.6.3.1 Basis of the Cautionary Rule

The dangers involved in accepting the evidence of a complainant in a sexual case would include the following: the charge may have been falsely laid, motivated by spite, sexual frustration or "other unpredictable emotional causes" (Hoffmann and Zeffertt 1988:579). Sexual offences, it is alleged, are difficult to disprove since they usually take place in private, leave no outward traces, and proof depends on the word of the complainant against that of the accused. There is the danger too that a complainant may wish to protect a friend or implicate someone richer. Hysteria may cause a complainant to imagine things which did not in fact happen.

In *R v M supra* Milne AJ focused on the possibility that such a charge may be brought for the purpose of vengeance:

"As a mode of obtaining vengeance for any affront to a woman's pride or dignity, the bringing of a charge of this kind is probably without equal. The very fact that the charge is calculated to damage the man even if he is eventually acquitted" (494).

Schreiner JA at 143 in *R v Rautenbach supra* emphasised the fact that frightened women may become hysterical and imagine that things have happened, which in fact have not:

"It is not only the risk of conscious fabrication that must be guarded against; there is also the danger that a frightened woman, especially if inclined to hysteria, may imagine that things have happened which did not happen at all".

In *R v W supra* Watermeyer CJ explained at 780 that a further danger may be created where the girl becomes pregnant. There may be the possibility that the girl may want to shield the actual perpetrator and implicate someone of relatively sound financial standing who may be better able to maintain the child.

Lewis AJA in *R v J* 1966(1) SA 88 (SR) at 92A-C enumerates, in this well-known passage, the possible dangers associated with complainants in sexual cases:

"In the case of all females alleging sexual assaults, the need for similar caution, in the absence of corroboration flows from the fact that such charges are easily laid and difficult for the accused to disprove, and a multiplicity of motives may exist for their being falsely laid. This has been recognised since time immemorial, and a classic example of such a false charge can be found in the Biblical story of Potiphar's wife and Joseph. Apart from the danger of maliciously false charges, it is also recognised that, even with adults, one may encounter cases of unfounded allegations of sexual assault which owe their origin to flights of fancy".

At 92D the court held that the main purpose of applying the cautionary rule in sexual cases was to guard against the danger of invention. As far as children who were complainants in sexual cases was concerned, the court felt that there was the potential danger that the child might have willingly indulged in some form of sexual experience with another child or adolescent of the opposite sex and when forced to explain this, she might endeavour to cover

up the real truth by making a false allegation of rape against an innocent person (93G).

In *De La Rouviere v S A Medical and Dental Council* 1977(1) SA 85 (N) Van Heerden J warned at 100F against accepting the uncorroborated evidence of complainants in sexual cases, since charges of this nature may be motivated by spite, sexual frustration or other unpredictable emotional causes. In addition, cases of this nature are difficult to refute because they take place in private and usually depend entirely upon the word of the complainant against that of the accused.

It is obvious from the many reasons forwarded for the existence of the cautionary rules that there are a wide variety of possible motives for laying false charges in cases of sexual assault. In *Balhuber v The State*, case no.30/1985, 25 September 1996 (A) Botha AJ refers to Glanville Williams' discussion of the reason for this rule:

"There is a sound reason for it, because these cases are particularly subject to the danger of deliberately false charges, resulting from sexual neurosis, fantasy, jealousy, spite or simply a girl's refusal to admit that she consented to an act of which she is now ashamed. Of these various possibilities, the most subtle are those connected with mental complexes".

One of the motivations for women bringing false charges against men was explained by Wigmore and referred to by Botha AJ in this case:

"The unchaste (let us call it) mentality finds incidental but direct expression in the narration of imaginary sex-incidents of which the narrator is the heroine or the victim. On the surface the narration is straightforward and convincing. The real victim, however, too often in such cases is the innocent man;" (at 43).

The wide variety of possible motives for invention was mentioned in *Balhuber's* case. Botha AJ explained that the complexity of such motives and the difficulty of perceiving them lie at the very foundation of the cautionary rule. The following further reasons were proffered by the Judge of Appeal at 45: the complainant may have been overcome by shame, disgust or remorse (even alcoholic remorse) at having consented to intercourse; she may have been sexually frustrated; she may have been filled with revulsion at what she did; or she may have become afraid with the coming of day.

The motivation and basis for the cautionary rule, therefore, appears to be threefold: charges of a sexual nature are easily laid; there are a multiplicity of motives; and charges of this nature are easily laid and difficult to disprove (Olckers 1992:427).

### **5.6.3.2 Criticisms of the Cautionary Rule**

This rule has been criticised since it discriminates against the victim and implies that the evidence of women must automatically be approached with suspicion (Hoffmann and Zeffertt 1988:579). This suspicion has been reinforced by the comparison of complainants in sexual cases with accomplices. This comparison was highlighted by the Appellate Division in *S v Snyman supra* at 585C-D:

"Unlike an accomplice in a criminal trial, a complainant in a sexual case is not *ex hypothesi* a criminal. Nevertheless in respect of both of them there exists an inherent danger in relying on their testimony. First, various motives may induce them to substitute the accused for the culprit. Second, from their participation in events which actually happened, each has a deceptive facility for convincing testimony, the only fiction being the deft submission of the accused for the real culprit."

This rule, according to Burchell and Milton (1997:448), has been characterised as a "lingering insult" since it seems automatically to approach the evidence of women with suspicion and appears to attribute ulterior motives to any person who alleges rape without the evidence of other witnesses.

The cautionary rule came under severe criticism in the Namibian case of *S v D supra* where Frank J referred to the approach in the *Balhuber* case *supra* as "stunningly imaginative". He argues at 515I that it is not clear why sexual assaults should be treated on a different footing from other cases. There is no empirical data to support the contention that in cases of this nature more false charges are laid than in any other type of crime. In fact, according to Frank J, the available evidence indicates the contrary. Olckers (1992:428) argues that the rule is illogical since there is no evidence to support the contention that charges of a sexual nature are easily laid. She refers to an empirical study conducted in America where it was shown that the incidence of false reports in cases of rape was 2% - exactly the same as that for other crimes. Studies conducted by NICRO support the American study since they indicate that nineteen out of every twenty rapes are unreported. The judge in *S v D* then went on to question the reasons on which this rule has been based:

"Why should the Court not speculate as to possible defences in other cases as well? Why is the ordinary burden of proof applicable to all other criminal offences not applicable to cases such as the present? Surely, whatever the offence, the trial court must take the nature of the evidence into account ... The trial court must, of course, consider the nature and circumstances of the particular offence, but why must a different ultimate test be applied ..." (516A).

Wilmot (1992:212) asks why a cautionary rule over and above that applicable to single witnesses is not applicable to an unwitnessed assault, or to a burglar caught red-handed by a single witness.

The Namibian case accepted that different motives may exist for laying false charges, but it was argued that this could apply to any offence and not only to offences of a sexual nature. The court referred to the reasoning of the judgment in *R v J supra* and said that the only relevance to the story of Potiphar and Joseph in that judgment was simply to indicate male bias:

"It would appear, however, that the reasoning in this regard is as follows. As the story appears in the Bible it is the truth. As it is the gospel truth it does not relate to a single incident but is of universal application. Thus all women are *prima facie* deceitful and act with hidden motives and all men are *prima facie* incorruptible and act without hidden motives." (516C)

Frank J went on to say that whether such hidden motives are found by the trial court would depend to a large extent "upon the fecundity of the presiding officer's imagination" (516D).

Olckers (1992:428) summarises the multiplicity of motives that have formed the basis of the cautionary rule: they

range from shame, disgust, sexual frustration, being filled with revulsion, fear, to sexual fantasies, neuroses, jealousy, revenge, spite, wounded vanity, explaining pregnancy and hysteria. She quotes as follows from Hubbard:

"It is hard to think of any other area of law in which the courts would be so willing to indulge in amateur psychology, without any supporting evidence from expert witnesses".

The court also found the cautionary rule to be unconstitutional since it discriminated against women. Frank J accepted that in strict theory the cautionary rule relating to cases of sexual assault was applicable to all cases irrespective of the sex of the complainant. However, he went on to argue that in at least 95% of the cases of this nature in Namibia the complainants are female. In view of this, the court was of the opinion that the cautionary rule had no other purpose than to discriminate against women complainants (516F). Here Frank J has employed the equality theory of outcome of effect, using the contextual approach. He found that despite the fact that the rule itself was technically gender neutral, in the vast majority of cases the complainants are female and the effect of the rule, therefore, is in practice to discriminate against women.

In *S v M* 1992(2) SACR 188 (W) the South African courts argued that to say the cautionary rule existed only to discriminate against women was a harsh statement. However, they did not provide any arguments to counter this, simply reiterating the statement that complainants in sexual cases can also be male. The court did not address the argument of Frank J that at least 95% of complainants in sexual cases were female. The judgment in this case, although distancing itself from the decision in *S v D supra*, does not offer any valid reason for retaining the cautionary rule. In fact, the decision entrenches a perception that has come under a great deal of criticism, namely that rape and crimes of an indecent nature are seen as crimes of sex rather than crimes of violence. The court at 190J admits that, if rape is to be viewed as a species of aggravated (and repulsive) assault, then there would not be a need for the cautionary rule. But if rape is seen against the background of relationships between the sexes, then the matter is complicated and one has to be aware of the nuances involved. This is precisely the argument which has been levelled against the present definition of rape, namely that it is perceived as being a sexual crime whereas it is in fact a crime of violence.

The South African Law Commission in its report on Women and Sexual Offences in South Africa (1985:57-62) noted the following objections to the cautionary rule:

- \* the normal incidence of the onus in criminal cases gives the accused adequate protection;
- \* this rule is not applicable to other kinds of violent crime;
- \* a high degree of caution has the effect of reducing the conviction rate;
- \* there is insufficient empirical data to show that a large number of false complaints are laid in rape cases.

However, the Commission were not persuaded by these objections. They based this decision on three factors: a woman may have ulterior motives for bringing false charges against a man (including spite, sexual frustration etc); a woman may have financial motives for making a false charge, especially where the woman is pregnant; and rape is especially difficult to disprove since it takes place in private.

Olckers (1992:428) argues that there exists absolutely no empirical evidence to suggest that more people are falsely convicted of rape than any other crime. In fact, the available data does not support this. Nineteen out of twenty rapes remain unreported and there is only a 50-55% successful prosecution rate in rape cases; there is no disproportionate number of false rape charges; there is the proven trauma of a rape trial and the cautionary rule. All these factors contribute very heavily towards making rape extremely difficult to prove.

It is submitted that the ordinary onus of proof employed in criminal cases is sufficient security against wrongful convictions (Labuschagne 1992:136). He argues that the fact that the court needs to prove a conviction beyond reasonable doubt means that there is no need for the cautionary rule. It affords adequate protection for the accused. A look at the facts in *S v D* indicate how this would work in practice, using the ordinary rules of onus.

Two girls, the complainants in the case, were allegedly raped by the appellants. Each complainant was allegedly raped by one of the appellants, more or less simultaneously but not in the same area. The complainants were, therefore, each single witnesses in regard to the respective rapes. The appellants admitted intercourse, but raised the defence of consent. In looking at the evidence before the court, Frank J came to the conclusion that the state had not proved its case beyond a reasonable doubt against the first appellant. This decision was not based on the application of the cautionary rule, but rather on the fact that the state had not discharged the onus. It was not the fact that the complainant was a single witness in a sexual complaint and that her evidence was uncorroborated on that aspect, but rather the fact that the evidence was actually contradicted by other witnesses. Insofar as the second complainant was concerned, the court found that the state had proved its case beyond a reasonable ground. As pointed out by Wilmot (1992:213-4), the outcome of this case illustrates how unnecessary the cautionary rule really is. If the complainant is unreliable in any way, this will become evident as the case proceeds, especially in regard to the incidence of the onus of proof.

In conclusion, the judge rejected the cautionary rule in sexual cases, arguing that it had no rational basis for its existence and should therefore not form part of Namibian law (146G). The nature and circumstances of each case must be considered, including whether the complainant is a single witness or whether the evidence suggests a motive for laying a false charge. At the end of the day, however, the test must be the same whether the crime is one of theft or rape (146H-I).

#### **5.6.4 Corroboration**

In terms of the cautionary rule, the court must warn itself of the dangers inherent in certain types of evidence. Once the court has warned itself of the dangers applicable to the particular evidence before it, it may convict if it is satisfied that the evidence is reliable. If the court is not satisfied with the reliability of the evidence, it must find corroboration before it can convict.

Corroboration is defined by Hoffmann and Zeffertt (1988:584) as "evidence which confirms the testimony of a witness". In *R v Kilbourne* 1973 AC 529 Lord Reid explained the concept of corroboration as follows at 75OG-H:

"There is nothing technical in the idea of corroboration. When in the ordinary affairs of life one is doubtful whether or not to believe a particular statement one naturally looks to see whether it fits in with other statements or circumstances relating to the particular matter; the better it fits in, the more one is inclined to believe it. The doubted statement is corroborated to a greater or lesser extent by the other statements or circumstances with which it fits in."

With respect to complainants in sexual cases and young children, corroboration is more fully defined in *S v C supra* at 109B-C as "some evidence, in addition to the complainant's, which is consistent with his story and in some degree inconsistent with the innocence of the accused". The evidence will not be regarded as corroboration if it is "wholly consistent with the accused's innocence".

The legislature has moved away from "formalistic proof" in that the Criminal Procedure Act 1977 only contains one mandatory provision relating to corroboration. Section 209 requires that confessions must be confirmed in a material respect or there must be some evidence *aliunde* that the offence was committed. The Criminal Procedure Act of 1955 required that there had to be corroboration in cases of treason, perjury, accomplice evidence and confessions (Hoffmann and Zeffertt 1988:567). However, only the provision relating to confessions remained in the new version of the act.

In order to determine what corroboration is required, the common law position will have to be examined. The purpose of corroboration, as explained in *S v S supra*, is to guard against false implication as far as possible (54C). According to Hoffmann and Zeffertt (1988:580), in sexual cases corroboration must therefore include evidence which confirms the complainant on a point which indicates guilt on the part of the accused. It must show the commission of the alleged offence, the identity of the accused, or the absence of consent.

In *R v Bell supra* the court held that a report made to her grandmother by the four-and-a-half year old complainant could not serve as corroboration. At 479 Gardiner JP explained that a previous consistent statement was not corroboration since it was not independent testimony showing that the crime charged had been committed. It served to show the truthfulness of the complainant and strengthened credibility by repelling the suggestion that the story had been made up, but it did not provide corroboration in the sense of supplying independent evidence that the offence had been committed. The court in *De Beer v Rex supra* came to the same conclusion at 34 where they held that the evidence of a complaint made by the six year old complainant to her mother was not corroboration. It merely tended to show consistency on the part of the complainant and thus affected her credibility. Evidence by the district surgeon that there had been recent interference with the complainant's private parts was also held not to be corroboration because it was not necessarily inconsistent with the innocence of the accused. The fact that the accused chose not to give evidence was also not regarded as corroboration.

In *R v Dikant and Others supra* the court explained that corroboration had to include some credible evidence which was in some degree consistent with the evidence to be corroborated although it did not have to go to the extent of confirming it or establishing the guilt of the accused. At 701 the Supreme Court held the following:

"In general there must be some credible evidence in addition to the child's which, in the necessary degree, is consistent with the child's story and inconsistent with the innocence of the accused, though it need not necessarily implicate the accused."

It would seem then that corroboration is evidence which is consistent with the witness's and inconsistent with the accused's evidence. The evidence only has to be consistent with the witness's evidence and does not actually have to confirm it. In addition, the corroboration does not have to implicate the accused. Bok J expanded on this in *R v S supra* at 422-3 and explained that in certain circumstances it may be necessary to insist that the corroborating evidence implicate the accused. These circumstances would depend on the facts in each case. He argued that, in the case of a six year old complainant, for instance, it may be necessary to insist on evidence which implicates the accused, whereas in the case of an intelligent, ten year old complainant who has testified convincingly, a lesser degree may be sufficient to satisfy the Court.

In *R v W supra* the accused was convicted of statutory rape in that he had sexual intercourse with a fourteen year old girl. The trial magistrate believed (incorrectly) that he could not accept the evidence of a child without corroboration. He further held that corroboration could include the following: the fact that the complainant is a credible witness; that from the circumstances her evidence was trustworthy; and that she was honest when testifying. This decision does not accord with the findings in *Bell* and *De Beer supra* where the courts held that these factors relate to credibility and not to corroboration. On appeal the Appellate Division held that the magistrate had misdirected himself by insisting that there had to be corroboration. However, having decided that corroboration was necessary, the trial magistrate found corroboration in evidence that was not indicative of the accused's guilt:

"He apparently thought that if the complainant's evidence was corroborated in any respect that might lead him to think that she was a trustworthy witness this was sufficient, even though the corroboration was wholly consistent with the accused's innocence and did not in any way, other than by its supposed effect on the complainant's credibility, render his guilt more probable." (781)

It would seem then that the corroboration must be in some degree inconsistent with the accused's innocence. In reaching this conclusion, Watermeyer CJ accepted the Transvaal decision in *MacKay v Ballot* 1921 TPD 430 that the corroborative evidence had to be inconsistent with the accused's evidence, although the court was aware that the latter case was civil in nature. In *S v Snyman supra* the Appellate Division held that corroboration could be found in evidence corroborating the complainant in a respect which implicated the accused, or in the absence of evidence to the contrary from him, or in his mendacity as a witness (585D-E). However, Holmes JA concluded that the ultimate requirement always remained proof beyond a reasonable doubt, and this would depend on the totality of the evidence and the degree of corroboration available (585F).

Holmes JA also presided in *S v Artman and Others supra* where he set the rule out more clearly at 340H. He held that in terms of the cautionary rule, the court must warn itself of the dangers inherent in the evidence and must require some safeguard which will reduce the risk of a wrong conviction. He stated here that if corroboration is relied upon, it must implicate the accused in the commission of the offence:

"The safeguard need not consist of corroboration, but if corroboration is relied upon as the safeguard, it must go the length of implicating the accused in the commission of the crime."

In *S v B supra* the court held at 59B that corroboration was independent evidence which confirmed the testimony of a witness. Such confirmation could either be "in a material respect" or on a point tending to prove the accused's guilt. Corroboration, according to Vos J, can be afforded by the admissions of the accused either by words or conduct. Corroboration can also be afforded by the fact that an accused has not testified or that he has given false evidence in court or has made false statements of an incriminating nature out of court. Similar fact evidence, where admissible, would also amount to corroboration. On the other hand Van Heerden J in *De La Rouviere v SA Medical and Dental Council supra* held at 100G that:

"The demeanour of the complainant in the witness-box or her apparent social standing in particular should never be relied upon as a substitute for corroboration."

It would appear from the above cases that what amounts to corroboration has given rise to difficulties. Confusion has been created, I submit, from the terminology employed. The courts talk about safeguards, confirmation and corroboration. Are these to be seen as synonyms, or do they refer to different concepts? This confusion relating to terminology arises in the following way. In terms of the cautionary rule it is alleged that corroboration is not essential. What is required is that the court warn itself of the dangers inherent in the evidence before it. Having warned itself, the court must then determine whether it is satisfied with the witness's evidence. In order to do so, the court must look at the merits of the witness as opposed to the demerits of the accused. In evaluating the witness in this way, the court will have regard to matters such as whether the accused has been a lying witness, or has refused to give evidence. The courts have described these as safeguards, but are they not in effect a form of corroboration. It is surely evidence which confirms the evidence of the witness i.e. corroboration.

The cautionary rule goes on to say that, if the court is not satisfied with the witness's evidence beyond a reasonable doubt, then there must be corroboration and this corroboration must implicate the accused. Is this corroboration different from the safeguards required above in evaluating the witness's evidence? In the first part of the enquiry (i.e. safeguards necessary) the credibility of a witness would amount to a "safeguard" but not to corroboration as required in the second part of the enquiry.

I submit that corroboration is actually required in both parts of the enquiry. When the court evaluates the evidence of a witness to determine whether it is prepared to convict on the evidence, it must evaluate the merits of the witness as opposed to the demerits of the accused. In order to do so, it has regard to corroboration relating to the credibility and trustworthiness of the witness and the accused. If the court has not been persuaded beyond a reasonable doubt, it then requires further corroboration which must implicate the accused. It would then seem that corroboration, in one form or another, is essential before an accused can be convicted on the evidence of a witness to whom the cautionary rule applies, which is exactly what the courts have consistently denied.

One further question needs to be addressed, and that is whether one child can be used to corroborate another or whether one complainant in a sexual case can be used to corroborate another. According to the decision in *S v*

*Avon Bottle Store (Pty) Ltd and Others* 1963(2) SA 389 (A) Botha J held at 393 that one accomplice can corroborate another provided that the cautionary rule is applied to each accomplice. This was also accepted by the court in *S v Vredon* 1969(2) SA 524 (N) where it was explained that one accomplice could be used to corroborate another provided that the cautionary rule was applied to each of them respectively. In line with this approach the Appellate Division in *Woji v Santam Insurance Co Ltd* 1981(1) SA 1021 (A) allowed one ten year old boy to corroborate the evidence of the other ten year old, and the court applied the cautionary rule to the evidence of both boys.

In conclusion, it would appear that one child can be used to corroborate another, provided that the court has warned itself in respect of each witness. Furthermore, although the rules relating to corroboration appear at face value to be clear, on closer examination the case law indicates that there is difficulty in determining what exactly would amount to corroboration. I submit that this difficulty relates to the use of varying terminology (safeguards, confirmation) for the same concept. Clarity needs to be reached as to what constitutes corroboration in respect of the initial evaluation relating to credibility as opposed to the further corroboration required in the second part of the enquiry.

## **5.7 The Rule against Hearsay and Child Witnesses**

### **5.7.1 Introduction**

The English common law rules relating to hearsay evidence applied in South Africa up until 1988. Hearsay evidence was defined as oral or written statements made by persons who are not called as witnesses to prove the truth of the contents in *S v Holshausen* 1984(4)SA 852 (A). The general rule was that hearsay evidence was inadmissible.

The most important reason for excluding hearsay evidence relates to its untrustworthiness. It is untrustworthy because it cannot be tested by cross-examination. There is the danger that the maker of the statement may be deliberately lying or he may simply have made a mistake or the statement may have been misunderstood by the witness testifying in court. According to Hoffmann and Zeffertt (1988:125), the purpose of cross-examination is to expose these defects. If the maker of the statement is not available for cross-examination, then the evidence can not be tested in this way. The court accepted this reasoning for the exclusion of hearsay evidence in *S v Mpofo* 1993(3) SA 864 (N):

"The maker of the statement is by his absence not amenable to cross-examination. His limitations as a witness, whether by reason of falsity, inadequate opportunity for observation, suspect memory, faulty rendition or the like, cannot be tested."

The court went further in *Harnischfeger Corporation and Another v Appleton and Another* 1993(4) SA 479 (W) where it was held at 483 that the major factor against admitting hearsay evidence is normally the harm or risk of harm to the process of reaching an accurate conclusion if the objecting party cannot test the reliability of the hearsay information. In *Mnyama v Gxalaba and Another* 1990(1) SA 650 (C). Conradie J held that a court should ideally

be in a position to establish as closely as possible the mood of the speaker, the interests he was attempting to serve, and any reason he might have had for concealing his true sentiments from the witness or for exaggerating them. This, however, was very difficult when the court was examining not the speaker himself but only an account of what he is supposed to have said (654A).

Despite the dangers inherent in hearsay evidence, the common law rule was nevertheless criticised as being too rigid. All hearsay evidence that did not fall within established exceptions was excluded, irrespective of how reliable the evidence may have been (Hoffmann and Zeffertt 1988:126). This was acknowledged by Schreiner JA in *Vulcan Rubber Works (Pty) Ltd v SAR&H* 1958(3) SA 285 (A) at 296H:

"There is no doubt that the exceptions to the rule against hearsay have come into existence mainly because there was felt to be a strong need for such exceptions if justice was to be done."

### 5.7.2 The Statutory Position

The common law relating to hearsay evidence was replaced by the introduction of s3 of the Law of Evidence Amendment Act 45 of 1988 which came into operation on 3 October 1988. In terms of this section, hearsay is now defined as "evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence". The statutory definition of hearsay evidence differs from the common law definition set out in *Holshausen's* case *supra*. It does not have to be tendered to prove the truth of the contents to be hearsay. The test for hearsay now is whether the probative value of the evidence depends on the credibility of a person other than the witness testifying. According to Hoffmann and Zeffertt (1988:127), the probative force of the evidence must at least be controlled by the credibility of the non-witness.

Section 3 has introduced three main exceptions to the rule against hearsay. Hearsay may be admitted where the party against whom it is adduced agrees that the evidence can be admitted. In *Great Shipping Inc v Sunnyface Marine Ltd* 1994(1) SA 65 (C), for instance, the court commented that "[c]ounsel were agreed that I should have regard to all the evidence, despite some of it being hearsay". Secondly, hearsay evidence may be admitted where the original maker of the statement subsequently testifies at the same proceedings. If the original maker of the statement does not testify subsequently, the hearsay evidence will be excluded unless it becomes admissible under one of the other exceptions.

The third exception relates to the wide discretion which has been given to the court to admit hearsay evidence if it would be in the interests of justice to do so. Conradie J in *Mnyamax Gxalaba and Another supra* described it at 653 C as an "immense discretion". In determining whether it would be in the interests of justice to admit hearsay, the court is entitled to take into account a number of factors. These factors would include the nature of the proceedings and the nature of the evidence; the reason why the evidence is being tendered; its probative value; the reason why the maker of the statement is not giving evidence; any prejudice that might be experienced by the other party; and any other factors which the court might need to take into account. In analysing these factors mentioned

in this section, the courts have made the following comments. In *Mnyama v Gxalaba and Another supra* Conradie J explained that hearsay evidence could be excluded where the probative value is low. According to him (653F), the evidence would have to be just about worthless for it to be excluded on this ground. It would probably have to amount to no more than idle chatter or empty gossip or fuzzy rumours.

According to the same judge, the mere fact that hearsay evidence is against the interest of the opposing party does not mean that it would on that account alone be prejudicial. Prejudice in this context means that the party offering the evidence would obtain some unfair advantage by its admission. Conradie J illustrated the point with the following example at 653E-F:

"for example, if a party, for fear of having him cross-examined, failed to call the person on whose credibility the probative value of the evidence depended despite the fact that he was available and otherwise competent to testify this might be gravely prejudicial."

In *Metedad v National Employers' General Insurance Co Ltd* 1992(1) SA 494 (W) Van Schalkwyk J looked at that part of the section which required the court to have regard to the purpose for which the evidence is tendered. According to him (at 498), this implied that evidence tendered for a compelling reason would stand a better chance of admission than evidence tendered for a doubtful or illegitimate purpose. Hoffmann and Zeffertt (1988:131) submit that the court's reception or rejection of hearsay should be subject to attack on appeal where the discretion has not been exercised judicially or where it has been based on a misdirection as to the facts. In *McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd* 1997(1) 1 (A) it was argued that, when a trial court refused to admit hearsay in terms of s3(1)(c), the court was exercising a discretion with which an appeal court could not interfere unless it considered that the discretion had not been judicially exercised. However, the Appellate Division did not accept this argument and held that a decision on the admissibility of evidence was, in general, one of law, not of discretion, and that a court of appeal was fully entitled to overrule a decision by a lower court if the appeal court considered the court *a quo's* decision to be wrong (27D-E).

In terms of subsection (1)(c) the court has been given a wide discretion to admit hearsay evidence. The question of how this discretion is to be applied has given rise to difficulty. In *Hlongwane and Others v Rector, St Francis College, and Others* 1989(3) SA 318 (DCLD) Galgut J admitted certain hearsay evidence in terms of this section on the basis that it would be in the interests of justice to do so. The court came to this conclusion despite the fact that the hearsay evidence was "fundamental to the respondents' defence; indeed the success of the defence depends entirely upon it" (324F). The court came to a different decision in *S v Cekiso and Another* 1990(4) SA 20 (E) where Zietsman J held at 22A-B that the discretion afforded the court in s3(1)(c) should not be exercised in favour of allowing hearsay evidence on controversial issues upon which conflicting evidence has already been given since it would not be in the interest of justice to allow such evidence which cannot be tested in the normal way. The question of the court's discretion was again raised in *Aetiology Today CC t/a Somerset Schools v Van Aswegan and Another* 1992(1) SA 807 (W). Here Cloete AJ examined the decisions in *Cekiso supra* and *Hlongwane supra*, and came to the conclusion that the decision in *Cekiso* should be followed. He held that where the evidence relates to one of the *facta probanda* in regard to which there is a dispute, the hearsay evidence should be excluded.

Two decisions following after the *Aetiology* case have argued that the discretion afforded the courts to admit hearsay evidence should not be used sparingly or reluctantly. In *Metedad v National Employers' General Insurance Co Ltd supra* Van Schalkwyk J at 498 argued that the purpose of amending the hearsay law had been to allow hearsay evidence in certain circumstances where the application of rigid and somewhat archaic principles might frustrate the interests of justice. At 499 he commented as follows:

"The exclusion of the hearsay statement of an otherwise reliable person whose testimony cannot be obtained might be a far greater injustice than any uncertainty which may result from its admission. Moreover, the fact that the statement is untested by cross-examination is a factor to be taken into account in assessing its probative value."

In *Hewan v Kourie* 1993(3) SA 233 (T) the court held that this subsection introduces into the hearsay rule a flexibility which should not be negated by introducing, in addition to the requirements of the subsection, reliability as an overriding requirement, or by falling back on the common-law rule against hearsay:

"By the same token it would not be in accordance with the intention of the legislature to categorise certain cases or certain issues and to hold that s3(1)(c) should be applied only sparingly or reluctantly in such cases or to such issues."

It is important to note as well that certain common law exceptions to the hearsay rule have fallen away by the introduction of the Law of Evidence Amendment Act 1988. Section 9 of the Act has repealed s223 of the Criminal Procedure Act 1977 which dealt with dying declarations and applied the common law. By repealing s223 the Act has explicitly done away with the common law. This would imply that the admissibility of dying declarations will be governed by s3, although the court would obviously be guided by the common law when evaluating the evidence in terms of subsection 3(1)(c). Hoffmann and Zeffertt (1988:130) argue that other common law exceptions, such as declarations in the course of duty, declarations against interest, declarations as to public and general rights, pedigree declarations, declarations as to the contents of wills and the reception of public documents at common law fall away by implication in criminal cases by the fact that s9 of the Law of Evidence Amendment Act 1988 has repealed s216 of the Criminal Procedure Act 1977, which applied the common law. This has been accepted by the courts. In *Mnyama v Gzalaba and Another supra* Conradie J, in referring to the hearsay exception relating to a person's state of mind, stated at 652J-653A:

"The Law of Evidence Amendment Act 45 of 1988 ('the Act') which came into operation on 3 October 1988, has made all of this obsolete but not irrelevant."

The court held further at 653C that this did not mean that hearsay evidence which was historically admissible under one or other of the exceptions would automatically become admissible in terms of the new hearsay law. However, it should also not lightly be held that traditionally acceptable evidence should in the exercise of discretion be excluded.

### 5.7.3 Hearsay and the Child Witness

In terms of the common law, hearsay statements by child witnesses were excluded unless they fell within the clearly defined exceptions. This would arise most frequently in the situation where the child was the complainant of an assault and made a report to his mother or guardian. At the trial the child is unable to give evidence, either because he is found to be incompetent or because he is afraid. The report made to the mother or guardian will then be inadmissible as hearsay. The facts in *S v T* 1973(3) SA 794 (A) are relevant. It was alleged that the five year old complainant had been raped. At the trial the child was frightened and unwilling to speak. Eventually the court called the mother and the child whispered the answers to her mother, who in turn repeated them to the court. These statements were found to amount to hearsay.

The dangers associated with hearsay evidence have already been discussed *supra*. As far as hearsay evidence emanating from children is concerned, there is a further danger relating to the competency (or lack of it) of the child. In *Chaimowitz v Chaimowitz (I)* *supra* the court was presented with the hearsay statements of a child in an application for custody. Rosenow J highlighted the danger in respect of children at 819:

"In the first place we are asked to accept at face value, may I say, what appears to amount to the hearsay ramblings of an infant and we are asked to do that without having an opportunity of satisfying ourselves as to whether the infant is a competent witness at all. Before we allow a child to give evidence in this Court that child must either be sworn, or warned to speak the truth, and the Court must be satisfied that it has a sufficient degree of intelligence before any value can be placed on its evidence at all."

For these reasons he held the hearsay evidence to be inadmissible.

What effect does s3 of the Law of Evidence Amendment Act have on the hearsay statements of children? In terms of the exceptions created by subsection (1), these statements would be admissible where both parties agree. It is submitted that there would be very few, if any, instances where an opposing party in a criminal case will consent to the admission of the hearsay statements of a child, especially where the child is the complainant.

The second exception afforded by s3 is not applicable, and the third grants the court a wide discretion to admit hearsay in the interests of justice. The question to be addressed then is whether it would be in the interests of justice to admit the hearsay statements of a child who is a complainant in a criminal matter and who is unable to testify. In making such a decision the court would have to examine the nature of the proceedings, the nature of the evidence, the reason why the evidence is being tendered, the probative value of the evidence, the reason why the child is not giving evidence, any prejudice which the accused may suffer as a result, and any other relevant factors.

A factor that the court would have to take into account when determining whether the hearsay statements of a child complainant should be admissible, is the fact that the conviction rate is particularly low in cases of child abuse. The South African Law Commission (1989:9-11) accepted that in South Africa the existing criminal procedure and rules of evidence made it exceedingly difficult to convict child abusers. They referred to a submission by the Regional Court President of Natal who stressed that, as a result of problems regarding the rules of evidence, guilty

child abusers were acquitted, "possibly to commit a second more serious aberration with other children" (SA Law Commission 1989:10). The Commission's Report also provides details of a survey that was conducted on the incidence of convictions in cases of child abuse which were investigated by Addington Hospital during the period 1985 to 1986. According to these results, there were only 3 convictions out of 42 cases where the child witness was under the age of six. Dr Key of the Addington Hospital is quoted as follows:

"My experience leads me to believe that except in the unlikely event of an adult witness being able to testify to having seen a child being abused, it is almost impossible to secure a conviction in cases of abuse involving a child who is younger than six years."

In cases where the child witness was between six and twelve years, there were only 11 convictions out of 49 cases, mainly due to lack of corroboration. Where the child witness was between twelve and sixteen years, the conviction rate rose to 73%. In conclusion, the Commission (1989:11) posed the question whether the State's burden of proof was not too high, considering all the problems pertaining to a conviction on the evidence of a child:

"Does this high burden of proof still serve the interests of society in the case of child abuse?"

The court, as the upper guardian of children, has a duty to protect children. This duty has been entrenched by the Constitution Act 108 of 1996 which provides that a child has a right to be protected from abuse and neglect. This places a positive duty on the state - it is not only the right not to be abused, but goes further and includes the right to be protected from abuse. In addition, it provides that in all matters relating to children, the child's interest shall be paramount. Therefore, it can be argued that the court, in deciding matters relating to children, must have access to all relevant information. This approach has already been followed before the introduction of the new hearsay provisions. In *Zorbas v Zorbas* 1987(3) SA 436 (W) the court was called upon to make an order of custody in favour of the mother. The accused (the child's father) alleged in a set of hearsay evidence that the man with whom the mother was co-habiting was a man of bad character who allegedly had murdered his wife and whose business, a bar-restaurant, was a source of drugs. Van Schalkwyk AJ made the following comments at 438F-G:

"All the evidence supporting the defendant's allegation that Mr Moutziz is a man of bad character is unquestionably inadmissible. To that extent there is no evidence before me upon which a finding adverse to Mr Moutziz's character can be made. But does that mean that these allegations, vague and inconclusive as they are, are to be ignored altogether? If, for instance, inadmissible evidence were to be placed before a Court that one of the parties to a custody action had been convicted of infanticide would the Court, sitting as upper guardian, ignore such evidence on the grounds of its inadmissibility? I think not. It seems to me that the concept of guardianship involves a responsibility which transcends the structures of the law of evidence."

Although this case relates to a civil matter and to a custody dispute where the courts are bound to find in the best interests of the child, the Constitution has extended the standard of best interests to all matters concerning children. In *Shawzin v Laufer* 1968(4) SA 657 (A) Rumpff JA also came to the conclusion that the court as upper guardian in issues of custody applied only one norm, namely "the predominant interests of the child". He went on at 662H-663A to find that in cases relating to the predominant interests of the child, the court was not bound by the contentions of the parties and could depart from the usual procedure and act *mero motu* in calling evidence, irrespective of the wishes of the parties. Accordingly van Schalkwyk AJ held in *Zorbas v Zorbas supra* that it

would be undesirable for him to make an award of custody where there was "the merest hint of serious misdemeanours" (439E), even if these were based on hearsay.

If, in deciding the best interests of children, the concept of guardianship is more important than the rules of evidence, as found in the above two cases, then this line of thinking should be extended to criminal proceedings since the court's role as upper guardian has been reinforced by the Constitution. The court's role as upper guardian of children would now, in terms of the Constitution, entail protecting children from abuse and neglect and ensuring that children's interests are paramount. This role of the court in protecting a child's best interests should then also "transcend[s] the strictures of the law of evidence" as has been the case in civil matters. Cachalia et al (1994) has even gone so far as to say that the exclusion of the hearsay statements of children may be unconstitutional since the interests of children are paramount in all matters relating to children.

However, despite this argument, the admission of hearsay remains within the discretion of the presiding officer, and courts may be very wary of admitting hearsay statements, especially those which emanate from children, due to issues of competency and the cautionary rule. For instance, the decisions in *S v Cekiso and Another supra* and *Aetiology Today supra* held that where the hearsay evidence relates to controversial issues, it should be excluded.

For this reason Zieff (1991:32) argues that an additional statutory provision should be introduced, creating a general exception to the hearsay rule in the case of the statements of children in sexual abuse cases. In making this proposal Zieff refers to similar legislation in the United States which has been introduced in an attempt to make the criminal justice system more sensitive to the child victim. Zieff (1991:32) explains that since 1982 there has been a rapid adoption of new hearsay exceptions for statements made by child victims of abuse in the United States, based on the fact that these statements are often the only evidence available and also that a child's early statements are considered to be more reliable than in court testimony since they are made closer in time to the event. He uses the Washington Statute (discussed above under the USA position) as a model. In terms of this statute, if the child is unavailable as a witness, the hearsay can only be admitted if the evidence is reliable and there is corroborative evidence of the act.

In view of the above, Zieff (1991:33) proposes that the South African legislature create an additional statute regulating the admissibility of the hearsay statements of children. He suggests the Washington Statute provides a sound model. When the hearsay statements of children are tendered as evidence, the court must conduct a full inquiry into the statement's reliability. In so doing, the court must consider all relevant factors, including the reason why the child is not testifying and the possibility that other external influences might be the source of the child's allegations. Only reliable hearsay should be admitted.

The weighing up of all relevant factors in evaluating the reliability of the hearsay evidence in terms of the Washington statute, I submit, sounds very familiar to the factors the court must take into account when exercising its discretion in terms of s3(1)(c) of the Law of Evidence Amendment Act 1988. I have already attempted to point out the difficulties that the courts have experienced in exercising this discretion and determining what is meant by probative evidence and prejudice caused etc. Therefore, introducing a statutory provision which will enable the

hearsay evidence of children to become admissible in certain circumstances will no doubt give rise to the same problems that have arisen from s3(1)(c). The only real advantage of the introduction of such a statutory provision would be the emphasis on the admissibility of children's hearsay statements i.e. the intention of the legislature would be that the hearsay statements of children should, where reliable, be admissible. There will be a stronger duty on the court to make these statements admissible. According to Milton et al (1994:431), the fact that an accused is accorded a right to cross-examine in terms of s25(3)(d) of the Constitution could possibly impact on the admission of hearsay evidence. However, there are already exceptions to the hearsay rule where the accused is deprived of his right to cross-examine. These exceptions have also been held, in the United States for instance, not to interfere with an accused's rights to cross-examine provided the hearsay evidence is reliable. Milton et al (1994:431) makes the further statement:

"Although the admission of hearsay obviously makes severe inroads into the right of cross-examination, it is permitted in many jurisdictions where it is sufficiently reliable and does not prejudice the accused. It is submitted that the present formulation of the exceptions to the hearsay rule accords with these principles and its application is likely to remain unchanged."

The accused's right to cross-examine will, therefore, have to be borne in mind when evaluating hearsay exceptions. However, the accused will nevertheless be entitled to cross-examine the person in court who is giving the hearsay evidence and can then raise any doubt or inconsistencies regarding possible misunderstandings or mistakes relating to the hearsay evidence.

What is needed, it is submitted, is a common sense approach. In order to convict an alleged perpetrator in a criminal case, the accused's guilt must be proved beyond a reasonable doubt. To determine whether the guilt has been proved beyond a reasonable doubt, the court evaluates the evidence that has been placed before it. If the evidence is unreliable, the court will be unable to convict. Surely, in order to determine whether guilt has been proved beyond a reasonable doubt, all relevant evidence should be placed before the court. The court, in evaluating the evidence, will accord the necessary weight to the evidence. It is unforeseeable that a court could convict an accused on the basis of a hearsay statement made by a child without any other evidence to corroborate this. However, where the court is faced with medical evidence that a child has been assaulted, there is evidence from a witness that the accused was seen with the child at the appropriate time, a child's hearsay statement would be relevant and carry more weight. Obviously, in assigning the weight to be attributed to the evidence, the court would look at the source of the evidence, the age of the child, his possible competence, why he is not giving evidence etc.

My submission, therefore, is that all hearsay statements emanating from child victims should be admissible. This is the position in other inquisitorial countries, and it has not been alleged that accused are wrongfully convicted in this system as opposed to the accusatorial. The ordinary rules of evidence would apply. The evidence would have to be relevant in order to be admissible. The mere fact that the evidence will be admissible does not mean that the accused will automatically be convicted. There will have to be evidence before the court which proves the accused's guilt beyond a reasonable doubt. The fact that evidence is hearsay is a factor which should go to weight and not to admissibility. This approach has already been hinted at by Van Schalkwyk J in *Metedad v National Employers' General Insurance Co Ltd supra* at 499:

"the exclusion of the hearsay statement of an otherwise reliable person whose testimony cannot be obtained might be a far greater injustice than any uncertainty which may result from its admission. Moreover, the fact that the statement is untested by cross-examination is a factor to be taken into account in assessing its probative value."

## 5.8. Previous Consistent Statements

### 5.8.1. Introduction

A previous consistent statement is a statement made on a previous occasion which supports what the witness later says. The general rule is that these statements are inadmissible. In *R v Stephen Rood* 1949(1) SA 298 (GW), a case relating to a paternity dispute, the witness made the following statement in reply to questions put to her by the magistrate (299):

"Na die kind gebore was, het beskuldigde se moeder gekom na my tante se huis en gevra wie se kind dit was. Ek het gesê dis beskuldigde se kind."

This was held to be a previous consistent statement and, therefore, to be inadmissible.

Previous consistent statements are excluded because they are not sufficiently relevant. In *R v Mack* 1969(4) SA 55 (R) Greenfield J, with reference to a previous consistent statement, held that the reason for exclusion was based on irrelevance (55F). They do not add anything further to the witness's evidence. It has been argued that a witness's evidence is assumed to be consistent, unless contrary evidence is produced. In addition, previous consistent statements have the disadvantage that they can be easily manufactured. According to Hoffmann and Zeffertt (1988:117), a witness "would be able to create any amount of evidence by repeating his story to a number of people". De Wet JA explained this at 473 in *R v Rose* 1937 AD 467:

"The idea that the mere repetition of a story gives it any force or proves its truth is contrary to common observation and experience that a falsehood may be repeated as often as the truth."

It would appear that these statements could be excluded in terms of the general rules relating to relevance. If the evidence was not sufficiently relevant, it would be inadmissible in terms of s210 of the Criminal Procedure Act 1977 which provides that no evidence which is irrelevant or immaterial shall be admissible in criminal proceedings. However, the English decisions have developed it into a rigid rule, which excludes all previous consistent statements, subject to a list of exceptions, irrespective of how relevant the evidence may in fact be (Hoffmann and Zeffertt 1988:117-8). The rigidity of this rule has led to criticism since in certain instances highly relevant evidence is being excluded. Because highly relevant evidence was being excluded, a list of common law exceptions grew which have developed into well recognised exceptions. These exceptions have specific requirements that must be complied with in order for a previous consistent statement to be admissible.

### 5.8.2. Complaints in Sexual Cases

In ancient Hebrew law, if a man raped a virgin inside the city walls, both would be stoned to death "for the elders reasoned that if the girl had screamed she would have been rescued" (Brownmiller 1975:20). If she was raped outside the city, the rapist had to pay an amount as compensation and marry the girl because "for all her screaming, no one might hear". This concept of 'making known' a rape is also found in early English law. Immediately a woman was raped, she would have to make a 'hue and cry' and show her injuries, as described by Bracton (Thorne 1968:415):

"She must go at once and while the deed is newly done, with the hue and cry, to the neighboring townships and there show the injury done to her to men of good repute, the blood and the clothing stained with blood, and her torn garments. And in the same way she ought to go to the reeve of the hundred, the king's serjeant, the coroners and the sheriff. And let her make her appeal at the first county court, unless she can at once make her complaint directly to the lord king or his justices, where she will be told to sue at the county court."

By the eighteenth century, if the raped woman did not make a complaint and an outcry immediately after being raped, this was considered to be strong (although not conclusive) evidence that her charge was false. Brownmiller (1975:30) quotes the following comment made by Blackstone (1787):

"if she concealed the injury for any considerable time after she had the opportunity to complain, if the place where the act was alleged to be committed was where it was possible she might have been heard and she made no outcry, these and the like circumstances carry a strong but not conclusive presumption that her testimony is false or feigned."

It was, therefore, required of a raped female that she make an early complaint to show that she had not consented to the rape. This was accepted by our courts in *Guttenberg v R* 1905 TS 207 at 211:

"It arises from old-established custom and practice in England. That custom appears to have originated from the old English rule that where a woman wished to lay a complaint of rape it was necessary that she must have raised the hue and cry within a reasonable time after the alleged offence. She was to raise the alarm and to exhibit the marks of violence and injury to her person or her clothing to those to whom she would naturally be expected to exhibit them under the circumstances."

According to Hoffmann and Zeffertt (1988:118-9) the practice of having to prove that an early complaint had been made to disprove consent "was so deeply established in the law that it survived the growth of the hearsay rule and the prohibition of self-corroboration".

Traditionally then, complaints made in sexual cases have been admitted provided that certain requirements have been complied with. The purpose of admitting these complaints is twofold: to show consistency and to negative consent. It is, therefore, a matter which relates to the credibility of the witness. In *S v Bergh* 1976(4) SA 857 (A) Rumpff AJ explained at 866 that the purpose of such evidence was to support the credit of a witness by sharing a consistency in his account which adds some probative value to his evidence in the box.

The reasons for the admission of previous consistent statements gave rise to problems for Hiemstra CJ in *S v M* 1980(1) SA 586 (B). He argued at 587H that it would have made more logical sense if a previous consistent statement was admissible exclusively to prove the absence of consent in a sexual offence, because someone who had consented would not go and complain. As far as he is concerned 'proof of consistency' amounts to self-corroboration. Steenkamp J agreed that there ought only to be one ground of admissibility in connection with a previous consistent statement, but he disagrees with Hiemstra CJ by stating that that ground should be 'consistency'. His reason for this is that these reports would otherwise become inadmissible in other sexual offences where consent was not necessary, such as sodomy, statutory rape and cases of children under sixteen who cannot consent (592D-E).

Previous consistent statements are not an exception to the hearsay rule since the witness must give evidence. These complaints can also not be used as corroboration, as discussed *supra* when dealing with the cautionary rule, since corroboration must come from an independent source (Hoffmann and Zeffertt 1988:120). In *R v Rose supra* De Wet JA explained the position at 473:

"In certain exceptional cases a previous similar statement made by the witness is admitted not to prove the truth of the facts asserted but merely to show that the witness is consistent with himself, but the general rule is that a witness cannot be corroborated by proof of prior similar statements."

In order for a complaint in a sexual case to be admissible, the following requirements must be complied with:

#### 5.8.2.1 Sexual Offence

To be admissible in terms of this exception, the offence involved must be of an indecent nature. This would include, amongst others, rape, indecent assault, statutory rape, incest and any other offence that would include an assault of an indecent nature. In *Westermeyer v R* (1911)32 NLR 197 it was held not to apply to a case of indecent language and a complaint made by a woman to her husband shortly after his return was held to be inadmissible. Nor did it apply where a charge of soliciting or enticing for immoral purposes was involved, as decided in *Guttenberg v R supra*. Innes CJ explained at 211 that this exception originally related to charges of rape, but was later extended to other cases of physical assault upon the chastity of women, such as indecent assault. The court held that the ambit of the exception should not be extended beyond this. Here the charge is one of using language which would only be employed in the presence of the woman alone. At 212 Innes CJ commented that "to extend the doctrine in that way would be extremely dangerous".

In *Lutchman v Rex* (1915)36 NLR 205 Dove Wilson JP held at 209 that the exception extended to incest and a previous consistent statement in this regard would be admissible. In *R v Bezuidenhout* 1946 CPD 190 the court accepted that this exception included cases of incest. In *R v Dray* 1925 AD 553 a previous consistent statement was held to be admissible under this exception where the charge was one of assault. Solomon ACJ held at 554 that, although the accused was only charged with an assault, from the facts the assault appeared to be of an indecent nature. The accused was alleged to have grabbed and pressed the breasts of the complainant.

In 1922 the Court of Appeal in *R v Camelleri* [1922]2 KB 122 held that his exception also applied to indecent offences where the complainant was male. This decision has been followed in South Africa in *R v Burgess* 1927 TPD 14. In this case the accused was charged with the commission of an unnatural offence upon a thirteen year old boy. The court held that they were bound by the decision in *R v Camelleri* and the exception was therefore, extended to male complainants as well. In *R v S supra* the complainant was a ten year old boy and the court admitted a complaint he made to his mother.

### 5.8.2.2 First Opportunity

The complaint must be made at the first reasonable opportunity that affords itself. This requirement is listed in the comments of Bracton (quoted *supra*) where he explains that the complainant "must go at once and while the deed is newly done". Blackstone, also quoted *supra*, adds that "if she concealed the injury for any considerable time after she had the opportunity to complain", this would amount to suspicious behaviour on the part of the complainant. In *R v C* 1955(4) SA 40 (N) Caney J described this requirement as follows at 40G:

"it must have been made, without undue delay but at the earliest opportunity which, under all the circumstances, could reasonably be expected, to the first person to whom the complainant could reasonably be expected to make it."

What amounts to a reasonable time will depend on the circumstances of each case, and lies within the discretion of the presiding officer. This will depend on the age and understanding of the complainant and the opportunity available to speak to someone in whom the complainant can confide (Hoffmann and Zeffertt 1988:119). For instance, in *R v Gow* 1940(2) PH H148 (C) it was held that it was not unreasonable for a girl, who was alleged to have been assaulted on a train, not to make a complaint to the ticket examiner, but to wait until she saw her mother. The court admitted the complaint to her mother. In *R v Gannon* 1906 TS 114 the complainant, an eight year old girl, made a complaint to her mother ten days after the alleged assault. The court admitted the complaint on the basis that the girl was too young to realise what had happened and, in addition, she had been bribed by the accused not to say anything. In *R v C supra* the court regarded as reasonable a delay of five days in the case of a five year old. At 41F the court made allowance for the fact that the child was too young to understand the nature and significance of the act alleged to have been committed upon her. In *R v Du Plessis* 1922 TPD 153 on the other hand, the complaint was not admitted where it was made nine days after the assault and the complainant was sixteen years old. Wessels JP held at 154 that a complaint will only be admissible if the complainant makes her statement immediately after she was raped on the very first occasion on which she can make the statement.

In *R v S supra* the complainant, a ten year old boy, was assaulted on two occasions, namely in May and June of the same year. His mother gave evidence that on the second occasion (June) she was annoyed because she had sent the complainant to the shop and he stayed away longer than necessary. She then rebuked him and he explained what had caused the delay and told her what the accused had done. She then asked him if this had happened before and he told her about the incident that had taken place in May. The court held at 423 that for a previous consistent statement to be admissible, the report must be made within a reasonable time. The complaint relating to the second

incident was made timeously (within an hour) and was therefore admissible. The complaint relating to the first incident was made two months later "and then only in reply to the question put by his mother", and was, therefore, inadmissible. In *S v S supra* a report made by an eleven year old complainant to her mother several months after she was allegedly raped was held to be inadmissible.

### **5.8.2.3 Voluntary Complaint**

The complaint must be made voluntarily, and must not be made in response to questions of a "leading and inducing or intimidating character", according to Ridley J in *R v Osborne* [1905] 1 KB 551 at 561. In *S v T* 1963(1) SA 484 (A) a mother noticed that her daughter had been sexually assaulted and threatened to beat her with a stick if she did not name the perpetrator. The child then named her stepfather. Hoexter JA held at 487E that the report was inadmissible since it had been made in response to intimidation:

"In the present case the mother of the complainant actually took a stick and was about to beat the complainant when the latter started crying and said she would tell what happened. In my opinion the complaint made by the complainant in these circumstances was wrongly admitted in evidence at the trial."

What will amount to voluntary will depend on the circumstances of each case, and remains in the discretion of the presiding officer. The complaint does not have to be spontaneous, provided it is not induced by leading questions. According to *R v Osborne supra* at 556, questions such as 'What is the matter?' or 'Why are you crying?' will not affect the admissibility of the complaint. It is unclear what amount of prompting will render a complaint inadmissible. In *R v S supra*, for instance, the boy made a report (relating to the second assault) after his mother demanded an explanation for his delay. This was found to be admissible. He then made a second report (relating to the first assault) after his mother asked him if this had ever happened before. The court held that this report was inadmissible because it was not made timeously and because it was made "only in reply to the question put by his mother" (423). The latter statement is confusing, because the first report was also only made in reply to a question put by his mother, yet this was held to be admissible. The second question also did not appear to be of a leading or an intimidating nature. In *R v C supra* the mother noticed the child had a discharge and was walking with difficulty. She asked her the cause of the hurt, in response to which the child made a complaint. The mother gave evidence that she had not threatened the child, but spoke to her quietly, not crossly. She said she did no more than insist upon being told the truth. The court found the report to have been made voluntarily, holding at 41D-E that the mere fact that a statement was made in response to questions did not make the complaint involuntary unless the questions were of a leading or suggestive nature.

In *S v S supra* the complainant, an eleven year old girl, made a report to her mother after she was questioned by her mother as to how she had lost her virginity. This had been discovered by a female relative to whom the girl had been sent for instruction in the facts of life, in accordance with custom. The girl, at first, remained silent and the mother then threatened that she would report her to the police if she did not tell the truth (at 53B-C). Although the court did not have to decide whether the report had been made voluntarily as it was already found not to have been made within a reasonable time, the court, nevertheless, found that the fact that the girl believed her mother's

threat indicated her naïvety and boosted her credibility (at 53C):

"The fact that thereafter the complainant told her story tends to confirm her naïvety, which in turn lends transparency to the truthfulness of her evidence."

#### **5.8.2.4 The Complainant must Testify**

In order for a complaint to be admissible in terms of this exception, the complainant must testify. If she does not testify, the report will be hearsay and, therefore, inadmissible. The purpose of admitting the complaint is to show consistency on the part of the complainant. If she does not testify, then the complaint cannot be used to show consistency (Hoffmann and Zeffertt 1988:120). Where the complainant does not testify, neither the contents of the complaint nor the fact that it was made may be admitted.

In *R v Kgaladi* 1943 AD 255 the complainant, a feeble-minded child of 12, was not called as a witness. The trial judge admitted evidence of a previous consistent statement made by the complainant. On appeal Centlivres JA found the previous consistent statement to be inadmissible, holding at 261 that:

"when the evidence of a complainant is not before the court, neither the particulars of a complaint made by her, in the absence of the accused, nor the bare fact that a complaint was made, can be given in evidence."

The interpretation of this requirement was somewhat stretched to admit the report in *S v R* 1965(2) SA 463 (W) where the complainant was raped. The complainant was a recovering chronic alcoholic who had a relapse. She called her psychiatrist who arranged for her to be fetched by ambulance and taken to a nursing home. On route to the nursing home, sexual intercourse took place in the back of the ambulance between the complainant and one of the ambulance attendants. On arrival at the hospital, the complainant was very distraught and accused the ambulance attendant of raping her. At the time of the trial, the complainant was suffering from amnesia and had no recollection of the rape. Although the complainant was in fact testifying, she did not remember the rape, and therefore, her report could not be used to show consistency with her evidence in court. However, Trollip J held that the complainant's report and condition were relevant to show her state of mind at the time of the incident and to rebut the accused's defence that she had consented. Her evidence was simply that she would never have consented.

#### **5.8.3 Criticisms of the Rule**

The logic upon which this exception has been based is fundamentally flawed. Exceptions to the rule against previous consistent statements have developed in order to admit evidence which is highly relevant, but which would have been excluded by the rule. Therefore, reports of sexual offences have been admitted because they often provide evidence which is highly relevant. However the requirements that must be complied with in order to fit within the exception are so rigid that three-quarters of the complaints are excluded anyway. It makes no sense to create an exception in order to admit evidence, if that evidence becomes inadmissible due to the requirements of that

exception. Hiemstra CJ in *S v M* 1980(1) SA 586 (B) at 587H refers to the rule against previous consistent statements as "een van die minder duidelike en lukrake erfenisse uit die Engelse bewysreg."

The requirements that need to be complied with also give rise to difficulties. They are extremely rigid and often exclude highly relevant evidence, without any justification for so doing. The complaint must be made at the first reasonable opportunity. Why? Is this based on any scientific evidence that these complaints are more trustworthy than those made at a later stage. In fact, this requirement does not accord with research findings. Olckers (1992:428) quotes figures that seventeen out of nineteen rapes go unreported. Sorenson and Snow (1991:15) examined 116 cases of children who had been treated for sexual abuse. For the majority of children, the disclosures were accidental, and at some point 75% of the children had denied that abuse had occurred. Ceci and Bruck (1995:35) summarise the position as follows: from the available data there are a number of children who immediately disclose their abuse, whether accidentally or deliberately, but there are also a number of children who delay their disclosures for long periods of time. In *S v S supra* Ebrahim JA had the following to say on this point at 52G-I:

"The evidential requirement that a rape victim should report the crime as soon as possible after its occurrence proceeds from the assumption that she is aware that a wrong has been committed against her. Now, it is abundantly clear from her evidence that the complainant was in a state of confusion over whether what had happened was wrong... The incident occurred during a period when the appellant was punishing the complainant, among others. To an immature and inexperienced mind what was done to her is likely to have seemed to be merely a particularised form of punishment."

Since what will amount to a reasonable time within which a complaint ought to be made lies within the discretion of the presiding officer, this gives rise to difficulties in application. In *R v S supra* a little boy made a report to his mother of two assaults, one that had happened within the hour and the other two months previously. The report relating to the former was held to be admissible, but not the latter. On what grounds can such a distinction be justified? How can one report be trustworthy and the other not?

In order to admit relevant evidence, the courts are often forced to strain the original ambit of the requirements. In *R v T* 1937 TPD 389 the accused was charged with committing an act of gross indecency upon a five year old boy. The little boy made a report 6 weeks after the act, and the court was called upon to determine the admissibility of this report. Tiddall JP held the following at 392:

"There is no doubt that the period in the present case is unusually long; I know of no case in our Courts where the complaint has been admitted after so long a lapse of time. But on the other hand the circumstances of the present case are very unusual. There is the fact that the child was only five years of age and could not have appreciated the moral impropriety of the experience to which he was subjected."

The court goes on to explain that in the circumstances of this particular case the facts explain away the delay, and accordingly the report was held to be admissible. The major difficulty of this exception is that it does not accord with modern psychological findings that complainants in sexual cases do not make disclosures soon after being assaulted.

This exception is also limited to offences of a sexual nature. Other than the fact that this exception has a long history in which it has been limited to sexual cases, there seems no justification why this should be so. If a child has been physically assaulted by a parent, and makes a report to a teacher, surely that report will be highly relevant. Since the evidence of child witnesses is treated with caution, any evidence that will assist the child's credibility should be placed before the court. This only seems fair in view of the fact that at common law a witness's previous inconsistent statements are admissible as being relevant to the witness's credibility (Hoffmann and Zeffertt 1988:452).

The rigid requirements have forced the courts to stretch their interpretation as in *S v R supra* in order to admit evidence which is obviously relevant. In *R v C supra* the court was faced with the complaint made by a five year old. It was argued that, since a child under twelve years could not consent, there was no basis for admitting such evidence, because the reason for its admission was that it tended to show absence of consent. Caney J held at 40F that this complaint was relevant to whether she had invented the story:

"When evidence of the terms of a 'complaint' is admitted in cases such as the present, this is not to rebut any suggestion of consent, nor as proof of the complainant's allegations against the accused or as corroboration of her evidence, but as showing consistency on her part and as being relevant on the question whether she has invented the story she has told before the Court."

Once again, it would seem that what is needed is a commonsense approach. If the evidence is relevant, which it would appear to be since it forms the basis of creating this exception, then it should be admissible. Whether the complaint was made a very long time after the event, the reasons therefore, whether it was made in response to leading questions - these are all matters which should go to weight and not to admissibility. A presiding officer is trained to evaluate evidence, in so doing he will determine what weight should be accorded to the report. If the evidence is very weak, then very little weight will be given to it.

I submit that the reasons for excluding previous consistent statements do not have a valid basis. They are excluded, firstly, because they are insufficiently relevant. However, a number of exceptions have been introduced to admit previous consistent statements which are, in fact, relevant. Secondly, it is argued that it is easy to manufacture previous consistent statements. This may be so, but it is a factor which goes to weight and depends on the circumstances of a particular case. In view of this, I submit that the common law rule against previous consistent statements be repealed by a statutory provision. The normal rules of evidence, i.e. relevance, should remain the guiding principle for admissibility. If the previous consistent statement is relevant, then it will be admissible. All other factors will go to the weight to be accorded to the individual report before the court. If the previous consistent statement is not relevant to the matter before the court, then it will be inadmissible in terms of s210 of the Criminal Procedure Act of 1977.

## **6. THE CHILD AS WITNESS**

### **6.1 Introduction**

Since the information relating to child witnesses is to be viewed in an ecological perspective, it is now necessary to look at those aspects of a child that will be relevant to the overall study of child witnesses in an accusatorial system of evidence.

We have already examined the macrosystems (constitutions and procedural systems) and microsystems (common law and legislation) of law. This section will attempt to look at the microsystems of the child and certain exosystems that exercise an indirect influence upon the child.

An investigation of the microsystems of the child will include the latest research findings relating to child development, memory, the distinction between fantasy and reality, the ability to tell the truth, suggestibility and the perceptions which children have of the courts and legal procedures. An exosystem which is of particular relevance to a child's capacity to give evidence relates to the manner in which children are perceived by legal personnel.

### **6.2 Child Development**

#### **6.2.1 Cognitive Development**

The study of cognitive development is based on the fundamental assumption that children show similar mental, emotional and social abilities, and that they undergo similar changes in capacities at roughly comparable ages (Bukatko and Daehler 1992:53). An understanding of cognitive development is important to recognise and explain the inconsistencies and confusions in children's reports. Saywitz (1990:343-4) offers the following example to illustrate this point: where a four year old witnessed a crime that took place at the paternal grandmother's sister's house, the child will be unable to understand the questions relating to kinship relationships. The child would be able to identify those present (sister, mother, grandmother, grandmother's sister etc.) only by name and not by relationship. The name Grandma Ann is no different from the name Mary-Jo. Knowing the name used to refer to the grandmother does not mean that the child can imagine that her father was once a baby and had a mother who happens to be the grandmother. This would require the mental operation of reversibility, which she would not yet have acquired by the age of four. Therefore, although she may know that she has a sister, she will deny that she is a sister to her sister. This has the effect that her credibility will be compromised by developmentally inappropriate questioning.

The most well-known cognitive development theorist is Jean Piaget, whose ideas have had a monumental impact on developmental psychology. He proposed that development proceeded through four stages: sensorimotor, pre-

operational, concrete, and formal. Each stage is seen as a progression and is defined by the appearance of a different level of thinking i.e. an increasingly sophisticated form of knowledge. Each stage develops into the next, involving the integration and incorporation of earlier ways of thinking (Bukatko and Daehler 1992:55).

According to Piaget, all children progress through the stages of cognitive development in the same order, without any stage being skipped. Although Piaget did provide age norms for the acquisition of each stage, some children may reach a particular stage more quickly or more slowly, depending on the child's environmental experiences. What follows is a very brief summary of the four stages through which children develop, based on that set out in Bukatko and Daehler (1992:318-324):

***The Sensorimotor Stage:*** According to Piagetian theory, this is the first stage of cognitive development and lasts from birth until approximately two years of age. In the beginning an infant's movements are reflexive, not deliberate or planned. As the child progresses through this stage, the actions become more goal-directed with behaviour deliberately being employed to attain a goal. The second aspect of this stage is the child's gradual separation of self from the external environment. The child becomes less focused on self and more oriented to the external world. The third accomplishment of this stage is the realisation that objects exist even when they are not in view. The end of the sensorimotor stage and the beginning of the next stage is reached when the child is able to imitate a model that is no longer present. To do so the child must have developed the ability to represent the model's overt behaviour in an internal form and then to draw on that representation later. It is this ability to represent events and objects internally that marks the transition to the second stage.

***The Preoperational Stage:*** The second stage of development lasts approximately from two to seven years of age, and thought is now symbolic in form. This is the child's ability to use a symbol, object or word to stand for something. This is a powerful cognitive ability because it enables a child to think about past and present and to employ language. Language would not be possible without this stage of cognitive ability. This ability is also a prerequisite for imagery, fantasy, play, and drawing.

This stage has a number of distinct limitations. Firstly, children in this stage are said to be egocentric. They are unable to separate their own perspective from that of others. This is illustrated by the three year old who thinks he is hiding when he crouches behind an object, despite the fact that his legs or feet are sticking out. The child believes that he cannot be seen because he himself cannot see. This has the effect that children under the age of seven have poor referential communication skills and are unable to appreciate the perspectives of others.

The second limitation relates to the child's inability to solve problems logically. This would include the tendency of the child to focus on only one aspect of a problem, the inability to reverse mentally an action and the tendency to treat two or more connected events as unrelated. This is best illustrated by the use of an experiment. If a liquid is poured from one beaker (A) to a different shaped beaker (B), perhaps a thinner but taller beaker, the child will believe the second beaker (B) has more water. This is because the child is only able to focus on one aspect of the beaker, namely its height, to the exclusion of all other information. The child does not have the ability to reverse the action, namely reverse the pouring from B to A, because then he would realise that the containers contain the

same amount. Thirdly, the child will see the liquid in beaker A and the liquid in beaker B and will not see the connection between the two, namely the sequence of events.

**The Concrete Operational Stage:** The third stage of development lasts from approximately seven to eleven years and is the stage in which thought is logical when stimuli are physically present. The child will now be able to solve the problems mentioned in stage two *supra*. This is because he has the ability to perform the mental actions such as reversibility. For instance, using the previous illustration, the child will be able to think about events i.e. he can pour the liquid back from beaker B to beaker A 'in his head'. The child is less egocentric, enabling him to understand the perceptions and beliefs of other people.

**The Formal Operational Stage:** The last stage of cognitive development extends from approximately eleven to sixteen years, and is the stage in which thought is abstract and hypothetical. Thinking is logical and abstract. The child is able to reason hypothetically.

According to Piaget, these are the four main stages through which a child must pass in cognitive development. Piaget's findings have given rise to a wealth of research on this topic. Many of the researchers agree with Piaget's findings, but disagree with his interpretation. His description of the ages at which cognitive skills are acquired has been challenged, as well as whether development does occur in stages, and whether there are alternative explanations for the behaviours he observed amongst children (Bukatko and Daehler 1992:358).

### 6.2.2 Moral Development

Moral development relates to the ways in which children reason about moral problems. The concept of moral development is important for legal purposes since part of the competency examination relates to whether a child is capable of understanding the duty to tell the truth (Saywitz 1990:349). The two most prominent cognitive-developmental theorists who worked on the moral development of children are Piaget and Kohlberg. They were of the opinion that children reason about moral issues in different ways depending on their level of development. In moral development, as in cognitive development, children are presumed to pass through stages in a sequence, which implies that children across different cultures will show similarities as they pass through the various stages (Bukatko and Daehler 1992:540).

In conducting his research on moral development, Piaget used two methods to explore children's understanding of morality. He first focused on children's understanding of rules (of games) since rules are essential in constructions of morality. He concluded that a child's appreciation for rules developed through several stages. The behaviour of young children is not guided by rules. They engage in acts for the pleasure of performing them or out of habit. Although pre-school children may be aware that there are rules, they do not incorporate them into their play. By the age of six children regard the rules (of their games) as "sacred and inviolable". The majority of the children do not understand the details of the rules, but they respect them unquestioningly. According to Piaget, adult authority is respected and regarded as the source of all rules. The final stage is reached at approximately ten years of age and here children understand that the rules are a result of agreement among the participants. Rules are not

obeyed blindly but can be modified since they are the result of co-operation among the participants (Bukatko and Daehler 1992:541).

The second method used by Piaget in his study of moral development was the observation of children's responses to a series of moral dilemmas. He would provide them with stories in which the central character did something wrong but the intentions and consequences varied. He concluded that children under the age of ten are in a stage of moral realism in which their moral judgments are based on the consequences of the act. The rightness or wrongness of an act is based on the visible consequences. The intention of the central character is not taken into account. According to Piaget, rules are viewed as unbreakable in this stage. When rules are broken, punishment is the inevitable consequence. Children at this stage believe in expiatory punishment i.e. the punishment does not have to be related to the transgression as long as the punishment is severe enough to teach a lesson. Adults are seen as being the authorities on moral standards (Bukatko and Daehler 1992:541-2).

In the second stage of moral development (moral relativism) children begin to take account of the wrongdoer's intention and motive. The child no longer believes that every violation of a rule will result in punishment. Punishment must be related to the transgression. The authority of adults is no longer the sole reason for obeying rules. Rather, mutual respect and co-operation with peers underlies the child's reasoning about moral issues. The movement from the stage of moral realism to moral relativism is related to the child's cognitive ability. The less egocentric a child becomes the more he is able to appreciate the point of view of another person's as distinct from his own. This enables him then to understand the intention of another person (Bukatko and Daehler 1992:542).

Research subsequent to Piaget has confirmed many aspects of his theory. It is accepted that children progress from a belief in imminent justice, expiatory punishment and obedience to authority to an increasing consideration of intention when judging acts. Also accepted is Piaget's belief that cognitive development underlies a child's development in moral reasoning. Piaget has, however, been criticised for underestimating young children's ability to respond to intentionality. In research carried out on a sample of children, ranging from kindergarten to fifth grade, even the youngest children took the intentions of the actor into account when making moral judgements (Bukatko and Daehler 1992:543).

Lawrence Kohlberg was heavily influenced by Piaget's emphasis on the link between cognitive development and moral development. Kohlberg's theory of moral development is also based on the belief that development consists of passing through stages in a hierarchical order. He identified three stages or levels of moral orientation. The following is a brief summary of these stages, based on the work of Bukatko and Daehler (1992:544-548): In the first stage of moral reasoning (pre-conventional level) the child's behaviour is motivated by the avoidance of punishment, the attainment of rewards, and the preservation of his own self-interests. The second stage is the conventional level. Here the child conforms to the norms of the majority and wishes to preserve the social order. The child considers the point of view of others, including intention and motives. A sense of responsibility to uphold the rules develops. The final stage is the post-conventional stage. Here the child has developed a fuller understanding of the basis for laws and rules. Laws are seen as the result of a social contract with individual principles of conscience emerging.

Kohlberg and Piaget differ in their approach to moral development in a number of respects. Kohlberg does not place as much emphasis on the role of adult authority as Piaget does. His emphasis is on rewards and punishment. Kohlberg is of the opinion that the movement towards autonomy occurs towards the end of adolescence, which is much later than that envisioned by Piaget (Bukatko and Daehler 1992:546). Although psychological theories differ in the emphasis they place on various aspects of moral development, all theories portray the child as moving through various stages from self-orientation to other-orientation.

### **6.2.3 Language Development**

In order to participate in the legal process, a child must have the ability to communicate in a manner that is understood by the adult listeners. Communication in this context, according to Saywitz (1990:345), is an interaction between what the speaker (child) and the listener (adult) bring to the context (courtroom) in which the interchange occurs. To give evidence successfully, a child must have reached a certain level of intelligibility, vocabulary and conversational skill.

An understanding of language development in a child is vital for conducting successful interviews with children. Studies have shown that children learn to communicate through a gradual sequence of phases. It is, therefore, important to be able 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 their responses in accordance with their level of development. For instance a child who is capable of understanding simple sentences of six to eight words long will not be able to respond accurately to a sentence that has twenty words and contains complex clauses (Saywitz 1990:346).

As in the other areas of development, studies indicate that children learn to communicate through a series of stages:

"When one compares the empirical findings of language acquisition studies, in fact, it is surprising how similar dates of predominant development of the various syntactic structure turn out to be. Onset time may indeed vary, but means display a remarkable correspondence." (Crystal et al 1976:31)

At birth a child's linguistic capabilities are limited to crying, clicks and sighs. Between the ages of six and eight weeks the child begins to coo. As the weeks progress, the coos become longer and begin to include certain consonants (Bukatko and Daehler 1992:277).

Most children begin to babble between the ages of three and six months and refine their skills in the succeeding months so that by the age of nine or ten months the babbling includes more numerous and more complex consonant-vowel combinations. From approximately twelve months children begin to utter their first words. In this stage most children only speak one word at a time. They acquire their first ten words very slowly, adding approximately one to three words to their repertoire every month. From eighteen months many children show a rapid acquisition of new words, although the majority of these words are nouns (objects, people or events). They also use verbs (action

words), such as give, go etc., and some adjectives (dirty) with some personal-social words (please) occurring (Bukatko and Daehler 1992:281).

Stone and Lemanek (1990:23) refer to the findings of studies which reveal that children between eighteen and twenty-four months begin to refer to themselves by name and by twenty eight months they demonstrate the ability to describe their own mental states, for instance 'see', 'thirsty', 'scared' etc. Singleton (1989:14) concludes that as far as the early emergence of language is concerned, there is good evidence of a stable sequence of stages which occur at relatively similar age-ranges.

From the age of two years children are able to produce sentences containing at least two words, which consist of combinations of nouns, verbs and adjectives without any conjunctions eg. more juice; mummy sit. By two-and-a-half years children's speech exceeds two words and includes more connective words, adjectives and pronouns. Between the ages of three and five the grammatical structures in a child's speech become more sophisticated and they use different tenses, singular and plurals as well as more articles and conjunctions. Negatives, questions and passives are also gradually introduced (Bukatko and Daehler 1992:286-8).

Even when children have mastered the basics of simple sentences, certain concepts still give rise to problems in communication. Studies have shown that even when children think they understand a word, they may not have the same meaning in mind as the adult. An example given by Saywitz (1990:346) illustrates this point: children only understand the concept of 'jury' by the age of ten or eleven, but they frequently mistake it for the more familiar word 'jewellery'. A case is something you carry books in, a court is a place where you play basketball, a minor is someone who digs coal, and parties are where you get presents. If an adult misjudges the child's level of knowledge, this can create a great deal of confusion in communication.

An understanding of the norms for the acquisition of certain words is very relevant to interpreting a child's language. For instance, children generally do not use the concepts 'frontwards', 'sideways', or 'backwards' accurately until they are about seven. Another frequent misunderstanding is the use of relational terms to describe the size and shapes of people and things. These terms may have different meanings for children. For example, if a child is asked whether an unfamiliar object is big or small, he will use himself as the standard. If the object is small enough for him to hold, it is little; if it is too big for him to hold, then it is big (Saywitz 1990:347). Therefore, if a child is asked whether somebody is fat, what may appear large and fat to him, could appear fairly slim and small to an adult.

There are a few common errors in children's communications which will be mentioned here for the sake of completeness. Firstly, young children sometimes extend the meaning of a word in their small vocabularies to include actions or objects for which they have no word (overextension). Although this practice violates the rules of adult language, it makes logical sense to children to apply a word to objects that resemble each other. For example, all four-legged furry animals may be referred to as 'doggies'. The lesson for courts then is that they have to be careful to decipher the specific meanings of words used by young children (Perry and Wrightsman 1991:126).

A second error found in children's communications is referred to as underextension. By this is meant that they attribute to a word only part of the meaning the term has for adults. A good example of this error is provided by Goodman and Helgeson (1985:197-8):

"if a child were asked, 'Did the man take off his clothes?' he or she might respond, 'No,' but if asked, 'Did the man take off his pants?' he or she might respond 'Yes.' In the questioner's mind, the first question might subsume the second, but for the child, clothes and pants may be two distinct ideas. Thus, the child's testimony may appear to be inconsistent when it really is not."

A further possible error in communication relates to syntax. In English the order in which words are spoken partially determine their meaning. A typical English sentence follows a subject-verb-object sequence. This has the implication, supported by research, that children have difficulty understanding passive sentences. Young children assume that the subject of the sentence is always the actor. For instance, if a child was told 'Jane was hit by John', he will understand it to mean that Jane is the one doing the hitting. Therefore, when talking to children, adults should use simply-phrased, active-voice sentences with only a few adjectives and adverbs (Perry and Wrightsman 1991:128).

Of particular relevance to the interviewing of children is their understanding of when, who, what, why and how questions. Initially children can only answer what, who and where questions, because these questions require concrete information they can understand - agents, objects and locations (Saywitz 1990:346). However, as far as when-questions are concerned, a child under the age of eight will have difficulty providing accurate information. The understanding of time and dates is very limited in young children, although they will be able to say if an event took place during the day or at night or if it is related to an important event such as a birthday or Christmas. A why-question is generally not understood before the age of eight or ten (Brennan and Brennan 1988:56)

The difficulty in understanding why-questions is related to a child's difficulty in understanding evaluative questions. An evaluative question is one that requires the child to think about and interpret facts. According to Perry and Wrightsman (1991:60), as a child's brain develops a fatty substance (myelin) begins to coat and protect the neural fibres which have the function of reducing the random spread of impulses from one fibre to another. The last structure to myelinate is the *corpus callosum*, which is the band of fibres connecting the right and left hemispheres of the brain. One of the major functions of the *corpus callosum* is to transfer information from one hemisphere of the brain to the other, which would enable children to evaluate and make inferences. Myelination of the *corpus callosum* is not complete until after a child is ten years old. However, this does not mean that children under the age of ten cannot give evidence. Although the left and right hemispheres of the brain function autonomously in very young children, communication improves greatly by the time the child is five years old (Perry and Wrightsman 1991:60-61).

"The corpus callosum of most five-year-olds likely is not mature enough for the transfer of more complex information, e.g., that involving complicated decisions and evaluation, such as making inferences and drawing conclusions. Thus, while young children may well be capable of accurately perceiving events and of communicating simple information about those occurrences, they are not able to engage in inferential thinking about the events. It is only as children approach adolescence that their maturing brains permit them to evaluate their perceptions with a degree of

sophistication approaching that of adults."

In fact, Perry and Wrightsman (1991:61-2) suggest that this may result in younger children actually being better witnesses, since they report details of what they have witnessed without evaluating them, while adolescents and adults may commit errors because they think about the details. The following example illustrates this point: an eleven year old girl and her nine year old sister were out walking when they met a young man on a bicycle who called out to them and exposed his penis. The girls provided separate reports to their mother. Initially they both provided similar reports with both of them saying that the man had worn cut-off jeans and had exposed his penis through the leg opening. Later, the older girl changed her statement, saying that the man had not worn jeans but loose-fitting blue shorts. When the child's mother asked her why she had changed her mind, the girl replied that he could not have been wearing jeans because jeans are too tight for him to have put his penis through the leg. Therefore, younger children are often capable of describing simple events but they may have difficulty comprehending or interpreting these events until they are older.

A lawyer's verbal skills are very well developed, but it is this very skill which sometimes creates a significant barrier to communication with children. This means that when lawyers (or even other adults) work with children, they must be aware of children's limited linguistic abilities and choose their words with great care. In order to communicate effectively with children, it is important that interviewers are knowledgeable about the stages of language development and of common errors in language usage (Perry and Wrightsman 1991:129-130).

### **6.3 Memory and Suggestibility**

#### **6.3.1 Introduction**

Two issues will be addressed here. The first is whether children are capable of remembering stressful events accurately. The question of memory is relevant to competency. As discussed *supra*, the American courts have held that competency relates to a child's ability to observe an event, remember it and then relate it at a later stage. An attempt will be made to examine scientific findings in the field of psychology to investigate whether they can be of any assistance in determining whether children can remember stressful events accurately.

The second issue is whether young children are more suggestible than older children and adults. Are children influenced by suggestive questioning techniques? In other words, do children incorporate assumptions contained in the interviewer's questions into their own reports? This will have an important effect on the credibility of a child witness and is relevant to the cautionary rule which must be applied to child witnesses. When the courts are presented with the evidence of a child, they have to warn themselves of the dangers inherent in a child's evidence. One of these alleged dangers is the supposed suggestibility of children. What needs to be addressed is whether this assumption is in keeping with scientific research.

## **6.3.2 Memory**

### **6.3.2.1 Introduction**

Memory involves the acquisition, storage, retention and retrieval of information. The ability, therefore, to remember depends on the skill with which a complex set of processes are executed, beginning with the event in question and ending with its retrieval at a later stage.

The three main stages of the system are: encoding, storage and retrieval. The first phase is called encoding and refers to the process by which a trace of an experience becomes registered in memory. There is selectivity as to what gets encoded in the storage system at the initial stage since in most cases attention is given to certain aspects of an event while other aspects are ignored. The following are some of the factors that could influence what enters the memory system and how strongly it becomes encoded: prior knowledge of the event, interest value of the event, duration and repetition of the original event, and the stress level at the time encoding takes place (Ceci and Bruck 1995:41-2).

The second phase is known as the storage phase, and in this phase encoded events enter a short-term memory store. Not all memories survive short-term storage, but those that do then enter long-term storage. It is important to be aware that 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, and the number and type of intervening experiences that have been encoded and stored (Ceci and Bruck 1995:42).

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 parallel those of encoding, for instance when the interviewer makes use of cues that reinstate the encoding context, accuracy of recall improves (Ceci and Bruck 1995:43).

In summary, what a person 'remembers' does not always come directly from storage. Memory is highly constructive and, therefore, memories are added to, deleted and shaped by experiences. These transformations can occur at any stage. The result is that what is retrieved is rarely a direct match of the original event.

### **6.3.2.2 Memory in Children**

Research studies have shown that 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 (Werner and Perlmutter 1979:56). 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. These problems seem to result from the fact that most of the processing space in children's active, working memory is filled by the instructions for encoding and retrieving information. With time, children become more efficient at processing information because the instructions become automatic (Myers 1987:487-8).

In order to remember an event, the first steps are to perceive the event and to pay attention to it. Perry and Wrightsman (1991:108) 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, he 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 does not have the ability to communicate the content of the memory. Therefore, 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 (Perry and Wrightsman 1991:108).

Recognition memory is the simplest form of remembering, and entails only that an object be recognised as something that was perceived previously. Recognition is within the capacity of very young infants and improves rapidly as children mature. For instance, a study conducted by Myers and Perlmutter (1978:218) found that two year olds recognised 81 percent of the objects presented to them correctly while four year olds were correct 92 percent of the time. Other researchers found that on photo-recognition tasks, six year olds had higher mean identification accuracy than three year olds and even adults (Myers 1987:489). It is generally accepted that by the time children begin school, their recognition memory is very good for simple stimuli with five year olds being as proficient as adults in recognising pictures of commonplace objects. But children do not perform as well with more complex stimuli and this limitation is important in the legal context (Perry and Wrightsman 1991:109-110).

Reconstruction memory is a specialised method of retrieving material from storage which involves reproducing the form of information that was seen in the past, as in reconstructing the scene of the crime. Piaget believed that children's reconstructive memory was superior to their free recall because children intentionally repeat the natural order of events when manipulating concrete objects. Myers (1987:490) refers to research studies conducted by Cohen and Perlmutter where two and three year olds demonstrated up to 75 percent accuracy on simple reconstructions.

Recall is the most complex form of memory requiring that previously observed events be retrieved from storage with few or no prompts. This is the form of retrieval most often required of witnesses, and is strongly age-related. Perry and Wrightsman (1991:111-2) refer to research studies where subjects, ranging in age from five years to adulthood, observed an unexpected, staged event. The subjects were then asked to use recall memory to relate what they could remember about the incident. A number of the younger children did not volunteer any information.

However, although the youngest group was able to recall less, what they did say tended to be correct (only 3 percent error) while the other age groups had error rates of between 8 and 10 percent. The subjects were then asked twenty simple questions about the incident and asked to select the man they had seen from an array of photographs. The results indicated that children of all ages were as capable as adults of answering simple, direct questions, and the children were as adept as the adults at recognising the person they had seen from the photographs. Perry and Tepley (1984/5:1389) interpreted the results of this research as follows:

"In the context of a legal interview or examination, this research suggests that when children are simply asked to tell what they can remember about an event, the quality of the narrative of older children will be better than that of younger ones, but neither will give as full a narrative as an adult. It also suggests, however, that even young children (kindergarten - first grade) have sufficiently developed ability to remember past events and that simple, direct (non-leading) questions or recognition recall [i.e., cued recall] appear to be viable means of finding out factual information from them. Using those methods, their answers apparently are no less credible than those of an adult, absent other influences."

Certain trends are evident in the development of recall ability. Infants, generally, are poor at recall. Preschoolers, although beginning to organise their memories around concepts, have poorly developed recall memory. When children enter school their recall improves with six or seven year olds recalling a story much as an adult would. Gaps do, however, remain in the children's version. Although most of the important features are recalled, incidental facts may be forgotten or not reported (Myers 1987:492). In conclusion, Perry and Wrightsman (1991:113-4) summarise the position as follows:

"It would be erroneous to assume that younger children necessarily have poorer recall than do older children or adults. In some cases, younger children can provide more accurate information. The important point is that because of their limited ability to use memory strategies, children often know more than they can freely recall."

### **6.3.3 Suggestibility**

#### **6.3.3.1 Introduction**

Traditionally, suggestibility has been defined as "the extent to which individuals come to accept and subsequently incorporate post-event information into their memory recollections" (Gudjonsson 1986:195). Ceci and Bruck (1995:44-5) suggest that a broader definition of suggestibility be used which follows the legal and everyday usage of the term. Suggestibility then would refer to "the degree to which the encoding, storage, retrieval, and reporting of events can be influenced by a range of internal and external factors". The broadened definition implies that suggestibility can result from social as well as cognitive factors, which would include information unwittingly incorporated into memory, subtle suggestions, expectations, stereotypes, leading questions as well as explicit bribes, threats and other forms of social inducement.

### 6.3.3.2 Early Research on Children's Suggestibility

Although there were many researchers who conducted studies on the suggestibility of children and adults, only the four researchers who had the greatest influence on subsequent psychological research will be discussed here. They are Binet, Varendonck, Stern and Lipmann.

In 1900 Alfred Binet published the results of a series of studies on the suggestibility of school children between the ages of seven and fourteen in which he maintained that suggestibility was induced by two broad classes of factors. The first class related to the influence of thought that developed within the individual and was not caused by the influence of another, while the second class included factors which were external to the child and reflected mental obedience to another person. He argued that the second class included manifestations of suggestibility which were the result of attempts to please powerful authority figures and did not actually always reflect genuine incorporation of the false suggestion into the memory (Ceci and Bruck 1995:51-54).

Binet attempted to apply his findings to the courtroom context and recommended that French judges be aware of forcing their own questions into the child's memory. His work, however, was never used in French courts and, although Binet wanted to extend his research into the courtroom by studying the transcripts of criminal cases, he was never allowed to do so. This was then taken up by other researchers like Varendonck and Stern (Ceci and Bruck 1995:55).

Varendonck was a Belgian psychologist who began to publish his research on the memory of child witnesses in 1911. He had been approached for assistance in the course of an investigation into a murder which was alleged to have been witnessed by a child. As a result he conducted a series of experiments on the suggestibility and accuracy of children's memory. Varendonck was of the opinion that the memory of children could not be trusted since they did not have the ability to observe and were highly suggestible. His reports, as translated by Hazen, are reproduced in Selkin and will be briefly summarised below. Varendonck believed that "[t]hose who are in the habit of living with children do not attach the least value to their testimony because children cannot observe and because their suggestibility is inexhaustible" (Selkin 1991:38).

One of his most famous experiments was conducted in 1912 and focused on the suggestibility of children aged between seven and nine years. The actual experiment involved a teacher addressing a class of students, in the course of which he referred the students to another male teacher (Mr H) whom the children knew well and saw many times a day. The teacher then rubbed his chin and said the word 'beard'. He then wrote the following question on the board: 'What is the colour of Mr H's beard?' Amongst the seven year olds, sixteen of the eighteen children wrote that Mr H had a black beard. In fact, Mr H did not have a beard. The question posed to the eight year olds was 'What is the colour of Mr T's moustache?' when in fact Mr T did not have a moustache. Only one out of twenty students observed that Mr T did not have a moustache. Amongst the nine year olds, sixteen out of the twenty were of the opinion that Mr T did have a moustache. Varendonck, therefore, made the finding that children are more

suggestible than adults, and younger children are more suggestible than older children (Selkin 1991:39). Since Varendonck had originally been approached in the course of a murder investigation, he compiled a report in which he set out his finding that "we cannot set the least value in their [children's] declarations".

Stern, A German psychologist, also focused on suggestibility in his research. He developed two types of experiments in this field, which are still used today. In the first, subjects were shown a picture, asked to study it for a while and then asked to recall what they had seen. They were then asked questions, amongst which were included some misleading questions which requested information about objects that had not appeared in the picture. In one of the studies he conducted, he tested children between the ages of seven and eighteen, and found that free recall produced fewer errors whereas the misleading questions produced the most errors. He found that, although the younger children were more suggestible, even the eighteen years olds were misled by the suggestive questions (Ceci and Bruck 1995:56-7). This finding is important with respect to Varendonck's findings. He found children to be suggestible but only tested children aged between seven and nine. Stern also found children to be suggestible, but his study was conducted on subjects aged between seven and eighteen and he found that even the eighteen year old were suggestible.

The second type of experiment developed by Stern was referred to as the 'reality' experiment and it aimed at mimicking situations which were closer to real life. This paradigm has been adopted by a number of later researchers in their studies on child witnesses' memory of events. Stern's findings are briefly summarised as follows: he cautioned that subjects should not be questioned repeatedly about an event; he claimed that a subject's original verbal answers were better remembered than the actual event; and he believed that the questioner was in many cases responsible for the unreliable evidence of witnesses because of the way in which a question was phrased (Ceci and Bruck 1995:57).

Another German psychologist, Lipmann, concluded that children were less reliable than adults as witnesses because children pay attention to different attributes of stimuli than adults and this plays a role in what they encode. This, together with certain social factors, was responsible for children being more suggestible than adults. Children are questioned in most cases by adults who have great authority over them about events which are neither essential nor salient to the child. Lipmann (1911:253) believed that in this situation children will attempt to revise their memory to comply with the authority figure.

These early studies of children's evidence dealt almost exclusively with children's memory and suggestibility. Today, however, understanding of cognitive ability is much greater and it is recognised that a child's knowledge of, or familiarity with, an event profoundly affects memory performance. A child who is knowledgeable in a certain domain may remember events in that domain better than an unknowledgeable adult. Memory is also related to cognitive development. These issues have only recently been recognised. In addition, early researchers tended to make categorical statements about the abilities of children. For instance, they stated that children are always more suggestible than adults or that a child always remembers less. These studies were designed to demonstrate the inaccuracies rather than the accuracies of memory. In addition, standards for scientific research have improved considerably since the early 1900s (Goodman 1984:18).

The conclusion to be reached from this, however, is that the present laws relating to children's competency and credibility are based on questionable assumptions and standards from the past, and need to be re-evaluated in the light of recent research.

### **6.3.3.3 Modern Research on Children's Suggestibility**

In the 1980s there was a revival of interest among developmental researchers on how reliable children's reports were. Although it is commonly believed that children are more suggestible than adults, psychological research has shown that children are not as suggestible as many adults would believe them to be (Myers 1987:496). Studies of suggestibility among children and adults have provided mixed findings. Some studies support the finding that young children are no more suggestible than adults. A number of studies have demonstrated that children as young as five can answer objective questions about simple events as well as adults can (Perry and Wrightsman 1991:115).

Duncan et al (1982) conducted a series of studies on subjects, ranging from six years to college students, in which subjects were shown slides and later questioned about the contents. The results demonstrated that children and adults were influenced equally by the questions asked. A second analysis, based upon only those instances in which there was correct memory, showed that the younger subjects appeared to be less influenced than the older subjects! A follow-up experiment obtained a similar pattern of results. In 1979 Marin et al (1979:295-304) also conducted a study on the recall memory of children with subjects ranging from kindergarten to college age. The results indicated that children were not more easily swayed into incorrect answers by the use of misleading questions than adults. They found that children were as capable as adults of answering direct questions about an incident. Children in the study were no more easily swayed into incorrect answers than were adults by the use of leading questions.

On the other hand, some studies have found that under certain circumstances, children may be more suggestible than adults. One such study was conducted by Cohen and Harnick (1980:208-9) on third-grades, sixth-grades, and college-age adults. The results showed that the third-graders had poorer memories than the older groups, and the younger participants had a greater tendency to accept false suggestion, although all three groups were influenced to some extent. Of importance was the fact that the analysis of results attributed the inferior performance of the youngest group regarding suggestion to their inferior encoding of the film in memory. The effect of suggestion upon the material that had been encoded well was not significantly different for the three age groups. Goodman and Reed (1986:317) conducted similar studies and found that adults were more likely to answer suggestive questions correctly than were six year olds, and six year olds in turn were better than three year olds. It is important to note, however, that when asked accurate but leading questions, the six year olds answered with the greatest accuracy, followed by the three year olds and then the adults. In addition, adults made more intrusion errors than the other subjects i.e. they allowed inaccurate information to intrude on their memory of an event. Although the three and six year olds were found to be more suggestible than the adults, this finding did not hold true for central information that had been encoded properly in memory.

Tucker et al (1990:117) also conducted a study to determine the effect of multiple interviews on the reliability of a child's evidence. They found that, consistent with the above findings, children provided minimal information spontaneously but gave relatively accurate responses, and were often able to resist suggestion.

Rudy and Goodman (1991:538) conducted a study to determine whether there were any differences in the accuracy of children's reports if they were participants in an event as opposed to bystanders. The older children were found to be more accurate than the younger children. However, an important finding in this study was that, although the responses of older children were more accurate than those of the younger children, this did not apply to misleading questions suggesting abuse. For these questions there were no age differences in accuracy. This finding has been used to support the argument that, although there may be age differences in suggestibility and children may be misled, these conclusions do not apply to suggestions concerning sexual abuse.

Saywitz et al (1991:682) also conducted a study that took the above experiment even further. In this research the reports of five and seven year old girls who visited a paediatrician were examined. Half of the girls had had their spines examined while the other half had had a genital examination. The older girls were more accurate than the younger girls in response to the misleading non-abuse questions. There was essentially no age difference for misleading abuse questions. The seven year olds made no false reports of abuse, while five year olds were misled into making false statements of abuse in three instances only (out of 215 opportunities). These findings again support the argument that children cannot easily be misled into making false allegations of abuse. A further significant finding in this study was that when the children's inaccurate reports were examined they were found to involve mainly omission errors. The children left out information rather than included false information. For instance, most children who had had the genital examination did not disclose genital contact unless they were specifically asked.

A review of the above results appears to lead to the conclusion that adults spontaneously recall more about incidents they have witnessed than children do. They do not, however, support the idea that children are always more suggestible than adults. The possible reasons for the discrepant findings in the above studies are explained by Loftus and Davies (1984:63) as follows:

"Probably no single factor can by itself explain the discrepant findings of these studies. This points to a possible resolution of the discrepancy. Perhaps age alone is the wrong focus for these studies. Whether children are more susceptible to suggestive information than adults probably depends on the interaction of age with other factors. If an event is understandable and interesting to both children and adults, and if their memory for it is still equally strong, age differences in suggestibility may not be found. But if the event is not encoded well to begin with, or if a delay weakens the child's memory relative to an adult's, then age differences may emerge. In this case the fragments of the event that remain in the child's memory may not be sufficient to serve as a barrier against suggestion, especially from authoritative others. Of course, if the child's grasp of the language is so weak as to make him or her oblivious to the subtle implications in the suggestive information, then the child may be immune to the manipulation regardless of the interest value or memorability of the stimuli, or the loss of an accurate memory record."

The belief that children are more suggestible than adults pervades legal thinking despite the fact that there is lack of scientific evidence to support this belief. Recent studies have failed to uncover any simple relationship between

suggestibility and age (Zaragoza 1987:53). It would appear that a number of factors interact with age in influencing a person's response to suggestion, and this is not limited to children. What does, however, appear to be clear is that legal rules and procedures are based on an inaccurate or outmoded knowledge of developmental psychology. For this reason, established research findings need to be made available to legal practitioners and policy makers (Flin 1991:23).

#### 6.3.3.4 Factors affecting suggestibility

Several factors appear to interact with age in influencing a person's response to suggestion. These factors include: degree of suggestion, centrality of the information to be remembered, strength of the memory, linguistics, the questioner's status, and intimidation of the witness (Perry and Wrightsman 1991:120). The degree of suggestion employed will obviously play a role in whether a child succumbs to the suggestion or not. Strong suggestion is more likely to elicit false agreement from a child than mild suggestion. Goodman and Helgeson (1985:181) explain that questions like 'Did Uncle Henry touch your penis?' (mild suggestion) would be less likely to lead to a false or inaccurate report than 'I bet Uncle Henry touched your penis, isn't that right?' (strong suggestion). The problem with this, however, is that children may not offer information spontaneously, and leading (often suggestive) questions may be required, as in the studies conducted by Saywitz et al (1991:682) *supra* where the children did not report genital touch in the medical examination until they were specifically asked.

The dangers associated with leading questions are clearly illustrated in the following extract from Dent (1982:291) where S.K., a police officer in an experiment, was interviewing a child about a woman's appearance:

- "S.K. : Wearing a poncho and cap?  
 Child : I think it was a cap.  
 S.K. : What sort of cap was it? Was it like a beret, or was it a peaked cap, or -?  
 Child: : No, it had sort of, it was flared with a little piece coming out (demonstrates with hands). It was flared with a sort of button thing in the middle.  
 S.K. : What - sort of - like that - was it a peak like that, that sort of thing?  
 Child : Ye-es.  
 S.K. : Like a sort of orange segment thing, like that, do you mean?  
 Child : Yes!  
 S.K. : Is that right?  
 Child : Yes..  
 S.K. : That's the sort of cap I'm thinking you're meaning, with a little peak out there.  
 Child : Yes, that's top view, yes.  
 S.K. : That sort of thing, is it?  
 Child : Yes.  
 S.K. : Smashing. Um - what colour?  
 Child : Oh! Oh - I think it was um black or brown  
 S.K. : Think it was dark, shall we say?  
 Child : Yes- it was dark colour I think, and I didn't see her hair."

In fact, the woman was not wearing anything on her head, nor was she wearing a poncho.

Children are more likely to adopt suggestion when it is related to peripheral information rather than central details. This, however, applies to adults as well. It follows logically that the more attention one pays to central information,

the less one is able to concentrate on peripheral detail. Children under the age of five scan events starting with the point of greatest action, which often results in children missing peripheral detail (Myers 1987:500).

Children, like adults, may be more prone to suggestion if their memory is weak. Where a memory is weak, misleading information can sometimes replace original memories. This means that a child whose memory for an event is relatively weak may be more suggestible than a child whose memory is strong for the same event (Myers 1987:501). As far as the interview of the child witness itself is concerned, the most obvious method of suggestion is the use of leading questions. Dale, Loftus and Rathbun (1978:274-5) conducted research on whether the form of the question would influence the evidence of a child, and they found that if the question asked was about an entity which was present in the film shown, the form of the question did not matter. However, if the question asked was about an entity which was not present, then the form of the question had a significant affect on the child's response. These results are of particular importance for the courtroom since the way in which a question is phrased may determine the accuracy or inaccuracy of the response.

Ceci and Bruck (1995:123) provide a very good illustration of the effects of leading questions. The following is from the trial evidence of Jennifer F, a nine year old girl who had witnessed the murder of an elderly couple, in *State v Macias*, 1984:

"Interviewer	:	What kind of shirt was Mr. Macias wearing?
Jennifer	:	It was blue shirt.
Interviewer	:	Was it a solid blue shirt?
Jennifer	:	Yes, that's what it was. Solid blue.
Interviewer	:	Are you sure it didn't have a check pattern on it, like a cowboy shirt?
Jennifer	:	Yes, that's it. It had a large check on it..."

A further instance of Jennifer F. incorporating leading questions into her evidence follows:

"Interviewer	:	What time was it?
Jennifer	:	It was nearly dark, around 6 o'clock, I guess.
Interviewer	:	Are you sure it was nearly dark or was it in the afternoon?
Jennifer	:	Yeah, I guess it was around 2 or 3 o'clock."

A further factor influencing suggestibility relates to the interviewer, and is termed 'interviewer bias'. This occurs where interviewers have previously decided beliefs about the occurrence of certain events and then proceed to mould the interview to elicit statements from the child that are consistent with these prior beliefs. The most obvious example is where the interviewer is convinced that abuse has taken place and then only gathers information to support this belief and fails to gather any information that may disprove this belief (Ceci and Bruck 1995:79).

An interviewer's bias will affect the entire interview and will reveal a number of features that are highly suggestive. For instance, to confirm their suspicions interviewers may not ask children open-ended questions, but rather use a number of very specific questions, many of which are repeated or leading. Another form that interviewer bias can take is when the interviewer provides much encouragement during the interview. This happens when the interviewer selectively reinforces the child's response when it is consistent with the interviewer's belief (Ceci and

Bruck 1995:80-1). This is explained succinctly by Campbell (1992:31) as follows:

"Via their own self-fulfilling prophecies, anxious parents convince themselves that their child has been sexually abused. Governmental agencies and treatment facilities respond to the genuine convictions of these parents and endorse the apparent legitimacy of their concerns."

Ceci and Bruck (1995:87-93) evaluated three studies which were conducted to determine whether interviewer biases influenced an adult or a child's behaviour. The data provided by this research indicates that an interviewer's bias or beliefs can exercise an influence on the accuracy of children's evidence.

Repeated questioning can also influence the suggestibility of children. When children become witnesses they are often subjected to a number of interviews. Repeated interviews are not necessarily to be regarded as negative, as is so often thought to be, since they serve as a form of rehearsal that prevents memories from decaying. Research studies have also shown that when given a number of opportunities to remember an event, both children and adults remember new items with additional interviews. Therefore, the repeated interviewing of a child can have beneficial effects (Ceci and Bruck 1995:108).

However, repeated interviewing can also be responsible for suggestion, but research has shown that this is particularly the case where the interviews have contained misleading information. This misleading information then becomes incorporated into the memory. This is even more dangerous because with each additional suggestive interview the delay between the original event and the interview becomes greater, and the memory weaker so that suggestion becomes so much easier (Ceci and Bruck 1995:108-119).

Not only is repeated interviewing dangerous as far as suggestion is concerned, but the use of repeated questions creates hazards of its own. A number of studies have demonstrated that when young children are asked the same question again and again within an interview, they change their answer. Siegal et al (1988:453) found in a series of experiments that young children were sensitive to repeated questioning. It conveyed ambiguity and misled children to be inconsistent. The following is an example from the transcript of the case State v Kelly Jnr 1991-1992, as quoted by Ceci and Bruck (1995:121):

"Prosecutor	:	And when you were laying on top of Bridget, where was your private?
Bobby	:	I forgot.
Prosecutor	:	Do you remember telling Miss Judy that you had to put your private next to her private? Did you have to do that, Bobby?
Bobby	:	No Sir.
Prosecutor	:	What did you say?
Bobby	:	No Sir.
Prosecutor	:	Did you say No or Yes?
Bobby	:	Yes Sir."

There are a number of possible reasons why young children may be sensitive to repeated questioning. It may be as a result of lack of experience or confidence or simply that the child becomes tired and changes his answer in the hope that the interview will end (Siegal 1988:453-4).

Repeated interviews and repeating questions within an interview may decrease the accuracy of a child's report and increase the possibility of suggestion when these interviews are conducted by biased interviewers. Poole and White (1995:42) caution against any sweeping recommendation that repetition be avoided. They argue that it is not the repetition which is dangerous, but the manner in which it is done. Repetition can, in certain instances, be beneficial, as pointed out above, provided that interviews are conducted in a non-leading, non-suggestive manner. An understanding of the factors that cause suggestibility can assist in devising methods that will guard against these dangers. For instance, Myers (1987:503-5) suggests that children should not be questioned in a suggestive way. Leading questions should be avoided since there is the danger that inaccurate statements may be elicited. Where children under the age of seven are being questioned, questions should focus on the central aspects of the event rather than peripheral details. The importance of understanding the reasons for possible inaccuracies is best explained in the words of Lindberg (1991:55):

"that knowledge of the psychology of eyewitness testimony and suggestibility can aid in that process by showing what things lead to accurate testimony and what things will lead to inaccurate testimony for different witnesses in different situations."

In conclusion, the body of the research conducted on the accuracy of a child's evidence appears to agree that if children have personally experienced a significant event and if they are given an opportunity to reconstruct their experience shortly thereafter, and if this interview is conducted in a supportive environment by a skilful interviewer focusing on central detail, then children's accounts will be highly reliable. However, in reality the legal system does not recreate the conditions which are conducive to eliciting a reliable account from children. In an adversarial system, the role-players are not neutral. With an authoritarian interviewer (police, prosecution, parent, defence) who may consciously or unconsciously be motivated to influence the child's account; with multiple pre-trial interviews; with a substantial delay in time between the event and the trial; with the fact that memory-fade increases over time, it is inevitable that there will be substantial impairment to the child's memory (McGough 1991:115-6).

Even Wexler (1995:337-8), who delivers a scathing attack on the so-called 'child savers' and alleges that they are biased in favour of trying to prove that all allegations of sexual abuse are always true, concedes that children can be reliable witnesses provided they are not influenced in any way:

"This does not mean that a child can never be a reliable witness. It just reinforces the need to question children with extreme care, and tape record every interview."

## **6.4 Distinguishing Fact from Fantasy and False Allegations**

### **6.4.1 Distinguishing Fact from Fantasy**

The ability to distinguish reality from fantasy or to distinguish memories of actual events from memories of imagined events is termed reality monitoring (Ceci and Bruck 1995:212). The belief that children are unable to distinguish between fact and fantasy has its origin in a number of sources. According to Spencer and Flin (1993:309-310), this is in part due to the fantastic evidence given by some children in the witchcraft trials and in

part due to the views propagated by early developmental psychologists. They refer as an example to the Salem witch trials of 1692, where people were convicted of witchcraft almost exclusively on the evidence of children. In fact, these trials were cited as a caution against accepting the complaints of children unquestioningly in *R v Norfolk County Council Social Services Department, ex parte M* [1989] QB 619. In 1697 seven people were executed for witchcraft in Scotland, based upon the evidence of an eleven year old girl. Nine women were convicted and hanged in 1619 at a trial for witchcraft in Leicester on the evidence of a single child.

Spencer and Flin (1993:310-311) caution that these cases have to be examined in the context in which they took place. They occurred in a society where nearly everyone believed in witchcraft, and evidence in these cases did not come exclusively from children but from adults as well:

"If some of the evidence that children gave in those cases seems bizarre to us, it was often only what everyone at the time said and believed happened. The children were retailing what was common rumour and gossip, rather than demonstrating that children have superbly fertile imaginations."

In addition, children were often dragged unwillingly into proceedings, and gave their evidence after long interrogations and under pressure. They refer to Bodin's treatise of 1593 where he explains that the daughters of witches were promised immunity if they in return provided "the names of the people involved, the times and places of the meetings, and what went on there".

Early developmental psychologists also contributed to the impression that children have difficulty in distinguishing fact from fantasy. Piaget, for instance, suggested that children have difficulty discriminating between thoughts and the things thought of, and that they mistake memories of dreams for memories of waking events. He concluded that children do not reliably discriminate between the internal (psyche) as opposed to the external (material) until they are about eleven or twelve years old (Johnson and Foley 1984:37). Werner and Perlmutter (1979:395), proposed that objective reality and fantasy are clearly separated in the adult but not in the child. Werner suggested that children only become aware of the distinction between reality and fantasy when they are between six and eight years of age.

Freud has also been accused of contributing towards the attitude that children should not be believed. Originally Freud argued that the basis of the neuroses suffered by his female patients related to childhood sexual trauma. He then altered that view and based his patients' neuroses upon their *fantasies* of childhood sexual activity. It has since been contended by a number of researchers that he made this shift because it was personally and/or professionally more acceptable to disbelieve his patients than to accept that the sexual abuse of children was widespread (Berliner and Barbieri 1984:127). Freud did not actually claim that pre-school children believe their fantasies are real, rather he suggested that their tendency to fantasise reduced their ability to be accurate and reliable. He believed that young children were aware of the unreality of their fantasies when they were engaged in them, but were prone to confuse memories of fantasies with memories of reality (Lindsay and Johnson 1987:95).

In the 1970's this view of children began to change with a number of researchers demonstrating that even three year olds could classify real and pretend figures correctly and could understand the distinction between fact and fantasy. The predominant view then shifted towards the belief that children do not confuse fact with fantasy (Ceci and Bruck 1995:212).

Johnson and Foley (1984:38) argued that, while Piaget described many examples of children's confusion between fact and fantasy, there is very little evidence which compares children with adults since it is known that adults sometimes confuse fact with fantasy as well. They conducted a number of experiments to investigate the influence of imagination on certain events in children and came to the conclusion that the children in the study did not appear to be more likely to confuse what they had imagined or done with what they had perceived. They describe their findings as follows, concluding that further investigation in this field is required (Johnson and Foley 1984:45):

"The belief is pervasive that children have more difficulty than adults in discriminating what they perceive from what they imagine, but it has little direct experimental support. Children in our studies did not appear to be more likely to confuse what they had imagined or done with what they had perceived. On the other hand, young children did have particular difficulty discriminating what they had done from what they had only thought of doing. This difficulty, though not part of a generalised confusion in children about fact and fantasy, is nonetheless important."

Nurcombe (1986:476-7) admits that some children "spin such an intricate web of deceit, fantasy and fact that they forget where one begins and the other ends", yet he goes on to say that it is an overstatement to contend that normal preschoolers are so prone to fantasise that they cannot distinguish between imagination and reality. He argues further that children's fantasies are generally rehearsals for, or attempts to assimilate, real events. He illustrates this by explaining that when a five year old provides a clear verbal or pictorial description of an erect, discharging penis, or of vaginal or anal penetration, it is unlikely that such a memory would be spontaneously invented.

Young children have always been described as being enchanted by fantasy and make-believe play, to such an extent that the study of children's play has become a field on its own. Researchers agree that fantasizing is a cognitive ability that develops from approximately eighteen months to the early school years. There has been very little experimental research that has focused specifically on a child's ability to distinguish fact from fantasy, but the current research does suggest that fantasy and make-believe are important parts of the young child's mental life, and young children are believed to be less likely than older children to differentiate clearly and consistently between fact and fantasy (Lindsay and Johnson 1987:100-101).

Ceci and Bruck (1995:212-3) refer to experiments conducted by Harris et al in 1991 which have modified the conclusions reached in the seventies and eighties. In support of the previous studies it was found that preschool children had a firm grasp of the distinction between fact and fantasy and were able to say that witches, monsters and ghosts were not real. However, when the children were told to imagine that a pretend character was sitting in a box, many of them began to act as though the pretend character was real. In the one experiment, half the children were told that the pretend character was a rabbit while the other half were told it was a monster. All the children agreed that it was a pretend character and that the box was really empty, but when the experimenter said that she had to leave the room for a few minutes, 4 out of 12 four year olds would not let her go. None of the six

year olds acted this way. When the experimenter returned, almost half of the children in both age groups said they wondered if there was an imaginary creature in the box after all. Upon further questioning some magical and unrealistic thinking emerged. The results of these studies suggest that when young children with fragile fantasy-reality boundaries are asked to pretend about some events, they may eventually become confused about what is real and what is pretend.

The procedures used in these experiments were mildly suggestive since children were encouraged to pretend that there was an imaginary character in the box. However, as Ceci and Bruck (1995:213) point out, this is very relevant since a number of therapeutic procedures and interviewing techniques are suggestive because they induce fantasies.

Ceci et al also conducted a series of experiments in 1994 where preschoolers were asked repeatedly to think about events, some were actual events they had experienced in the past (e.g. an accident that required stitches) and others were fictitious events they had never experienced (e.g. getting their hand caught in a mousetrap and having to go to hospital to get it removed). Each week for ten to eleven consecutive weeks thereafter, the children were interviewed by a trained adult who questioned the children about the events (the real and the imaginary one) with prompts to visualise each scene. After ten weeks the children were interviewed by another adult and 58% of the preschool children produced false narratives to at least one of the fictitious events. What is also important is the elaborateness of the narratives revealed in the final interview with internally coherent accounts of the context and emotions associated with the accident (Ceci and Bruck 1995:218-9). For instance, one of the four year olds claimed correctly at the first session that he had no memory of ever having had his hand caught in a mousetrap and that he had never been to a hospital before. By the tenth interview he gave the following richly detailed, plausible account:

"My brother Colin was trying to get Blowtorch (an action figurine) from me, and I wouldn't let him take it from me, so he pushed me onto the wood pile where the mousetrap was, and then my finger got caught in it. And then we went to the hospital, and my mommy, daddy and Colin drove me there, to the hospital in our van, because it was far away. And the doctor put a bandage on this finger (indicating)."

It would appear that the above studies on children's abilities to distinguish fact from fantasy have not focused on fantasies generated by the children themselves, but rather on false memories that have been encoded by suggestion. Once a false memory has been encoded, young children accept the memory and are unable to determine from where the memory was assimilated. The real issue, therefore, is to determine what are the possible causes of falsely encoded memories, and whether a child witness has been influenced by any of these factors.

Ceci and Bruck (1995:222-4) offer three possible sources of false memory. The first relates to any therapy which a child may have undergone. Since it would appear that young children may create false memories when they are repeatedly encouraged to think about or visualise events that never occurred, this is particularly relevant to the evidence of a child who has been in a certain type of therapy for a long time. Counselling very often forces some

form of 'memory work'. Children are urged to think hard and are given encouragement to enact events with props, such as dolls. Therapy in young children often takes the form of games or play therapy, because a young child's language skills are, as yet, not very well developed.

The second possible source of false memories, they suggest, could involve parents/adults reading books with abuse themes to their children. These books usually depict situations in which a fantasy character has a bad secret that he is afraid to tell, but once he tells he feels better. Ceci and Bruck (1995:223) analysed the contents of some of these books and raised their concern that when suggestions are couched in books that parents read to their children, some of the children may eventually come to believe that the suggested information actually happened to them.

The third possible source of false memories could be interviews conducted by police officers and social workers, and even parents when they first question their child. Of course, this will depend on the degree to which suggestion has taken place, and whether the questions were detailed enough for a false memory to be created.

Ceci and Bruck (1995:225) further point out that even if children are vulnerable to suggestion, this does not mean that their reports are inevitably false, but only that they could be. In addition, they emphasise that, although young children are most prone to making reality monitoring errors, adults also display similar memory problems. They discuss available research on adults which indicates that adults too can come to believe false memories.

It is also important to note that none of the above research has dealt with the creation of false memories of sexual abuse by the child himself, and one would have to distinguish between fact and fantasy in general and fantasy which leads to false allegations of abuse. Nurcombe (1986:476) is of the opinion that children very rarely fantasise that abuse has taken place:

"Children rarely, if ever, have delusions of a type involving a false, immutable conviction of having been physically or sexually abused. Such a symptom would be more feasible during adolescence as part of a schizophreniform, paranoid or manic psychosis. However, even in such adolescents, delusions of sexual abuse are rare and would always be associated with characteristic signs of psychotic thought disorder, derangement of mood or social eccentricity."

This view has been endorsed by a number of researchers who believe that children do not make up fantasies of being abused. Whether children deliberately lie is an issue to be addressed next.

#### **6.4.2 False Allegations**

In evaluating the credibility of child witnesses, it is important to know whether children consciously and deliberately distort the truth with the deliberate purpose of deceiving their interviewers. Although the traditional approach by the courts has been to warn itself against the danger that children tend to lie, this has not been the position as far as the study of psychology is concerned. Historically young children were believed to be incapable of lying because, according to Piaget, this required a level of cognitive sophistication that young children did not have (Ceci and Bruck 1995:262).

After Piaget a great deal of research was done on understanding the development and features of lying. There is now evidence that even young children sometimes do lie. One of the more well known studies was conducted by Jones and McGraw in 1987 in which they reviewed 576 reported cases of child sexual abuse in Denver in the course of one year. In 6% of these cases there were deliberate and/or malicious attempts to make a false accusation. Of particular importance was the fact that these allegations were made by parents on behalf of their children and were related to custody disputes (Ceci and Bruck 1995:31). In 1989 Everson and Boat estimated that the number of false reports (8%) was greater in the case of adolescents than children under the age of six (only 2%). Ceci and Bruck (1995:31) caution that these figures may be higher since false reports in these studies refer to deliberate and intentional lying and do not include reports that may be false due to suggestive interviewing techniques or coaching.

Berliner and Barbieri (1984:127) explain that according to their clinical experience many children who report assault actually underreport the amount and type of abuse. Exaggeration is rare. In fact, children often fail to report or actually recant their reports because the consequences of telling are worse than the consequences of being victimised again.

Many of the studies have highlighted the fact that false allegations appear to arise in disputed custody cases. Research has shown that reported sexual abuse is six times greater in families involved in custody disputes than that observed in the National Incidence Study (Thoennes and Tjaden 1990:151). A number of studies have produced results that support the hypothesis that there are high rates of false reports in divorced families. These findings are supported by Vizard and Tranter (1988:97) who explain that most false accusations occur in custody dispute cases:

"The available evidence suggests that false allegations do indeed occur, more often involving older children, frequently in the context of an access dispute, and most frequently when the child is used by one or other parent in dispute to make a false allegation of sexual abuse to strengthen their legal case".

After reviewing the data provided in the different studies, Ceci and Bruck (1995:33) conclude that up to 50% of reports of abuse in divorced families may be false. However, these reports in divorce disputes should not automatically be discounted since the studies have indicated that as many as 50% of the reports are valid.

Schudson (1992:112-3), a judge of the Wisconsin Circuit Court, accepts that false allegations of abuse are more likely to occur in family court battles and that, consequently, these are viewed more sceptically. But, he argues that false allegations remain relatively rare even in family courts and he warns against adopting the approach that in cases of custody disputes the allegation of abuse will often be false. He points out that in the majority of cases where intra-family abuse has occurred, divorce (and often custody proceedings) will follow. Therefore, all allegations of child sexual abuse should be evaluated in a thorough and sensitive manner to separate "the few allegations that are false from the many that are true" (Schudson 1992:113).

Since it has been accepted that children do lie, it is relevant to examine the conditions that foster lying. Ceci and Bruck (1995:262) identify five possible reasons for lying: avoiding punishment; sustaining a game; keeping a promise (of secrecy); achieving personal gains; and avoiding embarrassment. Children will lie if there is a

sufficiently important reason to do so. The most frequent motivation forwarded for four year olds to lie was the desire to avoid punishment. Lewis et al (1989:442) conducted an experiment to determine whether this was in fact so. A group of three year olds were told not to peep at a toy. When the experimenter left the room, 88% of the children peeped at the toy. On being questioned whether they had peeped, only 38% of children admitted that they had, indicating that children as young as three were able to adopt deception strategies.

Children can also be induced to tell a lie in the context of a game. In one experiment the adult experimenter pretended to find a watch that had been left behind by the teacher and told the children to play a game and hide it from the teacher. Only 10% of the preschoolers lied, but when the context was changed and an adult, well-known to the child, asked the child to tell a lie about playing with a toy, 35% of the children lied. The degree to which children will lie would appear to be context-dependent, and stronger coaching will result in higher rates of deception (Ceci and Bruck 1995:263).

There is also evidence that children as young as three will omit information about transgressions if adults ask them to do so. In one study an adult spilled ink over gloves the child was wearing and told the child that she (the adult) would get into trouble if anyone found out. When questioned, 42% of the five year olds denied knowing who had spilled the ink and 25% maintained this ignorance even when questioned two months later. It follows logically that if a child will lie to protect an adult, they will do so even more readily when protecting a loved one. In fact, in a study where the mothers of three and five years olds broke a doll, only 1 out of 49 children mentioned it. When asked specific, and even leading questions, the five year olds did not tell the secret (Ceci and Bruck 1995:264-5).

There is some argument as to the exact meaning of the term 'lying'. This is of particular relevance to court proceedings where the implications of lying are so important. Morton (1988:36) argues that lying is more complex since it involves a belief that the listener is capable of being deceived and, quoting relevant studies, he concludes that three year olds cannot lie. Although he admits that it is commonplace for three year olds to make claims that are manifestly untrue, he argues that this behaviour is not lying since it differs from lying in respect of intention. A child of three who denies a breakage does not intend the listener to believe him or her. The intention is simply to avoid the consequences of such actions. Morton (1988:36) concludes as follows:

"The claim that a three-year-old child cannot lie is only a small step. It is, however, a clear beginning. Three year olds may be malleable, compliant or mistaken. To know that they cannot be intending to deceive make things a little simpler".

Ceci and Bruck (1995:264-5) suggest that children will also lie to avoid embarrassment, guilt or shame. To support this contention they refer to studies, the results of which indicate that children do occasionally distort the truth about events which are perpetrated against their bodies.

Given that children do make false allegations, Nurcombe (1986:477-8) suggests that the veracity of a child's allegations can be assessed according to the following criteria:

- a. External consistency: statements to police and other agencies must be checked to see whether there are any serious inconsistencies as to the incident.

- b. Internal consistency: it must be determined whether the details of the event remain consistent with regard to time, location and other descriptive details.
- c. Internal detail: it must be determined whether the child's account provides sufficient detail regarding the actual incident e.g. furniture, clothing worn by the perpetrator, any music playing etc. Does it contain any convincing, idiosyncratic details of the accused's personality?
- d. Child's affect: the child must be observed to determine whether the emotion he displays is congruent with the material discussed.
- e. Susceptibility to suggestion: the transcript of previous interviews should be checked, if available, to see whether the child has been influenced.
- f. Reaction to challenge: the interviewer should, towards the end of the interview, gently suggest the possibility that the child's report might perhaps not be real, the possibility of fabrication and the possibility that someone may have induced the report.
- g. Histrionic, malicious or escapist motivation: this type of motivation will only be revealed after one or more of the previous challenges and further explanation is possible.

Children and adults both tell lies, but there is no available evidence to support the belief that children are more prone to lie than adults. Spencer and Flin (1993:329) refer to a survey of professionals who interviewed child witnesses, including police, social workers, judges and prosecutors. 93% of the respondents were of the opinion that children were not more likely to lie than adults. Many experts also believe that it is much easier to detect lies in young children than older children or adults and, according to Feldman and White (1980:128), this would account for the belief that they lie more frequently.

## **6.5 Perceptions of Children**

The credibility of children as witnesses is directly related to the perceptions held by those persons assessing the child. If presiding officers perceive children to be unreliable, then this perception will play a major role when they assess a particular child's credibility. It is, therefore, important to determine what perceptions are held by those officials who work with children.

In 1983 a study was conducted by Yarmey and Jones (1983:33) to determine how credible children's evidence was perceived to be. Several groups of people, including law students, legal professionals, potential jurors and experts in eyewitness testimony, were asked to judge the reliability of a hypothetical eight year old's evidence. Less than fifty percent of the participants in each group believed that the child would respond accurately. Oates (1990:129) refers to a study conducted by Sheehy and Chapman in 1982 which compared adult's and children's accounts of road accidents. Given the option of choosing between the evidence of an adult and that of a child, most people favoured the evidence of the adult. The findings of this study highlighted that there is a widespread belief that the immaturity of children severely limits their competence and reliability.

Goodman et al conducted a series of studies to investigate the perceptions which mock jurors hold about child witnesses. In the first two experiments college students were given written transcripts of a fatal car accident which included the evidence of five witnesses. The only eyewitness to the accident was a child. All the subjects received the same transcripts except that the ages of the eyewitness was varied as being either 6, 10 or 30 years old. The results were the same in both experiments with the 6 year old witness being seen as less credible than the 10 year old who, in turn, was perceived less credible than the 30 year old (Ross et al 1987:145). The third experiment made use of the same age-of-eyewitness manipulation as the others, but differed in three important respects: a more representative sample of jurors was used rather than college students, the trial description was presented in videotaped form rather than written form, and after each juror had made his decision as to guilt and credibility, he was assigned to a 12 member jury and they had to reach a verdict (Ross et al 1987:146). The findings were consistent with the other two experiments with the 6 year olds being seen as significantly less credible. A second analysis was done to determine the degree to which witness credibility is predictive of guilt. The analysis showed that the credibility of the 30 year old witness significantly predicted guilt ratings. The credibility of the 10 year old eyewitness was still relatively influential, but the 6 year old's credibility did not correlate with the guilt rating any more than the other witnesses, who had only given circumstantial evidence (Ross et al 1987:146).

These experiments indicate that the age of the eyewitness may have a significant impact on the perceived credibility of the witness. A summary of all the above studies indicates that the child witness is perceived as less reliable in terms of remembering events, more suggestible and prone to manipulation and generally less credible than an adult.

With this background, Ross et al (1987:146-8) conducted a further study on whether jurors perceive children to be credible witnesses, and strikingly different results emerged. Here college students watched a videotape of a simulated court trial relating to dealing in cocaine. There were three versions of the trial, all identical except for the age of the eyewitness in each case which differed, being either 8 years, 21 years or 74 years. The findings in this study were that the 8 year olds were viewed as equally credible compared to the 21 year olds and 74 year old witnesses. Generally the child witness was viewed more positively than the 21 year old, and the ratings of the elderly witness were more similar to those found for the child witness, than those found for the 21 year old witness. The child witness was viewed "as more accurate, more forceful, more consistent, more truthful, more intelligent, and more confident" than the 21 year old witness (Ross et al 1987:148).

In attempting to explain these findings in relation to those of earlier studies, Ross et al (1987:148-9) suggest that this difference could be attributed to "perceptual adaptation hypothesis". In terms of this principle, jurors interpret the same stimuli using different standards depending on the age of the witness. For instance, if an adult witness describes a fairly complex event with a moderate level of detail, jurors may find the witness average in terms of intelligence and accuracy. If the child gives the identical description the jurors are likely to rate the child as being extremely intelligent and having an excellent memory. However, when a second analysis was performed to determine to what degree the credibility of an eyewitness affected the guilt of the accused, the results showed that the child's testimony was not weighed heavily in making the final decision of guilt, whereas there was a significant

positive correlation between the credibility of the 21 and 74 year olds and the guilt ratings. This gives rise to the ironic result that, although a child witness may be viewed as more credible, the evidence will not carry as much weight as that of an adult (Ross et al 1987:149-50):

"These findings tell an interesting story. Although the child witness was viewed more positively than either the young adult or elderly witness, the child's testimony was not weighed heavily. It may be that independent of the positive impressions that jurors may form of a child witness, it is very difficult for them to convict a person on the basis of a child's testimony. Jurors simply may not place the same trust in the testimony of a child as they do an adult's testimony".

This impression is supported by a comment made by a member of the jury after acquitting the defendant which was recorded by Beach (1983:58) about a child sexual abuse case that took place in Maryland:

"It is very difficult to put someone in prison for something so serious, based on a child's story".

Further experiments conducted by Leippe and Romanczyk (1987:172-4) confirmed the findings by Goodman. The 6 year olds were perceived as being less credible than the adult witnesses and the 10 year olds were rated as only slightly below the adult eyewitnesses. Their findings are summarised as follows (Leippe and Romanczyk 1987:172):

"Numerous inconsistencies during the course of his testimony appeared to tarnish the credibility of a young child, but not of an older child or adult. Thus, we can give a tentative nod of support to the hypothesis that jurors are particularly sensitive to a young child's inconsistency, and perhaps tend to take it as a confirmation that the child has questionable credibility. Inconsistency on the part of 6 year old children in any case, is not 'excused'".

Further research conducted by Leippe et al in 1992 and 1993 probed the perceptions of mock jurors with respect to the accuracy and believability of child witnesses. The results indicated that the younger children were viewed as less believable than adults even when their reports were more accurate. The mock jurors were fairly good at discerning accurate from inaccurate reports given by the older children, but when evaluating the reports of the young children, mock jurors underbelieved the accurate children and overbelieved the inaccurate children (Leippe et al 1993:184):

"When they gave testimony about a novel, participatory event that they actually experienced, child witnesses - especially younger ones - were less believed on average than adult witnesses to the same event. This was true even when their testimony was quite accurate".

From these studies it can be tentatively inferred that adults have difficulty discerning the accuracy of reports, especially when given by younger children. Research has shown that jurors rely heavily on witness confidence even though confidence has been found to be a weak indicator of accuracy. Therefore, an adult's evidence will be perceived to be credible because they are able to organise their evidence in an ordered and rational way, while a child's evidence is often poorly articulated and lacks cohesion. This has the result that an adult's account will appear more credible, although it contains factual inaccuracies, than a child's account (Sheehy and Chapman 1989:314). This reasoning is supported by Leippe et al (1993:194) where they argued that the reason younger

children were not regarded as accurate witnesses related to the manner in which they gave evidence. Their reports were more fragmented, less smooth and they appeared less confident. This concurs with empirical research which shows that young children may appear to be inconsistent because certain of their communication skills are not fully developed. From these findings it would appear that it is not only important what children communicate, but how they communicate.

Luus and Wells (1992:88), in the studies they conducted, found that the children recalled the witnessed events with the same degree of accuracy as the adults, but that they only report the event with the same degree of accuracy as adults if they are questioned in a direct, straightforward manner. The eight year olds in the study experienced more problems with cross-examination, which had an effect on their perceived credibility. An important factor would then appear to be the way the child's evidence is presented.

Brigham and Spier (1992:106-7) studied the perceptions of professionals in the legal arena towards child witnesses. Prosecuting attorneys, child protection workers, and law enforcement personnel (despite differences in level of education, gender and professional duties) viewed child witnesses in the same way. They had more confidence in a child witness's ability to remember accurately, to testify appropriately, and to resist suggestion. Defence attorneys, on the other hand, believed that children were likely to give completely inaccurate or distorted evidence about sexual abuse almost one fifth of the time.

The dilemma experienced by the law is the difficulty it has in reconciling the image of children as victims ("vulnerable, unformed, dependent creatures in need of protection") with that of an accurate, reliable child witness. This dilemma is explained as follows by King and Piper (1995:67):

"In countries which operate an adversary, day-in-court trial system of criminal law this image of children as unreliable is clearly at variance with the need to bring children into the courtroom to give evidence and face cross-examination just like any other witness".

In order to address this problem, the image of children as witnesses will have to be reconstructed. The reconstruction must aim at enhancing the perceived reliability of the evidence of children, removing the assumption that children are unreliable and suggestible as witnesses. This will have to be achieved by re-evaluating rules of evidence such as competency rules and cautionary rules, and training legal professionals with regards to scientific findings of children as witnesses (King and Piper 1995:70).

## **6.6 Children's Perception's of the Legal Process**

### **6.6.1 Introduction**

In order to partake effectively in the judicial process, a witness needs to be equipped with some knowledge of the procedure that is to be applied in that process as well as an understanding of the role he or she is to play therein. Since children frequently appear in court as witnesses, the question that needs to be addressed is whether children

have the necessary knowledge to enable them to take part in a court process with competence and credibility (Saywitz and Snyder 1993:121).

Research has shown that the quality of a child's evidence in legal proceedings is dependent upon three interacting factors: the child, the court personnel involved in the trial, and the environment (Cashmore and Bussey 1990:177). As far as the child himself is concerned, his evidence will depend on his cognitive ability (the ability to remember and to communicate) as well as his perceptions of the court proceedings and the role he plays therein. Much research has been done on children as witnesses, as can be seen from what was discussed *supra*, but this research has focused mainly on the child's competence to give evidence, more specifically the child's ability to recall events accurately and the allegations of suggestibility that have been made against children. As far as the court environment is concerned, a number of reforms have been instituted in various countries enabling children to give evidence outside the courtroom by means of closed-circuit television and videotaped statements. However, this research has been conducted on the premise that children give evidence in a vacuum. It has not taken account of the fact that children give evidence in a particular environment and that their perceptions of that environment as well as that of their own role in the procedure will have an affect on their ability to give evidence (Cashmore and Bussey 1990:177).

### **6.6.2 The Importance of Children's Perceptions of Court**

It is important to understand how children perceive the legal process for a number of reasons, two of which will be highlighted here. Firstly, it is necessary to establish from children themselves what aspects of the judicial process they experience as traumatic. A number of reforms have taken place in courtrooms in order to alleviate the stress experienced by child witnesses when they give evidence. It is, therefore, necessary to find out what children find stressful and whether the reforms introduced actually address these stresses (Cashmore and Bussey 1990:178).

Secondly, a child's perception of legal concepts and procedures will affect his performance as a witness. Fear of the unknown leads to stress. Many experts believe that appearing in court is stressful for a child. A recent study conducted by Goodman et al (1988:51) to find out what impact a court appearance had on children giving evidence has found that child victim's of sexual abuse do find it stressful to give evidence and this may give rise to long-term effects.

As Myers (1987:417) explains: "Ask a young child to describe a courtroom. The reply is often 'It's a scary place'". The anxiety is caused by a lack of understanding of the trial proceedings and the child's role as witness. This is confirmed by the following statement made by Myers (1982:15):

"We knew from listening to kids that they didn't understand what the court process was all about or how it related to their family. Nor did they know who all the players were. They were very much non-participants in a process that was designed to make decisions about their lives".

Yates (1987:476) reports that one five year old witness thought that the judge would put her in prison for being 'bad' because she was not able to answer all the questions. This fear is sometimes compounded by confusion and misconceptions regarding the process and the people involved. Birch (1992:275-6), for instance, reports that some children believe that they may be punished if they tell the truth but are disbelieved.

As Dziech and Schudson (1989:170) explain, for children "the courtroom can do more than encourage civic responsibility - it can terrify and silence". In *State v Phelps supra* a five year old giving evidence in court explained that "he thought he was in a police station and that the robed judge was a karate expert" (at 453). Ignorance of the procedures followed in court and the inability to understand the language employed prevents the child from being an effective witness and from taking part effectively in the judicial process.

According to Saywitz (1995:135), generalised anxiety which is most often associated with fear of the unknown could lead to avoidance. This would reduce the child's motivation and effort to remember details to such an extent that the event might not even be mentioned in spontaneous free recall, thus causing the child to 'forget' essential information. Generalised anxiety also leads to disorganised retrieval efforts which result in "frantic, illogical searches". This causes children to recall things incorrectly; to confuse events and details, and has a dramatic effect upon their credibility. It would, therefore, not be unreasonable, according to Saywitz, to suggest that the quality of a child's evidence is affected by his (mis)conceptions about the legal system. Saywitz (1995:134) illustrates a number of ways in which this lack of knowledge could affect a child's evidence. For instance, the fact that children believe that a judge is omniscient will lower their motivation to remember details, since the judge would 'know' these details. On the other hand, if children believe that they will go to jail if they make mistakes, this will dramatically increase their motivation to remember details, and this could make them far more accessible to suggestion.

Since children's knowledge of and perceptions about the court have such an important effect on the quality of their evidence, a few studies have been conducted abroad with the purpose of investigating what children know and feel about the court process. Some of these studies will be referred to in order to discover what children think about the judicial process and then to compare these perceptions with the results of a study conducted by the present author as part of this research (Müller and Tait 1997a).

One of the earlier studies, conducted by Cavenagh in 1959, was aimed at assessing the legal knowledge of juvenile defendants in the English courts. He discovered that many children did not understand the meaning of words such as 'charge', 'summons', 'prosecution' and 'defence' (Cavenagh 1959). This study served to highlight the fact that at a trial children may be subjected to language which they do not understand. According to Stevens and Berliner (1980:254) children in the legal system "are regularly subjected to legal jargon and terminology that even their parents do not comprehend". In 1985 a similar study was conducted by Feben in Victoria, and focused on children's understanding of the words that formed part of the competency examination, such as 'truth', 'promise', 'God' etc. She found that the majority of five year olds and half of the seven year olds did not have sufficient knowledge of these concepts to answer questions relating to the competency examination. It was, therefore, concluded that the oath test was not a valid indicator of a child's competency to give evidence since children did

not have a knowledge of the terms employed in the examination. Saywitz and Jaenicke carried out similar studies in the United States of America in 1987, assessing children's understanding of legal terminology. They found that some words were easy for children to define, such as police, judge, lie, whereas others created more difficulty, such as oath, lawyer, and witness (Flin et al 1989:287).

These findings were supported by studies conducted by Warren-Leubecker et al (1988:31) in 1988 who also concluded that the majority of young children had very little knowledge of the role of court personnel and procedure. In addition to this, the perceptions of children with regard to the court was found to be very negative, with the majority of children believing that the court was a bad place for bad people.

A study was conducted by Flin et al (1989:291-2) in Scotland in 1989 to determine the legal knowledge of children between the ages of 6 and 10 years. They found that the roles of the different professionals were often misunderstood with children not knowing what a lawyer or a judge did. A misconception that was consistent throughout the various age groups was the role of the prosecutor. As far as the children were concerned, being prosecuted meant being hung, killed or jailed.

Viewed from a qualitative basis, the perceptions of the children in the aforementioned study were also generally very negative towards the court. The children were convinced that if the court did not believe them, they would be sent to jail, or they feared that the court might believe that they were bad people and send them to prison. The court was also described as a place where 'people tried to force answers out of you', where 'they did not trust children', or where 'they would be annoyed with you if your forgot' (Flin et al 1989:293-4).

Misconceptions about the role played by judges, lawyers and prosecutors may create difficulties for children who have to go to court, and could contribute to the fears which children have about going to court as a witness. These negative emotions seem to be related to their perception that courts are places for bad people and that they would go to jail if they were not believed. From these results it would appear that there is an underlying misapprehension for children that it is the witness who is on trial and not the accused (Flin et al 1989:295).

This study dealt with two further factors that are very relevant to children in court: what fears they experienced about going to court, and what they understood about the duty to tell the truth. Children in the study expressed the following fears: not understanding what would happen, not knowing what to do, fear of being on their own in court, having to speak to an adult audience, fear of seeing the accused and concern that they might not understand or be able to answer questions posed (Flin et al 1989:295). The findings in this study supported those of Feben *supra*. Very few of the children knew the meaning of the word 'oath', but they did understand the concepts of promising and of truth telling. There was very little doubt that children appreciated the importance of telling the truth. The younger children (under eight) were unanimous in their belief that lying in court would be punished by imprisonment (Flin et al 1989:295).

Davies and Westcott (1995:199-201) identified the three most acute fears children have of giving evidence. Firstly, a significant fear is experienced by having to give evidence in the presence of the accused, especially in cases of

sexual abuse. Secondly, children are afraid of the unfamiliar setting of the courtroom. The third set of fears are associated with examination and cross-examination.

Cashmore and Bussey (1990:180) also carried out a study to investigate the perceptions of children aged between 6 and 14 regarding the criminal process. In this study the younger children described court as a jail or a police station whereas the older children were aware that some sort of dispute resolving role was involved. The judge was most frequently referred to as the person who asked the questions, with several children believing that the judge asked questions to determine whether they were lying or whether they had done something wrong. In fact, Perry and Wrightsman (1991:102) found that young children described the judge in terms of irrelevant details, for instance, as the person who wears a black robe or someone with a hammer.

In the Cashmore study children viewed defence lawyers in more negative terms as being people who shouted at you, asked you questions you did not understand and tried to make you say something you did not mean to say. There was also a strong perception that the aim of the defence lawyer was to implicate the child witness (Cashmore and Bussey 1990:181). Children under the age of seven were found not to have knowledge of the function of a lawyer. In the Warren-Leubecker study children described lawyers as people who "play golf", "sit around" and "lie" (Warren-Leubecker, 1988:32).

The reason for going to court also raised a number of misconceptions in the Cashmore study. Going to court was regarded as punishment for not telling the police what they had seen when they were first interviewed, and the aim was to determine whether the child witness was telling the truth and whether he was involved in the crime (Cashmore and Bussey 1990:181). The younger children believed that if they did not tell the truth in court they would go to prison, which seems to suggest that younger children are less likely to lie in court due to their fear of the harsh imagined consequences. Children believed that they would have to prove their own innocence in court and that they would be implicated in the crime. Generally, the children equated going to court with getting punished, even though they were witnesses. This seems to be related to children's perception that they will be guilty and will be punished if they do something wrong or are not believed. The study concluded that children do not have knowledge about the court process and this gives rise to a number of unrealistic concerns (Cashmore and Bussey 1990:182).

In Canada a three year project was launched to investigate the position of child witnesses in the Canadian criminal justice system. One of the aspects of this project was a questionnaire designed to measure the child's understanding and knowledge of court personnel and their role. The findings supported previous studies that children were fairly ignorant about court proceedings and had gross misconceptions which would obviously place them at a disadvantage if they were to give evidence in court (Dezwirek-Sas 1992:195).

Finally, Saywitz (1995:134) conducted interviews with forty-eight children ranging from 4 to 14 years to assess their knowledge of the judicial process. Many of the children did not understand what the role of the judge was and believed that the jury members were in fact friends of the accused. The children had no concept of what a trial

was, believing that they would go to jail if they made a mistake. They assumed that judges were omniscient and would know if they told a lie, giving weight to the suggestion that young children are less likely to lie than adults.

From the above studies the hypothesis emerges that children have very little knowledge about the court process. The distorted perceptions which they have regarding the legal system has much to do with the source from which they glean this knowledge. The depiction of court on television is argued as being simplistic with a conscious avoidance of the so-called "grey areas" which are inherent in legal cases (Perry and Wrightsman 1991:100). It is argued that television misrepresents the nature of crime and the role of personnel in the legal system. Since television is a source of knowledge for children, it has important implications on children's perceptions of the court and their role as witnesses, and should be taken into account when evaluating results on a qualitative basis (Macauley 1987:197).

### **6.6.3 The Perceptions of South African Children**

Internationally very little research has been conducted on children's understanding of the legal process and in South Africa, specifically, none at all. Based on the premise that a child's understanding and perceptions of the criminal justice system will have a critical effect on his performance in the courtroom, exploratory research was conducted to establish how children in the South African context perceive the court process by testing their knowledge of legal terms and procedures. The research specifically incorporated two different cultural groups in order to determine not only the knowledge which the children had of the judicial process, but also to establish whether there were any differences in the perceptions of children from diverse cultural backgrounds.

#### **6.6.3.1 Methodology of Studies**

##### ***Subjects:***

The research was carried out in two phases, referred to hereafter as Study 1 and Study 2 for ease of reference. In the first study 286 children, between the ages of 8 and 14, took part. There were approximately equal numbers of males and females in each group, giving a total of 146 males and 140 females. The children were recruited from two schools, both of which were situated in a traditionally white area, although the schools did have a few black, coloured and Asian pupils. The schools were chosen on the basis of language, with the medium of instruction in the one being English and the other dual-medium English and Afrikaans. Socially the children could roughly be categorised as falling into a middle to upper-middle class social background.

180 children took part in the second study with those children being recruited from a single primary school in a black township. The children tested were between the ages of 7 and 16 years, the ratio of boy to girl being 4:5 with 80 boys and 100 girls taking part in the study. These children could roughly be categorised as falling within a low socio-economic grouping, with Xhosa being their first language.

In evaluating the differences in perceptions between the different cultural groups, it would have been ideal to use samples from similar socio-economic backgrounds. However, it is not very easy to find children with similar socio-economic backgrounds from different cultural groups within the context of the South African society at large, and virtually impossible within the Port Elizabeth area where the research was conducted. Other constraints, such as financial limitations, also prevented the testing of more samples.

### ***Procedure:***

The children were asked to complete a questionnaire which was aimed at assessing their knowledge of legal terms as well as certain aspects of procedure. In compiling the questionnaire, the choice of the terms used was based on two studies, one conducted by Flin et al (1989:185) in Scotland and the other by Saywitz (1996) in California. The final choice of terminology was dependent on whether the word would form part of the vocabulary that a child witness would be confronted with in the event of giving evidence in court. Terms that children were not likely to come into contact with, such as hearsay, plea etc, were not included.

The questionnaires in Study 1 were drawn up in English and Afrikaans. For Study 2 the questionnaire was translated into Xhosa, giving the black children the option to complete it either in English or Xhosa. For the latter study research assistants, who spoke Xhosa as a first language, were employed to assist with the fieldwork. The assistants were well briefed as to the procedure so that they did not in any way attempt to assist the children with the answers. The children were allowed to complete the questionnaire in the language they preferred. Except for one, all the children in Study 2 completed their questionnaires in Xhosa. The answers supplied by the children were then translated by the same assistants, who were once again briefed to translate exactly what the child had written, irrespective of whether it made sense or not.

The questionnaire itself consisted of two main sections: the first section contained a list of legal terms which the children were asked to explain, such as 'court', 'prosecutor', 'judge', and the second contained five very general questions which were aimed at assessing their knowledge of procedure, for instance, 'what does a witness do in court?'

### **6.6.3.2 Results of the Studies**

The results showed a clear developmental trend with increased knowledge of terminology and procedures in older children. The study especially highlighted the fact that there were definite deficiencies in children's knowledge of the legal process as well as gross misconceptions of certain terms and procedures (Müller and Tait 1997a). This replicates earlier findings carried out in Scotland (Flin et al 1989:291-2) and the United States of America (Flin et al, 1989:287).

In analysing the results it became clear that the use of questionnaires did have certain limitations when dealing with children. Since young children have difficulty in expressing themselves in writing and are not proficient readers, it was not possible to clarify certain answers. This can be illustrated by the response which a number of children

gave to the word 'trial'. It was regularly explained as 'when leaving footprints', indicating that the children had perhaps misread the word as 'trail'. Perhaps, if the children had heard the word expressed aloud, they may have answered differently (Müller and Tait 1997a).

Since one of the main purposes of this study was to investigate children's perceptions of certain legal concepts, the results were predominantly studied on a qualitative basis. It should be stressed that the perceptual findings reported here are preliminary in nature, enabling certain initial conclusions to be reached which will serve as a point of departure for a more comprehensive study. When evaluating the perceptions of the children, general trends were able to be drawn from the answers supplied, with the more significant trends being reported below:

i. *Policeman*

There was a quite dramatic contrast between the two studies as to the perceptions which the children held towards policemen. The children in Study 1 had extremely positive feelings towards policemen, who were seen as people who help you and protect you. A policeman was described as 'somebody who protects you' or 'a person who helps you when you need it'.

The children in Study 2 saw policemen in terms of their capacity to arrest criminals, describing them as 'somebody who arrests people', who 'takes thieves to the charge office', 'chases people' and 'puts them in jail'. The perception of this group, however, was generally negative towards policemen with a number of children describing a policeman as a 'person who shoots people'; as one who 'arrests and shoots a thief with a gun'; he 'harasses others'; 'arrests the wrong people'; 'doesn't care for the people'; and 'drives a car and beats people'. The main focus of the thoughts of the latter group of children was directed at crime and violence. Policemen are seen as people who combat crime, they wear guns and they shoot people.

The difference in perception between the two groups may perhaps be attributed to the political upheaval that South Africa has experienced over the last decades and the role which the police are alleged to have played therein. This becomes even more noticeable when analysing the examples the children used when referring to criminals. The children in Study 1 referred most often to murder and theft as crimes with a large proportion of them explaining that it was a crime not to pay your television licence. Of particular note as well was the fact that only two children used rape as an example of a crime. The children in the second group, however, had a far more detailed knowledge of crime and frequently used the following as examples when referring to criminals: thieves, drug abusers, murderers, car hijackers, child rapists and people who sell drugs illegally. Again, seen in the context of the South African political situation, the children in this group have been exposed to violence to a far greater degree, and this may account for their knowledge.

ii. *Court*

Generally the children in Study 1 had a negative impression of the court with the younger children believing that if you have to go to court you are in trouble, amongst bad people and that something awful will happen to you. A number of the children equated court with jail and described it as 'a place where bad people go'; 'a place where people are executed'; and 'a place where people go if they kill'.

The children in Study 2 had a more positive approach to the concept of a court and saw it as a place where cases were heard and where an argument or discussion took place. The word 'debate' was frequently used in the descriptions. A great deal of emphasis was attributed to the fact that it was a place 'where truth is told' with one eight year old believing that it was a place 'where questions are answered'. A certain amount of solemnity was attached to the court with one child describing it as a church and a thirteen year old explaining that a court is a place where, 'if there is a problem, old men are called to discuss the matter and come up with a solution'. Another believed that a court was 'an important place in the community'. Very few children amongst this group confused the court with a prison or believed that people were detained there. Rather it was perceived as being a place where solemn decisions were made regarding people who break the law.

An observation of particular interest that should perhaps be mentioned here was the fact that many children interpreted words in terms of their own experiences. For instance, court was defined as 'when the judge chooses who lives with the children' and 'when a person goes to court it means that 'either you've killed a person or you want to get divorced'. An eleven year old from Study 1 who had been to court, defined it as being 'a place where people are very strict to people they don't know'.

### iii. *Magistrate/judge*

In Study 1 the children had virtually no understanding of the term 'magistrate' but fared better with the term 'judge'. Magistrates were described as being anybody from 'a person in the Parliament who keeps the noise level down', to 'a queen or king' and 'a female judge'. Judges, on the other hand, were described more in terms of peripheral details without any knowledge of the actual function of such a person. The following descriptions were forwarded: 'a person who tells people to keep quiet and the lawyers speak to him'; 'the man with the hammer'; 'the boss'; and 'someone who shouts at prisoners'. A number of children perceived judges as having omniscient qualities: one child explained that 'when you have done something wrong, the judge knows it' and another said that a judge was 'a man who can see if you killed or not'.

In Study 2, the position was completely reversed. Here the children were confused by the term 'judge' and had very little knowledge of who a judge was or what he did. He, in turn, was described as anything from a preacher to an author, a person in charge of the police and a doorkeeper. Although the majority of the children in this group associated the judge with a courtroom, they were unable to provide any detail as to what his actual function was. He was said to keep order in court when there was a noise, to withdraw cases, to assist the magistrate, and was also described as an investigator and a prosecutor. A few children knew that he was in charge of the court and 'the boss', whereas other had certain reservations and believed that 'you win the case if the judge knows you or your father'.

In this group the children generally had some idea of who a magistrate was and what he did in court. According to them, he asks questions, demands that you speak the truth, explains the charge, says you are guilty and sentences thieves. He was described by a ten year old as being 'the supreme person in court, he listens to the allegations and breaches of the law such as theft from banks, shops and shebeens'.

As in other studies conducted on children's knowledge of the legal process, the children in this study believed that one of the magistrate's functions was to see if people spoke the truth. If people do not speak the truth then the magistrate sends them to prison. This adds further weight to the theory that younger children are less likely to lie in court because of the consequences they perceive will follow. Here too a number of children described a magistrate in terms of peripheral details. He is the person 'who says attention please people and then the people stand up'; 'he beats the desk'; 'he wears the gown of a graduate or a reverend'; and 'he sits at a big table and attorneys go up to him'.

The children in the second study appeared to regard magistrates in a positive light, accepting that they were persons in control of the court and that they took care of people who broke the law. An eight year old said that he was a person 'who stands for the truth', while another believed that 'he was the person who corrected things'.

#### iv. *Lawyer*

The children in the traditionally white schools (Study 1) held lawyers in very high regard and described them as people 'who help you in court'; 'who help people in trouble'; 'somebody who sorts out other people's problems'; and 'who were on your side'. One child described a lawyer as a 'very special man'.

The children in the traditionally black school (Study 2) were well acquainted with the concept of a lawyer and explained that he was a person 'who speaks on your behalf at a trial'; 'defends you'; and who 'represents you'. There were, however, three perceptions in particular that these children had about lawyers which came strongly to the fore.

Firstly, lawyers were seen primarily in their role of representing the accused or the wrongdoer. They help people 'who are to be imprisoned for a long time in jail'; they are 'employed to speak for the thief and bring him out'; and 'some people have got lawyers and when they do wrong things the lawyer will talk for them in the court'. One twelve year old explained that 'when one wants to get out of jail he says here is my lawyer'.

The second noticeable trend seems to be linked to the children's perception that the lawyer represents the accused. The majority of the children in Study 2 were distrustful of lawyers and many saw them as people who lied and twisted facts. An eleven year old explained that 'a lawyer was a person who did not tell the truth'; and a thirteen year old added that a lawyer was a person 'who changes the truth to lies'; whilst another defined a lawyer as someone who 'does not want people to tell the truth'. The image of manipulating what people said was very strong, and perhaps one of the most important findings of this study. A lawyer was described by an eight year old as being a person 'who confused things'. A ten year old was more vehement when he explained that a lawyer was 'someone who twists the charge; he twists the magistrate's statement; he twists what the thief has said'. A few of the other comments made included the following: 'a lawyer changes what you have done and says you did not do it'; 'he changes things and puts it in another way'; 'a person who changes what is right and makes it wrong'; and 'a person who changes what an individual has said'.

Thirdly, the children emphasised the concept of money in relation to lawyers. A lawyer is someone 'who wants to be paid'; 'he speaks for the person who gave him money'; and he is someone to whom 'money is supposed to be paid'. A thirteen year old explained that 'when a lawyer is employed money is necessary - the lawyer cannot work for nothing'. A number of children seemed to see the payment of money as being related to the winning of a case, as can be seen from the following statement: 'when you are in court you will give money to a lawyer who will speak for you in court so that you win the case'. Lawyers were, therefore, perceived by these children to be arch manipulators who twist what you say. They are closely associated with the wrongdoer and use their talent at manipulation to ensure the release of the accused.

The contrast in perceptions between Study 1 and Study 2 are indeed significant. Whilst lawyers are perceived by some as very special and helping (Study 1), they are also seen as arch manipulators who are not to be trusted (Study 2).

#### v. *Prosecutor*

This concept gave rise to the most significant finding regarding the perceptions of the children in the first study. The prosecutor was the 'real bad guy' and was described as a person 'who kills people'; 'who insulted other people'; 'who had a bag over his head and prosecuted people'; and 'who chops off heads'. He was frequently described by the children as being 'a man who was against you in court'. Clearly there appears to be some confusion between the term 'prosecutor' and that of 'executioner', but the fact that the children do confuse the two does not detract from their misconception and the accompanying stress when having to meet the person 'who chops off heads'.

The children in the second study did not have the same negative feelings towards a prosecutor as their counterparts in the 'white' schools with most of the children unsure as to what the term actually meant. Of interest in this study was a perception amongst the children that a prosecutor was someone who hurries you. The following explanations were given: 'he is somebody who hurries people'; 'he doesn't give people enough time to speak'; 'he makes you do things in haste'; 'he is a person who wants you to talk fast'; 'he makes the person to speak the truth quickly not to think too much'; and 'he hastens you to speak the truth'. The comments seem to imply that these children perceive a prosecutor as being a person who urges you to answer quickly and does not give you an opportunity to think.

#### vi. *Witness*

In both studies the children seemed to be quite confused as to what was meant by this term. Two noticeable trends were identified in relation to this word, perhaps highlighting the confusion. Firstly, a majority of the children were adamant that a witness was a person 'who speaks the truth' and an eleven year old explained that a witness was 'one who witnesses what he saw with his own eyes and when the time has come to go to court, he argues for what he saw'.

The second observation, also held by a substantial number of the children, was that the witness was perceived to be particularly partisan. He was a person 'who acted on behalf of people'; 'who is in your favour'; 'who agrees

with the one being questioned'; 'who agrees with your lies'; and he 'helps you'. Closely related to this was the fact that witnesses were perceived only in the sense of giving evidence on behalf of the accused. Thus, a witness was described as 'someone who agrees with the thief or speaks for him so that the thief is not arrested'; 'he represents the thief or rapist'.

Despite the fact that children seem to have a good idea of what a witness is supposed to do ('someone who says what he saw'), there is a lot of confusion as to the actual role. Although they believe that a witness has to tell the truth, they also believe he has to give evidence for a particular party and that party is the accused. Hence, perhaps, the confusion. The children perceive the witness as being someone who has to take sides and thereby the objective truth is compromised.

vii. *Victim*

Knowledge of this term was virtually non-existent with only a handful of children providing reasonably accurate descriptions, namely that a victim was 'one who suffers' and 'a person who has suffered a painful thing'.

Although the vast majority of the children had no knowledge of what the term meant, they perceived it in a very negative light. A victim was frequently referred to as the person 'who is guilty'; 'who is looked for by the police or who has run away from jail'; a person 'who wants to kill you'; 'who speak lies'; and 'who is a criminal, dishonest or a rapist'. In addition to that, he was also referred to as an 'untidy person'; a 'lazy person'; and a 'liar'.

Another explanation given, which came perhaps closest to the truth, was that 'an animal that eats meat, its lunch is called a victim'! Again this negative perception of a victim must create stress for the child, especially when he is referred to as the victim.

viii. *Accused*

Amongst both groups of children the perception appeared to exist that the accused was a person who was wrongfully charged. He was described as 'a guilty person who is accused of having done something although he did not'; 'somebody who did not do the crime'; 'a person who is taken by surprise and told that a complaint has been made against him', with one child explaining that an accused was 'when they say you did something but you did not'.

ix. *Abstract concepts (truth, lie, promise, oath)*

It was evident that the children had great difficulty explaining these concepts. One child explicitly stated: 'I know what it is, but cannot explain it'. This supports the psychological research that children have difficulty in explaining abstract concepts, and has important implications for the competency examination, which in essence is based on abstract concepts such as 'truth', 'lie' and 'promise'. Very few children were able to explain the difference between the truth and a lie, often merely describing them as opposites e.g. 'a lie is not the truth'. If children are unable to express their understanding of the terms employed in the competency examination, these examinations cannot have any relevancy.

### 6.6.3.3 Conclusion

It was clear from the two studies conducted that children under the age of eleven have very little knowledge about the role of personnel in the courtroom or of the procedures used in court. Added to this, children also have some serious misconceptions about certain aspects of the process, and this would have dramatic implications as far as fear and stress were concerned if they had to give evidence in court.

X This initial study has shown that significant differences in perceptions can exist between different cultural groups, and these would also have to be taken into account when addressing children's lack of knowledge as far as the court process is concerned.

From the children who took part in the study, there were traces of a perceptual framework emerging in terms of which children understand the court process. Combining all the above information, the picture that emerges is one of a (wrongfully) accused person, assisted by a lawyer (the good guy), who has to fight against all the odds - the court, the judge and the prosecutor (the bad guy) - with the help of a witness to prove his innocence. However, these findings are, at most, preliminary and further research would have to be conducted to verify the existence of such a perceptual framework.

The results of these preliminary studies, therefore, emphasise that there is a very strong need to prepare children before they give evidence in court. As one nine year old succinctly put it when asked to explain the meaning of the word 'victim': 'if you have a robbery and you go to court and they ask you questions and you don't know, you are a victim'.

### 6.6.4 Conclusion

It is generally accepted now that a child should be prepared for a court proceeding. Children need to know what is happening to them, who will be involved and what the procedure entails. This will assist in removing part of their fear. This finding is described as follows by Melton and Thompson (1987:219):

"Personality research and theory strongly suggest that child witnesses will find the legal process (whether pretrial or trial procedures) to be less stressful and their performance as witnesses will be improved if they are prepared sufficiently for the experience - 'inoculated' against stress."

The two studies referred to above, including the two conducted by the present author, would appear to emphasise that there is a very strong need to prepare children before they give evidence in court. A basic knowledge of court proceedings would assist them by reducing the fear and stress they experience as a result of their unrealistic expectations and thereby enabling them to partake more effectively in the judicial process. In fact, this was one of the findings made by the Pigot Committee in their Report (Home Office 1989:67):

"The courts should be more receptive to children. Where children do appear in a public court they should be informed, insofar as they are able to understand, about the purpose of the proceedings and the functions of the people present. Visits to courts and suitably written booklets are useful ways of achieving this."

## 7. EVALUATION AND PROPOSALS

### 7.1 Ecological Approach

At the beginning of this research it was suggested that the child witness be approached as a source of information. The child, in the context of this research, will be a witness (whether as victim or observer) to certain events. The purpose of this research then is to find a way in which the information which the child possesses can be accessed in its most accurate form while simultaneously protecting both the child against any further trauma and the accused from any infringement of his right to a fair trial.

In evaluating the child witness as a source of information, an ecological perspective was adopted (Gabarino and Stott 1989:8). In terms of an ecological systems approach, there is a constant interaction between systems, and any change in one system will have an effect on another system. In viewing the child as a source of information, the quality of the child's evidence will depend on a number of interacting factors: the child himself (his cognitive ability, language ability and perceptions of his role); the context in which the evidence is given (in an 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) (Cashmore and Bussey 1990:177). All of these factors are interrelated and, therefore, any change introduced into one system will cause an effect in another system.

This study has highlighted a number of instances where a change in one system has created an effect in another by the introduction of statutory exceptions to deal with certain aspects of the child witness. In the United States, for instance, statutory exceptions were introduced in a number of states to enable the out-of-court statements of young children to be admitted as evidence in an attempt to protect a vulnerable child from a court appearance. This resulted in major constitutional implications, since the accused is granted a right to confront his accuser and it was argued that these statutory exceptions were, in fact, unconstitutional. A similar situation occurred in South Africa. Section 170A of the Criminal Procedure Act of 1977 enabled a child witness to give evidence via closed-circuit television. This section was introduced in an attempt to alleviate the trauma experienced by children having to give evidence. However, it has also given rise to constitutional challenge, where it has been alleged that it interferes with an accused's right to a public trial and his right to cross-examine, as provided for by the Constitution Act 108 of 1996. In addition, the statutory innovation has not taken account of the developmental needs of children. An example would be cross-examination. Research has shown that young children are only able to answer questions accurately if the questions follow a logical time sequence. Although s170A enables cross-examination to take place via an intermediary, this will not assist young children where the questions jump from one time sequence to another.

The patchwork application of statutory amendments to deal with particular problems on an *ad hoc* basis will only result in confusion and further amendments. It is therefore proposed that, in dealing with the child witness, an ecological systems approach be adopted in terms of which all amendments and proposals regarding the position of the child witness must be viewed. The child witness cannot be seen in isolation since all systems are interlinked.

The individual child and his family form a microsystem. The court, the personnel, the preparation offered to a child witness and the way in which a child must 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. Exosystems (legal) are found in policy-making and include legislative innovations affecting child witnesses. All these systems operate in a larger system (macrosystem) which includes the constitution and overriding procedures, such as the accusatorial system (Gabarino and Stott 1989:297-302). The acceptance of an ecological perspective on children as sources of information demands that the focus must be turned inwards to the child's capabilities and outward to the social and physical contexts in which the information is sought from children.

## **7.2 The Constitution**

In terms of the ecological approach, all systems operate within a larger macrosystem. The Constitution Act 108 of 1996 would be such a macrosystem since it acts as a standard against which all acts are to be measured. It is, therefore, important to understand the implications of this norm on the child witness as any recommendation or proposal will have to be evaluated in terms of this norm.

The rights which are of particular relevance to the child witness are contained in s35(3) and s28(1) of the Constitution Act of 1996. In terms of s35(3) an accused has a right to a fair trial which includes, amongst others, the right to a public trial in an ordinary court, the right to be present when tried and the right to adduce and challenge evidence. These rights relate to the issues of a public trial, confrontation and cross-examination. Section 28 provides children with certain rights, namely the right to be protected against abuse, neglect, maltreatment and degradation.

### **7.2.1 Public Hearing**

Section 35(3)(c) of the Constitution Act 1996 provides that the accused has a right to a public trial in an ordinary court. The right to a public trial is not absolute and there are statutory exceptions which enable a hearing to be closed where it would be in the interests of the State to do so, where a witness would be harmed by giving evidence in public, where the witness is a complainant in a case of indecency, and where the witness is a child under eighteen. The constitutionality of these sections will have to be addressed. Access to the courts by the public and the media may be inherent in the freedom of speech and expression enshrined in the Constitution, as well as being a component of the right of access to information protected by s23, and a separately protected right under s22 (Chaskalson et al 1996:20-34). Chaskalson argues that the probable effect of these sections of the Constitution is that, although restrictions on access may be based upon reasonable grounds, these will no longer be assumed. In each case the court will have to balance the various interests involved and make a decision.

In the United Kingdom the courts as well as Parliament are bound to conform with the European Convention on Human Rights. In terms of article 6(1) of the Convention the accused is entitled to a fair and public hearing. This right is also qualified by a number of exceptions. The public can be excluded from a trial where it is in the interests

of morals, public order, national security, juveniles, protection of private lives or justice. In addition, there are statutory provisions in the United Kingdom (s37 of the Children and Young Persons Act 1933) which enable the court to allow a hearing to be conducted *in camera* where the victim of an offence against decency or morality is a child.

Although the position in South Africa and the United Kingdom would appear on the face of it to be identical, with presiding officers given a discretion in terms of statute to clear the court, there are, however, differences in approach. In South Africa, it would appear from the discussion *supra* that in cases where children or victims of an indecent assault are called to give evidence, the courts are automatically cleared. In the United Kingdom, however, Morgan and Plotnikoff (1990:190) have argued that presiding officers are very reluctant to use this discretion and, in fact, it is very rarely used. So much so that a number of organisations have suggested that this discretionary power to clear the court should be mandatory. This, too, was one of the questions which the Scottish Law Commission (1990:5) dealt with in their report on the evidence of children. They decided against the creation of a mandatory provision as they were afraid that this would be interpreted rigidly by the court to exclude anybody that did not fall within the provision, irrespective of the facts of the case.

The Sixth Amendment of the American Constitution provides that in all criminal prosecutions, the accused shall enjoy " the right to a ... public trial". Although the accused has been granted a right to a public trial, this right is not absolute and will be weighed up against any competing interest (Myers 1987:425). However, as has been pointed out *supra* in the discussion of the various cases, any denial of the right to a public hearing must be exceptional. Evidence will have to be led to show that it is essential that the court be closed. The courts have accepted that the victims of sexual offences and children would in certain circumstances justify the exclusion of the press and the public to protect them from the trauma and embarrassment of public scrutiny (*Press-Enterprise Co v Superior Court supra*). Although the courts have recognised that the accused's rights will yield in favour of the above arguments, this does not mean that whenever a child gives evidence the public will automatically be excluded. The court will in each case have to decide whether it is necessary to protect the child.

A number of states in the USA have enacted statutes which bar some part of the public from the courtroom while the complainant of a sexual offence gives evidence. Others limit the privilege to children. These statutes came up against constitutional challenge and in *Globe Newspapers Co v Superior Court supra* the court found such a statute to be unconstitutional and said that the question of whether the press and public should be excluded in a particular case should be left to the discretion of the presiding officer to determine in each case whether the interests are compelling enough for the judge to close the trial.

According to the argument forwarded by Chaskalson et al (1996:20-34), the introduction of the South African Constitution will create a situation similar to that adopted in the USA. He argues that restrictions on access will have to be based on reasonable grounds and will no longer be assumed. This would mean that, although presiding officers may have been granted a discretion, they would not be allowed to exclude the public automatically. They would only be able to do so where reasonable grounds have been laid for so doing.

In countries which are based on the inquisitorial system, the presiding officer has also been given the discretion to exclude the public where children and victims of indecent offences are giving evidence. In West Germany, for instance, the presiding officer has been granted a discretion to exclude the public where children under sixteen are being interrogated (Frehsee 1990:34). However, these provisions do not carry the same importance as in those countries which operate within an accusatorial system since there is not the same importance placed on the child appearing in court at the trial. Often, the record of a former interrogation by a judge can be read in court in lieu of the child giving direct oral evidence (Frehsee 1990:36). In France, also operating in terms of the European Convention on Human Rights, the accused is also afforded the right to a public trial. Again, the exceptions to a public trial do not receive the same attention as in accusatorial countries since children rarely give evidence in a criminal court and the judges avoid as far as possible making child victims appear in court (Hamon 1990:60-1). In Israel, too, protecting a child witness from the public does not attract much attention since the creation of the youth interrogator has resulted in very few children appearing in court. The youth interrogator has been granted the discretion to decide that a child will not give evidence if it is believed that the child may be harmed by a court appearance (David 1990:105-6).

In conclusion, it would appear that the vast majority of countries, both accusatorial and inquisitorial in nature, make provision for the public to be excluded in cases where a child or a victim of an indecent assault must testify. In countries which follow an inquisitorial system the emphasis on exceptions to a public trial is not as great, since children do not appear in criminal courts as often, as other methods of enabling children to give evidence are used. In countries following an accusatorial system, much greater emphasis is placed on a trial being public. In the United Kingdom the presiding officers very rarely make use of their discretion to clear a court and in the USA a finding must first be made that it is essential in the interest of the witness that the court be cleared. The interests of the witness will be weighed up against that of the accused.

In South Africa the right to a public trial has not been defended as strongly, and statutory exceptions have been made use of on an automatic basis where children and victims of sexual assaults are concerned without a showing of need. It has been suggested that this position might change with the introduction of the Constitution, and that the public will no longer automatically be excluded. Instead, there will have to be a weighing up of competing interests. In weighing up the interests, the court will have to take cognisance of s28(1)(d) of the Constitution which provides that children have the right to be protected from neglect, abuse, maltreatment or degradation, and s28(2) which provides that a child's best interests shall be of paramount importance in every matter concerning the child.

It can, therefore, be accepted that, although the Constitution does grant the accused the right to a public trial, this right is not absolute and can be waived where children or victims of indecent acts have to testify. No amendments to this position are suggested at this stage since publicity and exceptions thereto can only be addressed once it is known how children are to give evidence. For instance, if it is recommended that all child witnesses give evidence via closed-circuit television, then publicity will not play a role. However, if it is recommended that children must testify in court, then the exclusion of the public becomes an important factor. Once again, the importance of an ecological approach is highlighted.

### 7.2.2 Confrontation

Section 35(3)(e) of the Constitution Act 108 of 1996 provides that the accused has the right to be present when he is being tried. It does not specifically provide that he has the right to confront or face witnesses. Joubert (1995:521) argues that this right demands confrontation in the sense of being able to see the witnesses and observe their demeanour. This right, too, is not absolute and an accused may be removed where he behaves in a manner which makes the continuance of the proceedings impractical. It has been argued that s170A also provides an exception to the right of confrontation because the child witness gives evidence from a place other than the courtroom. Confrontation in the traditional sense is thus excluded, but this is justified on the grounds of the trauma experienced by the child in giving evidence in the courtroom in the presence of the accused (Joubert 1995:77). In *Klink v Regional Magistrate NO and Others supra* the court accepted the decision of the Canadian court in *R v Levogiannis supra* that a technological innovation which enabled a witness to give evidence out of the presence of the accused did not deprive an accused of his right to face an accuser but only limited the right.

In the United Kingdom the position is governed by the European Convention on Human Rights. The Convention does not specifically grant an accused the right to confront witnesses. Instead, article 6(3)(d) provides that he has the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. In *Delta v France supra* the European Court of Human Rights emphasised that the Convention did not insist on the witness having to give evidence personally in court. This could be done by means of obtaining written statements from the witnesses before the trial, provided the accused was at some stage given an opportunity to challenge the evidence.

Section 32 of the Criminal Justice Act of 1988 enables a witness under the age of 17, who is a victim of a sexual offence, to give evidence through a live television link from another room. This statutory innovation has thus limited traditional confrontation, but is nevertheless in line with the European Convention which appears to place more emphasis on the right to examine evidence than to face an accuser. An additional limitation has been introduced by s32A of the same Act which enables the videotaped interview of a child witness to replace direct examination, provided that the witness is later available for cross-examination.

In terms of the European Convention the focus would appear to be on the right to examine or have examined a witness's evidence rather than to face/confront the witness. In fact, in the *Delta v France* case *supra* the court specifically emphasised that the Convention did not insist on a witness having to give evidence personally in court. It could be done by means of written statements.

There is, however, much greater emphasis placed on the right to confrontation in the United States of America. The Sixth Amendment to the Constitution provides that the accused has the right to be confronted with the witnesses against him. This has been interpreted to mean that the accused is entitled to confront a witness face-to-face. This right is, nevertheless, not absolute and can in certain very limited instances give way to competing interests where this would be in the interests of justice. A minimum substantive standard must be fulfilled before such evidence can be admitted. The evidence must have sufficient indicia of reliability before it can be admitted

(Myers 1987:305). The leading case, *Coy v Iowa supra*, emphasised that the Sixth Amendment right to confrontation entails a strong preference that confrontation between the witness and the defendant be 'face-to-face'. Any exception would have to be based on a case-specific finding of trauma, instead of a general presumption. In addition, the trauma experienced by the child must be more than that normally experienced by a court appearance.

In the inquisitorial system countries do not appear to experience problems with the concept of confrontation. This would probably relate to the fact that children rarely appear in court. In Norway children under the age of sixteen undergo a judicial interview by an examining magistrate who produces a report that is read as a substitute for the child's appearance in court. This procedure was adopted in order to protect the child, but also because it produced better evidence (Andenaes 1990:11). In Denmark a child under the age of fifteen will be interviewed in the judge's chamber as soon as possible after the event. Although the prosecution and defence will be present and can ask questions, the practice has developed of allowing a police-officer to conduct the interview while the judge, prosecution, defence and accused watch the interrogation on a television in another room (Andenaes 1990:15). In Sweden a female police woman conducts the interview with the child. This is videotaped and this tape is used in court to replace the evidence of the child (Smith 1990:22-3).

In Israel, confrontation also does not attract as much attention as in the USA, since the youth interrogator can, in terms of s2(a) of the Law of Evidence Revision Law, interview the child and, where he believes it to be in the interest of the child, compile a report and himself appear in court in lieu of the child. He will then read the report and answer questions (David 1990:107).

There are widely divergent approaches to the issue of confrontation between the various countries, ranging from the position in the USA, where confrontation is regarded as essential to the discovery of truth, to countries like Israel, where confrontation is dispensed with completely in most cases.

In conclusion, the position in South Africa would be that, although the Constitution does not insist on confrontation, it has been argued that this is an element of the accused's right to be present when he is being tried. This does not necessarily imply that he can insist on face-to-face confrontation and exceptions to traditional confrontation, as introduced by s170A of the Criminal Procedure Act 1977, would not interfere with his right to a fair trial.

### **7.2.3 Cross-Examination**

Section 35(3)(i) of the Constitution Act of 1996 provides that the accused has a right to adduce and challenge evidence. This right is regarded as so fundamental that its denial will almost invariably lead to prejudice according to *Klink v Regional Court Magistrate NO and Others supra* at 409 F-G. Although the Constitution does not specifically mention the right to cross-examine, this right is also enshrined in s166 of the Criminal Procedure Act 1977 which specifically grants the accused the right to cross-examine any witness giving evidence against him.

Although this right would appear to be regarded as one of the essentials of a fair trial, it is nevertheless not absolute. The court does have a discretion to disallow questions which are irrelevant, unduly repetitive, or otherwise

improper. It also has the authority to intervene when cross-examination is irrelevant or unreasonably lengthy, in terms of s166(3). A further limitation of this right has been introduced by s170A of the Criminal Procedure Act 1977 which provides that all questions must be directed via the intermediary, where the latter has been appointed by the court. The constitutionality of this section came before the court in *Klink v Regional Magistrate NO and Others supra*. Melunsky J found that this section did not exclude the right to cross-examine, but only limited it in the sense that it had to be conducted via an intermediary. At 412 E-F he held that the use of an intermediary did not affect the fundamental fairness of the judicial process, since the witness could be questioned on all aspects of his evidence while at the same time the intermediary could play a role in balancing the interests of the accused with those of the child witness.

Of particular interest in this judgment was the comment by Melunsky J at 412 B-C that, although criminal proceedings should be scrupulously fair, it did not follow by implication that a modification to the accepted rules of evidence and procedure would automatically be open to objection. He based this on the decision of the Canadian court in *R v Levogiannis supra* where Judge L'Heureux-Dubé explained at 250 that the criminal process must enable a presiding officer to establish the truth while simultaneously affording the accused an opportunity to present a proper defence. Rules of evidence and procedure were evolving rules and the trend in Canadian courts was to remove those procedures which created barriers to ascertaining the truth.

In the United Kingdom the right to cross-examination is also regarded as a fundamental aspect of the right to a fair trial. The European Convention on Human rights provides that the accused has the right to examine or have examined witnesses called against him. The courts and legislature in the United Kingdom have interpreted this to mean that the accused (or his representative) must be afforded an opportunity to cross-examine a witness giving evidence against him.

Any infringement of this right in criminal proceedings will amount to an irregularity and a conviction can be set aside on those grounds. Other countries in Europe that have adopted the European Convention have not necessarily interpreted this article in the same way. In many of the countries which are based on inquisitorial models of evidence, cross-examination is not prohibited by law, but it is completely uncommon in practice (Frehsee 1990:33). In West Germany, for instance, only the presiding judge may pose questions to children under the age of sixteen. In France, children are rarely required to testify at a hearing. All necessary evidence is gathered by the examining judge before the trial and is presented as part of the *instruction* (Hamon 1990:62). In these countries the right to examine or have examined witnesses simply means that any evidence given against the accused must be tested, and this can be done by a judge or other official when he interrogates a witness.

In the United States of America, on the other hand, the opportunity to cross-examine is regarded as an essential safeguard of the accuracy and completeness of evidence (Cleary 1984:47). The right to cross-examine a witness is included in the confrontation clause of the Sixth Amendment and has been accepted by the courts as the most important component of the confrontation right (Myers 1987:300). In *Davis v Alaska supra* the Supreme Court

explained at 315-6 that the main purpose of confrontation was to secure an opportunity for cross-examination. In addition, the right to cross-examine is regarded as an essential element of due process as provided for by the Fourteenth Amendment.

Although confrontation is regarded as the most important aspect of the confrontation rights, it is not absolute. In terms of the Federal Rules of Evidence the trial court has a discretion to control the way in which witnesses are questioned. This means that the court can use this discretion to place reasonable limits on the cross-examination of witnesses by, for instance, limiting questions which are embarrassing, irrelevant, confusing or ambiguous. A balance must be struck between the accused's right to cross-examine and the court's power to limit cross-examination. The accused's right can only be overcome for compelling reasons (Westen 1978:581). The court has the power to limit cross-examination in exceptional circumstances, but cannot deprive the accused of the right to cross-examination completely, as is the case in inquisitorial countries.

Again there are widely divergent approaches between the countries, this time in relation to the issue of cross-examination, ranging from the position in the USA where cross-examination is regarded as fundamental in the search for truth to countries like France, West-Germany and Israel where cross-examination is dispensed with completely in most cases.

In conclusion, the position in South Africa can be summarised briefly as follows: the accused has been granted a right to challenge evidence led against him. The right is not absolute and can be limited where there is a competing interest, as in the case of child witnesses. Of significance, as well, is the approach of the courts elucidated in *Klink v Regional Magistrate NO and Others supra* that rules of evidence only exist to enable a presiding officer to establish the truth, and those rules and procedures which create barriers to ascertaining the truth should be removed.

#### **7.2.4 Children's Rights**

Children have been granted the right to be protected from maltreatment, neglect, abuse and degradation in terms of s28(1)(d) of the Constitution Act of 1996. The emphasis here is not on the fact that a child has a right not be abused, but rather that he has a right to be protected from abuse. This in effect places a positive duty on the State, and is much wider than that currently in force in the USA. As argued *supra* this may have implications for the rules of evidence where a child is a witness.

Subsection (2) provides further that a child's best interests are of paramount importance in every matter concerning the child. It has been argued that this standard, traditionally confined to issues of custody, access and maintenance, be extended to all proceedings in which children are involved (Sloth-Nielsen 1996:25). Melunsky J in *Klink v Regional Court Magistrate NO and Others supra* also referred to this concept as being relevant to criminal proceedings.

The Constitution has thus entrenched an approach towards children which insists that emphasis be placed on protecting them from abuse and ensuring that their interests are of paramount importance.

### 7.2.5 Conclusion

The Constitution forms a macrosystem in which the various microsystems operate, and in that way exercises an influence on these microsystems. Legal microsystems and those microsystems relating to the child and its development need then to be investigated within the framework of the larger macrosystem. In summary, the macrosystem created by the Constitution lays down the following guiding principles:

- the accused has a right to a public trial, but this right is not absolute and can be waived where children who are victims of indecent acts have to testify;
- the accused has a right to be present when tried and it has been argued that confrontation is an element of this right, although this does not necessarily imply that he can insist on face-to-face confrontation. It has been held that exceptions to traditional confrontation, as introduced, for instance, by s170A of the Criminal Procedure Act 1977, would not interfere with an accused's right to a fair trial;
- the accused has been granted a right to challenge evidence that is led against him, but this right is not absolute and can be limited where there is a competing interest, as in the case of child witnesses;
- emphasis has been placed on the protection of children from abuse and maltreatment and the best interests of children are seen to be paramount in all cases, thereby enforcing the role of the courts as upper guardian of children to an even greater extent;
- finally, in interpreting the Constitution, the courts have been prepared to look beyond the rights to their ultimate purpose, namely the ascertainment of the truth. Therefore, if rules of evidence create barriers to discovering the truth, these should be removed.

Any recommendations to legal rules and procedures (legal microsystems) will, therefore, have to be addressed in the light of the above macrosystem.

### 7.3 The Accusatorial System

Another legal macrosystem within which legal microsystems and exosystems operate is the model of procedure adopted in a particular country. In South Africa, as discussed previously, the legal system operates on an accusatorial basis. The essential features of this system include the passive role of the presiding officer, the existence of two opposing parties, cross-examination, and elaborate rules of evidence. Since this procedural model provides the macrosystem within which children have to give evidence, the model itself will have to be evaluated to determine whether it enables children to act as effective witnesses. If it is shown that this model does not lend itself to obtaining accurate evidence from children, then the model itself will have to be modified. This approach was sanctioned by the Ontario Court of Appeal in *Regina v Toten supra* where Doherty JA explained at 58:

"The public adversarial process is, however, a means to an end - the ascertainment of truth - and has virtue only to the extent that it serves that end. Where the established process hinders the search for truth, it should be modified unless process or resource-based considerations preclude such modification."

### 7.3.1 Effect of Accusatorial System on Children

Giving evidence in a court is a stressful experience for a witness. He will have to give evidence in the presence of a group of people, previously unknown to him, often about embarrassing and intimate details. If he is the complainant in the matter, he has the further arduous task of having to give evidence in the presence of the accused himself. He is then cross-examined by the accused's representative, or even worse, by the accused himself. The cross-examination is often hostile, is used as a tool to trip up the witness, even confuse him at times, and is finally employed to suggest to the court that the witness has some other motive to implicate the accused falsely. The setting of the courtroom is itself alien with the key figures wearing long black gowns. A procedure is followed that is not understood by the ordinary lay person. The language used is formulistic, at times archaic and very specialised. The position is adequately described by Dziech and Schudson (1989:170) as follows:

"Courtrooms were designed for the large number of adults who become participants and spectators in trials. Their furniture, lighting, acoustics, and uniformed personnel assure a serious and, in some ways, intimidating atmosphere. The theory is that in such an environment, witnesses and jurors will be more likely to take their responsibilities seriously. For children, however, the courtroom can do more than encourage civic responsibility - it can terrify and silence."

There has been a growing concern about the effects on children of giving evidence in an adversarial environment. Many attorneys, mental health professionals and legal commentators claim that court involvement traumatises a child victim. Psychiatrists believe that psychological damage is caused not only by the abuse but by being forced to testify in an open court in the presence of the accused (Bjerregaard 1989:169). Adler (1987:51-2) described the incident of a little girl of eleven who had a complete breakdown when she was asked to point out the man who had attacked her. She was unable to return to court and the following day the court was informed that psychiatric treatment had to be arranged for her.

Bjerregaard (1989:169-170) refers to a study where a sample of children who had testified in court were compared with a random sample of sex abuse victims. It was found that 73 percent of the court victims had behavioural problems as compared with only 57 percent of the random sample. The researchers attributed these differences to the trauma of testifying in court.

Goodman et al (1988:47) refer to studies conducted by Gibbens in England in 1963 and DeFranas in New York in 1969. In the former study it was found that the children who had gone to court showed greater disturbance, and the latter study showed that court appearances resulted in much stress and tension for the children. It has been widely accepted that child sexual abuse victims experience a variety of psychological problems, including depression, low self-esteem, somatic complaints, guilt, phobias, nightmares, promiscuity, self-destructive and suicidal behaviour, to name but a few. Hill and Hill (1987:820) argue that these symptoms can be greatly aggravated by forcing a child to testify in open court in the presence of the perpetrator.

Goodman et al (1988:48-51) studied the emotional effects on child sexual assault victims of having to testify in court over a period of a year in Denver, Colorado. They found that the children who testified in court showed a

marginally significant increase in overall behaviour disturbance. The children who testified in court exhibited more internalizing problems than the children who did not testify, with scores being twice as high as those of the no-court groups.

Oates and Tong (1987:544) conducted a study in Australia in which parents were asked to rate on a scale how their children felt after they had testified in cases of sexual assault. 85,7% of the parents rated their children as being very or extremely upset immediately after the hearing. When these parents were again asked to rate how their children felt two and a half years later, more than half of the parents rated their children as being extremely upset about the court hearing.

In South Africa the SA Law Commission (1989:12-13) accepted that the adversarial nature of proceedings in our court was traumatic for child witnesses, and quoted the following statement of Mr WGM van Zyl, the Regional Court President of Natal:

"The assault that was already such a traumatic experience for the child is followed by interrogation by the Police which again revives the whole unpleasant experience. Now, after months, the child is asked to relate the whole story and go through everything in his or her mind. It may be expected that he or she will be afraid and upset; and if he or she is taken into a large court room with its exalted bench and other paraphernalia a measure of dread perhaps descends upon him. Besides his guardian he sees the accused who assaulted him and some other strangers in black robes. Can he then be blamed if he freezes and does not know what to say, or just says anything to escape from this situation as soon as possible? We must bear in mind that the tension rises in the presence of his assailant, who has probably threatened him with death should he dare tell what really happened."

In contrast to the possible harmful effects of legal proceedings, it has been argued by some that the same procedure can, in fact, be beneficial. Pynoos and Eth (1984:109) argue that open discussion and exploration of trauma can be beneficial for children. Testifying can serve as a coping strategy and can provide the child with the sense of psychological closure to a traumatic experience. In fact, Berliner and Barbieri (1984:135) suggest that testifying can be very therapeutic and some children report feeling empowered by their participation in the process. Levett (1991:17), arguing from the South African point of view, agrees that legal procedures and the outcome of the court case may be vindicating for the child since it offers the child an opportunity to be heard, but she concludes that these cases are in the minority. It is submitted that the trial may be able to offer a child an opportunity for 'seeing that justice is done', but this will only happen where there has been a successful prosecution of the offender and the child has been treated well in the court process and received support. Where, however, a suspended sentence has been imposed or even worse, the accused has been acquitted, this is seen as a secondary betrayal of the child by adults and gives the child a sense of disempowerment (Levett 1991:17).

Giles (1989:5) summarises the following as possible advantages for children testifying:

- it serves to identify the child as the plaintiff, the person who has been wronged;
- it ought to give the child an opportunity to be provided with skilled assistance of a legal and psychological nature;
- it provides the child with an opportunity to explain how he feels about what has happened;

- it affords the child an opportunity to hear expert opinion which contextualises, validates and responds to the trauma;
- the child can see that the responsibility of dealing with the accused is taken over by competent and powerful adults;
- in psychological terms, the court appearance provides a ritual whereby the child ceases to be a victim and a pseudo-adult and returns once more to childhood;
- it makes available for the family an effective yet positive way of showing their disapproval of what the offender has done and their desire to protect their child.

The study conducted by Tedesco and Schnell (1987:270) revealed that the interview and litigation process was not necessarily harmful to children. In fact, a greater percentage of the victims rated the legal process as helpful than rated it harmful. However, when the data is analysed more closely the positive attitude towards the court process appears to be linked to the way in which the child gave evidence. For instance, subjects who testified in court rated the procedure as less helpful than those who did not testify, and those who testified in court also appeared to be more ambivalent or conflicted about the process (55%) as compared with those who did not testify (13%). Tedesco and Schnell (1987:271) concluded that, since children more often viewed the process as harmful when they were required to testify in court, a thorough study of courtroom procedures was needed to determine what aspect of the courtroom procedures children found most traumatic.

Hill and Hill (1987:814-5) conducted an experiment to investigate what effect an environment had on children's ability to recall. Children were shown a videotape and the following day half the children were interviewed in a courtroom and the other half in a private room. The results indicated that 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.

These findings support the argument that traditional courtroom procedures act against eliciting complete evidence from children. Afterwards the children were questioned about their feelings regarding the process. The majority of the children who testified in the courtroom said they were nervous, embarrassed or scared with only a few saying they felt good as opposed to the children in the private room who expressed feeling nervous and feeling good about equally. Most of the children in the courtroom said they would not ever want to testify again, although a few said they might be willing if they were older. The children in the private room were more willing to take part in such a procedure in the future. There were many instances noted in the courtroom where the children showed signs of nervousness, for instance twisting hair, trying to leave the witness stand or courtroom before they were finished, shaking and in one instance the child cried (Hill and Hill 1987:816). A further study was conducted by Saywitz and Nathanson (1993:615) to explore the effect of the courtroom environment on the quality of children's evidence and the level of stress they experienced. Two groups of children participated in a staged event involving body touch play between an unfamiliar adult male and small groups of children. The children were then questioned about the event two weeks later in a simulated trial environment in a mock courtroom. The other half were interviewed at their schools. The results of the study indicated that certain characteristics of the courtroom context interfere with the ability of a child to give evidence optimally, and increase the stress experienced by children. The children who were

questioned in the simulated courtroom produced less complete descriptions of past events in free recall than children of the same age who were questioned at school. They made more errors in response to direct questions and acquiesced more often to misleading questions than those questioned at school (Saywitz and Nathanson 1993:619).

The results of this study highlight a number of points which are applicable to the efficacy of the adversarial procedure. The physical context of the courtroom has for decades been presumed to promote the truth. This study suggests that this is not necessarily the case where the witness is a child. For instance, these findings support the idea that testifying via closed-circuit television from a room outside the courtroom produces more reliable and competent evidence from some children. The findings indicate that a variation in the environment in which the questioning takes place can affect the child's evidence. It would appear that more complete and detailed reports are to be expected in statements gathered from interviews which are held in familiar, private, informal settings than those which are obtained in court. The results of this study highlight the need to develop innovative methods for preparing child witnesses and for modifying standard courtroom procedures when children give evidence (Saywitz and Nathanson 1993:620-1).

From the above, it would appear that the adversarial system of procedure gives rise to two serious problems when the witness is a child. Firstly, this system of procedure results in trauma for children and, secondly, it affects the accuracy of a child's evidence. The South African Law Commission (1989:11) accepted that "[o]ne of the great and repeated complaints against the present system is directed against the adversary system and everything it implies". For this reason Zieff (1991:37) argues that where children are caught up in "a gladiatorial contest between parties", as in our adversarial method of trial, the children are bound to suffer. At the same time, however, a court appearance can have a positive, therapeutic effect on children where the court appearance is conducted in a manner sensitive to the child's needs. It would, therefore, be incorrect to argue that children should be eliminated from the court proceedings completely.

\* Since children are unable to testify in an adversarial framework, it remains to be investigated whether they will be able to testify more effectively in an inquisitorial environment. If proceedings were conducted as an inquiry into the truth rather than a contest, Zieff (1991:37) argues that children would not find giving evidence in court as traumatic. He suggests that many problems would be eliminated if an experienced judge conducted an inquiry in an informal setting with the object of trying to discover the truth.

In order to investigate the efficacy of adopting an inquisitorial-based system of giving evidence in the case of child witnesses, the various elements of the present system will have to be evaluated, namely confrontation and cross-examination and what effect any recommendations might have on the rights afforded to the accused by the Constitution. However, it is important to note at the outset that, although a move from an accusatorial to an inquisitorial form of procedure in certain cases would be a dramatic change, this by itself does not mean that such a change should be avoided. As pointed out earlier, both the accusatorial and the inquisitorial systems are the consequences of historical growth and political developments. They have not developed as a result of scientific inquiry into which of the two models is better equipped for accurate fact-finding. Each system rather is based on popular conviction and speculation rather than on empirical research (Herrmann 1978:12). It would, in addition,

be an over-simplification to talk about these systems as though they were mutually exclusive. All systems have characteristics drawn from both models (Spencer and Flin 1993:80).

The basis of recommending any change to a system is that it will result in the discovery of the truth. The SA Law Commission (1989:28) accepted that if such a drastic change was needed, then the mere fact that the change would be of such a drastic nature would not stand in the way of reform:

"If the interests of the entire community - including those of the accused and the child - were to demand such a solution, then the mere fact that the said solution is of a drastic nature would not stand in the way of law reform."

This approach was endorsed by the Canadian court in *Regina v Toten supra* at 58, which is quoted here once again for emphasis:

"The public adversarial process is, however, a means to an end - the ascertainment of truth - and has virtue only to the extent that it serves that end. Where the established process hinders the search for truth, it should be modified unless due process or resource-based considerations preclude such modification."

In evaluating any possible changes, the following statement by Saywitz and Nathanson (1993:621) should be borne in mind:

"As a society, we have responsibility to create an environment that maximizes the completeness and accuracy of children's testimony and minimizes the stress placed on children in the process."

## 7.4 Confrontation

The concept of confrontation includes two aspects: firstly the fact that evidence must be given in court at the trial and, secondly, that evidence must be given in the presence of the accused.

### 7.4.1 Evidence at the Trial

In terms of the accusatorial system of procedure, oral evidence is given at the trial. The insistence that a witness give oral evidence at the trial has two implications for child witnesses: the child must give evidence personally in the courtroom and there is usually a long delay between the child experiencing or witnessing the original assault and then having to give evidence at the trial. The effect upon a child witness of giving evidence in a court has been discussed in great detail *supra*. It was concluded that children experience a great deal of stress by having to give evidence in court and, in addition, research has shown that children give better and more accurate evidence out of the courtroom. The research conducted involved children who witnessed events and were not necessarily complainants or the victims of an assault. Yet, there was a difference in quality of evidence given in the courtroom as opposed to out of the courtroom.

In accusatorial systems of evidence there is the fundamental assumption that the oral testimony of a witness at the trial is superior to all other means of evidence. It is this assumption which needs to be challenged since much of

the stress which the child witness experiences stems from the fact that oral evidence must be given personally in court at the trial (Spencer and Flin 1990:218).

"The idea behind this seems to be that by subjecting a witness to fear and stress we make it more likely that he will tell the truth: a barbarous and stupid notion, contrary to all psychological opinion, and the logical conclusion of which is the result in various ancient legal systems whereby one litigant could insist upon having his opponent's witness tortured to see if this made him tell a different tale." (Spencer 1987b:445)

This assumption, on the other hand, is not shared by other legal systems. For instance, the French and German systems prefer documentary evidence and they regard oral evidence as second-best. Criminal courts in France use the written transcripts of pre-trial interviews which are carried out by an official entrusted with this duty. These written transcripts supplement the oral evidence given at trial and, where children are concerned, replace it completely (Spencer and Flin 1990:219).

It is, therefore, proposed that children who have to give evidence be removed from the adversarial nature of the trial and be allowed to give evidence outside of the courtroom. This will be in the interest of children, since it will protect them from the stress and trauma associated with giving evidence in court, and will accord with s28 of the Constitution Act 108 of 1996 in that it will assist in protecting children from abuse and their interests will be taken into account. At the same time, it will also be in the interests of discovering the truth, and therefore justice, in that research has shown that children give more accurate evidence outside of the courtroom.

#### **7.4.1.1. Effect of Delay**

The insistence that a witness must give oral evidence at the trial has the practical effect that there will be a long delay between the event and the trial. The existence of these delays are well documented in most countries. In Aberdeen child witnesses wait an average of five months between witnessing an offence and having to testify, while in Glasgow child witnesses wait approximately seven months before they give evidence (Flin et al 1992:324). In South Africa delays of up to five years can occur. In *Woji v Santam Insurance Co Ltd* 1980(2) SA 971 (SE) two boys, aged ten, gave evidence about an accident that had taken place five years previously. In *Damba v AA Mutual Insurance Association Ltd supra* the child had to give evidence about an event that had taken place three and a half years previously. This delay has two major implications: firstly, there is the question whether the child should be allowed to receive therapy in the intervening period, and, secondly, there is the danger that the child's memory may be affected by the long delay.

Where a child has witnessed a traumatic event, such as an assault upon or even the murder of a parent or has himself been the victim of a rape or assault, the child will require some form of therapy to cope with what has happened. For a child to come to terms with such a traumatic experience, he must, according to psychiatrists, deal with the experience, usually by talking about it or sometimes even playing out the incident, and then he must be helped to put it out of his mind (Bentovim and Boston 1988).

In the United Kingdom a child witness may not receive counselling until after he has given evidence. This is based on the fact that if the child is given the opportunity to talk the incident through with someone (whether counsellor, psychiatrist or therapist), there is the danger that the child's evidence may become contaminated by suggestion which will have an important effect on the child's credibility (Spencer and Flin 1990:71).

In South Africa, where there are no rules of practice preventing a child from receiving counselling before the trial, this matter will have to be considered carefully. Research has shown that memory is not static and that children are susceptible to suggestion. Therefore, if a child is to receive therapy, which would include talking about the event and perhaps even playing out the event, it can be alleged that the child's evidence has been contaminated by suggestion. Interview techniques employed in the course of a therapeutic interview usually include leading questions in an attempt to get the child to divulge his experiences. Leading questions, it has been proved, can result in a child incorporating information into his memory which did not in fact form part of the event. If a child is given an opportunity to act out what has happened in play therapy, there is the danger, especially where the child is young, that aspects of the play may become part of the child's memory of the event.

In order to ensure that evidence is not tampered with, a possible solution would be to adopt the same position as in the United Kingdom and prevent a child from receiving therapy until after he has given evidence. This may, however, not be in the best interests of the child, since a seriously traumatised child may have to wait up to a year (if not five!) before he can receive any psychological assistance. Also, it will give rise to confusion in situations where the abuse is first disclosed in the course of counselling. Rather, it is suggested that the child's evidence be captured as soon as possible after the event (perhaps on videotape), and this information will then be used as evidence in court to show whether the child's version has changed by the time of the trial, especially if the child has received counselling. The details of this proposal will be elucidated once the effect of delay on memory has been examined.

The second danger is the effect of this delay on a child's memory and suggestibility. Myers (1987:56-7) explains that a child may forget an event as a result of a long delay between the event and the time of the trial. In *Hollaris v Jankowski*, 315 Ill.App. 154,42 N.E.2d 859 (1942) an eight year old had to testify about an accident which had occurred four years previously. The court found at 861 that the child had "little, if any, independent recollection as to the facts and circumstances" of the accident. In *Macale v Lynch*, 188 P.517 (Wash. 1920) an accident occurred when the child was five years old. Fourteen months later, at the time of the trial, the court found that the boy was not capable of relating the facts truly due to the lapse of time.

When dealing with a child's memory of events *supra*, it was emphasised that memory is not static and that memory can change as a result of thinking about past events, which means that children may become more susceptible to suggestion and coaching. Goodman and Helgeson (1985:184ff) describe the following incident which highlights this danger. Three year old twins were abducted and found in a refrigerator the following day. One of the twins was dead. The other, Tina, reported that a blonde-haired boy called Jackie had put them in the refrigerator. Although there was a blonde-haired boy named Jackie who lived in the town and was implicated in the crime by other evidence, no line up was attempted. Over the years Tina was repeatedly interviewed and her story gradually

changed. She then alleged that she and her twin were locked up in the refrigerator by a former babysitter, a mentally-retarded Indian girl called Jackie. Seven years after the incident the babysitter was charged with the murder of the other twin and a trial ensued. At the trial Tina gave a detailed account of what had happened, how they had been taken from their grandmother's house to an abandoned house and there forced into a refrigerator. The defence argued that Tina had been coached by her parents and the police, and that her memory had been distorted by the passage of time. The trial ended in a hung jury, with some of the jurors believing Tina's evidence while others did not. This example indicates how important it is to obtain a factual account of an incident as soon as possible after the event.

Flin et al (1992:327) conducted an experiment in which children aged six and nine and adults witnessed a staged event and were interviewed in the days following the event and then again five months later. The results of this study indicated that over a period of time children do forget significantly more than adults. After five months there was a significant difference between the overall accuracy scores of the two groups of children, with the six year olds performing less well than the nine year olds. No significant differences were found among the accuracy scores of the three age groups when tested after only one day. This suggests that the younger children were able to understand and encode the event, but that their memory faded over long intervals to a greater degree than that of the older subjects. Of interest is the fact that the six year olds were not more inaccurate than the adults after the delay, but rather they remembered less. It was further found that suggestibility to the leading questions was very uncommon at the immediate test but was apparent to some degree after the five-month delay. In conclusion, Flin et al (1992:333) suggest that evidence should be taken as early as possible, and this becomes increasingly important the younger the child.

These findings support those of Jones and Krugman (1986:255) who interviewed a three year old girl five days after she was abducted and sexually assaulted and on a few occasions thereafter. Six and a half months after the abduction the little girl was interviewed on videotape for the purposes of the trial. Although her evidence did not differ from that contained in the first interview, "Susie was not as spontaneous or detailed as she had been in the earlier interviews, which were closer in time to the trauma".

In addressing the problems which children experience in an accusatorial system, the SA Law Commission (1989:26) identified delay as a source of concern for children. They referred to Hammond and Hammond (1987:8) who suggest that a maximum time limit should be set for the trial of child sexual abuse, namely no more than a three month delay. They argue the advantages of this rule would be less disruptive for the child and his family and the memory would still be relatively fresh. Parker recommends a maximum delay of six months before the case goes to trial. The SA Law Commission (1989:34) accepted that the avoidance of delay should be stressed where children were concerned, but then ineffectually referred the matter to the Department of Justice for their proposals since this was a matter which could not be regulated by legislation. The suggestions supported by Hammond and Hammond and Parker do give rise to problems. It would be very difficult to set time limits within which a trial must take place. What happens if a child has been raped and the accused is only apprehended a year later, or if an accused (or the child) is involved in an accident and the matter has to be postponed for months? It would not be practical to enforce limits. Rather, one would have to see whether there is perhaps another way that the child's initial

memory can be captured and stored until the trial.

#### 7.4.1.2. Videotaping Initial Statement

Based on research findings, it must be accepted that children tend to forget faster than adults and are therefore, susceptible to suggestion. There is also the added danger that a child's memory can be tainted by therapy which the child receives before the trial. In order to obtain an accurate account of events from a child, the first interview must take place as soon as is possible after disclosure. This will be beneficial for a number of reasons. The evidence obtained will be fresh and untainted, since there has not been an opportunity for the memory to fade or become affected by suggestion. It will also enable the child to receive counselling thereafter. If, at the trial, it is alleged that the child's evidence has been tainted by suggestion, the court will have access to the original interview and can then determine whether there are, in fact, any discrepancies. This will be in the interests of the accused, as well as the discovery of truth since any pertinent discrepancy between the original statement and the evidence given at the trial needs to be brought to the attention of the court.

One of the grounds on which the accusatorial model has based its insistence on oral evidence at the trial is the fact that it affords the court an opportunity to observe the demeanour of the witness. It enables the court to observe the non-verbal communication which accompanies oral evidence. Since this is not possible if the evidence consists of a written record, it would appear to be preferable to videotape the initial interview so the court would be able to observe the demeanour of the witness on the tape.

It is, therefore, proposed that the initial statement which the child witness makes to the police must be videotaped and this videotape must be admitted in court as evidence. This will offer a method by which the child's earliest memory of the event will be captured and stored until the trial. What a difference it would have made to the court in assessing evidence if they had been provided with a videotape of the children's initial statements, made five years earlier, in *Woji v Santam Insurance Co Ltd* 1980(2) SA 971 (SE).

The advantages of videotaping a child's initial statement are manifold. Note that it is not suggested that this videotape will replace evidence in court. Rather, the purpose of this videotape is to capture as early as possible the child's version of events. The videotape will, therefore, contain a statement made by the child when the event is still fresh in his memory and before there is an opportunity for his evidence to be influenced in any way. This will overcome the problem of the long delay between the event and the trial (Davies and Westcott 1992:212). Since the interview will take place soon after the abuse has been discovered or an allegation has been made, this will usually provide an account which will not be tainted by any subsequent discussions or interviews (Home Office 1989:18). The court will be given the opportunity to hear exactly what the child said when he was initially interviewed. This gives the court the chance to hear what the child had to say before he began to forget any of the details or before there was the opportunity for anybody to influence his testimony (Spencer and Flin 1990:161).

By the time the child appears in court, he will have been interviewed by social workers, psychologists, police and prosecutors and will have, by this stage, learnt the correct names for body parts. When the child eventually testifies

in court, he uses the correct term (vagina, penis etc.). This creates the impression that his evidence has been coached. By seeing the videotape of the original interview, the court will be able to see and hear what words the child himself used, which would in all likelihood be appropriate to his age and ability. Spencer and Flin (1990:162) give the following example of how easy it is for a child to appear coached:

"When an eight year old says, 'And then he ejaculated over me', defence counsel will immediately ask, 'did your mommy teach you that word?', to which the answer will probably be yes - with the resulting suspicion that the child's knowledge of such things also comes from what her mother told her rather than from witnessing an indecent act."

A further advantage relates to the fact that the court will also be given the opportunity to see how the child was interviewed. It has been accepted that the manner in which questions are phrased can influence the reply. The court would, therefore, be able to see what questions were asked and be able to evaluate the witness's evidence more accurately.

The comments of the court regarding video recordings in *S v Baleka and Others supra* are repeated here for emphasis:

"...I am convinced that the video can be a very helpful tool to arrive at the truth. It does not suffer from fading memory as do witnesses. The camera may be selective, but so is the witness's recollection, even more so. The best word artist cannot draw his verbal picture as accurately and as clearly as does the cold eye of the camera. Not to mention the faltering witness who has difficulty in expressing himself. The tape records and retains for the benefit of the Court not only the words but also the intonation and emphasis of the speaker and the reaction of the audience. A tape sound and video recording can often be more reliable than the recollection of a witness."

Since the courts are wary of the evidence of children, because they are alleged to be suggestible, inaccurate and have difficulty in distinguishing between fact and fantasy, the existence of such a videotape will go a long way in assisting the court in evaluating the child's credibility. It will be able to determine whether the child's version in court accords with the initial statement. The videotape will serve to supplement the child's evidence, especially if he is inarticulate in court.

One of the proposals received by the SA Law Commission was that the initial statement of the child be recorded on video and used as evidence at the trial. In evaluating this proposal, the Commission (1989:32-3) found that it could not be supported since a video recording of a child's initial statement would be inadmissible because it would serve as self-corroboration, be a previous consistent statement, and be irrelevant as witnesses must testify in person in court. As argued earlier, the Commission simply accepted that the video recording would be inadmissible in terms of our current rules of law, and did not go further and question the basis of inadmissibility. They did not address the issue, for instance, that, in the case of child witnesses, previous consistent statements should be admissible as self-corroboration to support the credibility of the child, but simply acknowledged that such a video recording of the initial statement may be of informal and practical use to the police and prosecution. In fact, Zieff (1991:41) argued that the Commission was short-sighted in their approach to alternative video proposals. This again is the danger of proposals that are not made within a holistic (ecological) framework.

The proposal that a child witness's initial statement be videotaped and admitted as evidence subsequently at the trial, must be evaluated within an ecological framework. A change in this system would influence other systems, and the latter need also to be considered. This proposal would have an effect on the training of police, resources as far as the making of the videotape is concerned, and specific rules of evidence, such as the rule against previous consistent statements.

#### **7.4.1.3 Training of Police**

It has been argued that if videotapes of child witness's statements are to be made admissible, this will lead to a lot of court argument about whether proper interviewing techniques have been used. This will waste time, cost money, and change the focus from whether the accused molested the child or not, to whether the social worker or police officer interviewed the child properly or not (Spencer and Flin 1990:160).

This problem can be overcome if the interviewers are trained in the correct manner in which to conduct an interview that will be legally acceptable. In South Africa the police already have a specialised unit for dealing with cases of child abuse, namely the Child Protection Unit. This would simply involve training those officials in aspects of child development, acquisition of language and techniques of conducting a legally acceptable interview. In order for this proposal to be effective, it is essential that the police officers interviewing the child be adequately trained. Although reference is made to police officers, there is no reason why this could not be extended to include, for instance, social workers, where this would be practical. In fact, this has been extremely successful in the United Kingdom. In 1991 s32A was introduced into the Criminal Justice Act 1988 and provided that a video recorded interview with a child complainant be admitted in a criminal trial in lieu of the child's evidence-in-chief. This section introduced a procedure which differs from the present proposal in that it has not been suggested that the latter be used to replace the child's evidence at the trial. However, what is relevant is that police officers and social workers were given the task of conducting the videotaped interviews. These interviewers were thoroughly trained and an official Code of Practice (The Memorandum of Good Practice) was developed in terms of which these interviewers would operate. The contents and shortcomings of the Memorandum have been dealt with in great detail earlier. It suffices to say that a similar Code of Practice would have to be implemented in South Africa which would give guidance as to where the interview should be conducted, the preparation necessary and the manner in which the interview should be conducted. The importance of such a code would be the need to ensure a particular standard of interviewing and to ensure as well that there is a level of consistency in the way interviews are conducted. Since the videotapes are to be admissible at the trial, it is essential that proper interviewing techniques be applied.

A further issue relates to the availability of resources to implement a system of videotaping initial statements by children. Although resources would have to be made available to implement such a system, the cost need not necessarily be exorbitant. As mentioned already, it seems logical that this task would be taken over by the Child Protection Unit (as in the United Kingdom), who already have offices in the various centres where they interview children. It would, therefore, be required that these centres be provided with the necessary video equipment to videotape these interviews. Since this equipment would be necessary to ensure that a complete record be placed before the court and would be in the interests both of justice and child witnesses in general, it is submitted that the

costs would not outweigh the interests involved.

#### 7.4.1.4 Previous Consistent Statements

The SA Law Commission (1989:32-3), when evaluating the proposal that a child's initial statement be videotaped and admitted at the trial, found that they could not support the proposal because the videotape would be irrelevant and because it would amount to a previous consistent statement. As far as regarding the videotape of an initial interview as being irrelevant is concerned, I submit that the Law Commission was incorrect in their approach. They believed that the videotape would be irrelevant because the person would testify at the trial. Evidence which is irrelevant is evidence which has no bearing directly or indirectly on the matter before the court. It would be incorrect to say the videotaped interview would have no bearing directly or indirectly on the matter before the court. The videotape of the interview would be relevant to show the court what the child said when the event was fresh in his memory; it would be relevant to show that suggestion had or had not taken place by the time of the trial; it would be relevant to show how the child had been interviewed and whether it had any effect on the child's evidence; and it would be relevant to the child's credibility. For these reasons, I believe it would be incorrect to say that the videotaped interview of a child's initial statement becomes irrelevant because the child himself gives evidence at the trial. Children are a particular type of witness and there are particular dangers (real and perceived) associated with their evidence. The videotape would be very relevant to this issue.

It has already been accepted insofar as the psychology of human memory is concerned that memory for an event fades gradually with time and that stress impairs the power of recall. Although these problems apply to both adults and children, they are much worse in the case of children. Children are frightened more easily than adults and they forget more quickly than adults (Spencer and Flin 1993:268). In view of this, it would appear that a statement made by the child as soon after the event as possible would therefore be more accurate since it would be made when the event was still fresh in the child's memory. This was accepted by the Scottish Law Commission (1990:25) in their report, where they made the following statement:

"It is probably fair to say that, in many instances, a witness's recollection of events is likely to be more accurate and reliable shortly after the events in question than will be the case many months later. It appears that this may be particularly so in the case of children, and especially young children."

The previous statement, in the form of the videotape, would be admissible at the trial to supplement the child's evidence. This seemed fair, according to the Scottish law Commission, since previous inconsistent statements were admissible to challenge the witness's credibility.

In the United Kingdom the Pigot Committee, having considered the various criticisms levelled against the inadmissibility of previous consistent statements, felt that there should be a more general change relating to prior statements and that these criticisms raised wider questions about the rules of evidence than those relating particularly to children (Home Office 1989:14). In Canada there is a statutory provision which admits a videotaped prior statements provided the proceedings relate to a sexual offence, the complainant is under eighteen, the videotape is

made within a reasonable time and the complainant adopts the contents of the videotape. I submit that the adoption of such a statutory provision would probably give rise to greater difficulties.

Since it has been accepted that children in general experience stress when testifying and that their memories fade faster, there does not appear to be any sense in limiting the use of previous consistent statements to complainants in sexual offences. Nor does it appear to be in the interest of justice to admit a previous consistent statement if the complainant adopts the contents. Surely, if the contents are not adopted because the evidence has changed, the courts should have access to the videotape as well? The statement must have been made within a reasonable time of the event. Since one of the main reasons for wanting to admit previous consistent statements was to capture an accurate and fresh account, this requirement appears to be sensible. However, the phrase "within a reasonable time" is vague and imprecise and could give rise to endless arguments as to what is meant by "a reasonable time", as has happened in the case of the common law exception to prior consistent statements, complaints in sexual crimes. In the case of the latter, a complaint must be made at the first reasonable opportunity. This has given rise to a number of cases in which the courts have had to decide whether the complaint was made at the first reasonable opportunity.

The Scottish Law Commission (1990:30) recommended that a statutory provision be introduced in terms of which any witness giving evidence could introduce a prior statement if the statement was in a written form and signed by the witness or in the form of an audio or video recording or in any other permanent form which accurately and completely records what was said.

It is submitted that previous consistent statements are relevant, and this has been accepted by the courts in the creation of the common law exception which allows complaints in sexual cases to be admitted. However, the insistence that rigid requirements be complied with has led to the courts having to determine metaphysical questions like what a reasonable opportunity would be and when a complaint would be voluntary. This exception was introduced to admit evidence which was obviously relevant, but the requirements that must be complied with are so rigid that the majority of complaints are excluded anyway. As argued above, it makes no sense to create an exception in order to admit evidence, if that evidence becomes inadmissible due to the requirements of the exception.

A more detailed criticism of the rule against previous consistent statements was made earlier, in the discussion of the position under South African Law. At this stage it suffices to say that it is my submission that the reasons for excluding previous consistent statements do not have a valid basis. They are excluded, firstly, because they are insufficiently relevant. However, a number of exceptions have been introduced to admit previous consistent statements which are, in fact, relevant. Secondly, it is argued that it is easy to manufacture previous consistent statements. This may be so, but this is a factor which goes to weight and depends on the circumstances of a particular case. In view of this, I submit that the common law rule against previous consistent statements be repealed by a statutory provision. The normal rules of evidence, i.e. relevance, should remain the guiding principle for admissibility. If the previous consistent statement is relevant, then it will be admissible. All other factors will

go to the weight to be accorded to the individual report before the court. If the previous consistent statement is not relevant to the matter before the court, then it will be inadmissible in terms of s210 of the Criminal Procedure Act of 1977.

As far as videotaping a child witness's original statement is concerned, it is submitted that this situation differs from other instances of previous consistent statements. The latter will relate to consistency of the witness whereas in the case of a child witness the videotape will be used to assess aspects of memory and suggestibility, and will enable the court to formulate a more accurate position on the credibility of the child.

Since it has been proposed that the rule against previous consistent statements be repealed and the normal rules of evidence apply, the admission of the videotaped initial statement of a child witness will be governed by the normal rules of admissibility, namely relevance. The danger of this, however is that presiding officers are not aware of the research that has been conducted on children's memory and suggestibility and may not understand the relevance of such a videotaped interview and may, therefore, declare the videotape to be irrelevant and consequently inadmissible. For this reason, it is further submitted that any statutory provision repealing the rule against previous consistent statements should also include a section stating that the videotaped interview containing the child's initial complaint or statement may be admissible at the subsequent trial. Although such a section would still leave the court with a discretion, the emphasis would be on the admission of such videotapes. It would also provide the police with a statutory basis for conducting videotaped interviews.

#### **7.4.2 Confronting the Accused**

Not only is it required of a witness to give evidence in court, but the witness must also give evidence in the presence of the accused. The right to confrontation in accusatorial and inquisitorial systems was discussed earlier. What remains to be noted at this stage are the widely divergent approaches to the issue of confrontation between the various countries, ranging from the position in the United States where confrontation is regarded as essential to the discovery of truth to countries like Israel where confrontation is dispensed with completely in most cases. This begs the question of how essential confrontation really is in the process of discovering the truth. In Norway, for instance, confrontation was dispensed with because they found that children became so nervous that they produced inaccurate evidence (Andenaes 1990:11). In the United States the courts have repeatedly held the opposite. In *Tennessee v Street supra* confrontation was found to ensure accuracy and in *Ohio v Roberts supra* it was believed to augment accuracy. At 63 the Supreme Court explained that confrontation makes it more difficult to lie since the person about whom you are lying is present. This premise is fundamentally flawed. It has been proved that children experience stress at having to give evidence in the presence of the accused and that this stress has an effect on the accuracy and completeness of the child's evidence. In addition, a person who has deliberately (and maliciously) laid a false charge against the accused is probably the kind of person who would be quite capable of giving false evidence in the presence of the accused.

Children experience stress at having to give evidence in a courtroom, and this stress increases when the child is forced to testify in the presence of the accused. Empirical research has shown that physical confrontation with the

accused damages the reliability, quality and often the very existence of the child's evidence (Hill and Hill 1987:820). Two studies have examined the effect of stress, caused by confrontation, on the retrieval of memory. Children were asked to identify an adult who had been involved in a staged event from a live identification parade as opposed to a photo parade. The results showed that the children made fewer correct identifications when viewing the live parade than when viewing the photo parade. The one study (Dent 1977:340) used behavioural observations while the other (Peters 1991:60) used objective ratings of stress. Both studies found the children who viewed the live parade to be more anxious. In fact, several children commented that they failed to identify the adult in the live parade because they were afraid. Saywitz and Nathanson (1993:614) therefore argue that confrontation is one of the characteristics of the courtroom context which creates anxiety, associated with the fear of perceived consequences, which influences the quality of evidence.

The effect of confrontation on child witnesses has already been dealt with in detail in earlier discussions. These arguments were accepted by the SA Law Commission (1989:12) with a poignant reference to the little boy who held his hand against his face to blinker out the sight of his father while testifying how the latter had repeatedly sodomised him. As a result of the Commission's recommendations, s170A of the Criminal Procedure Act 1977 was introduced. An evaluation of s170A will have to be undertaken to determine whether it serves the needs of all in terms of an ecological systems approach. Comparisons also need to be drawn with innovations introduced in other countries to see whether lessons can be learnt from these approaches.

#### **7.4.2.1 An Evaluation of s170A**

Section 170A of the Criminal Procedure Act 1977 enables the child witness to give evidence from outside of the courtroom, thereby protecting the child both from the court environment and the presence of the accused. Before examining the section in detail, it will be compared with the innovations introduced in the other systems studied previously.

##### **7.4.2.1.1 Depositions**

In the United Kingdom s42 and s43 of the Children and Young Persons Act of 1933 enable a complainant, under the age of fourteen, to give evidence against the perpetrator by means of a deposition where the child has been too badly injured to appear in court. The Pigot committee found that this procedure was very rarely used in practice (Home Office 1989:12), and Spencer and Flin (1990:74) support this view, saying that they have found no written record of this procedure being used. The reasons for this probably relate to the fact that the accusatorial system supports the oral tradition of justice, as well as "a feeling shared by advocates and judges that a written transcript of an interview is a poor thing indeed, because it does not enable the court to listen to the witness's tone of voice and see his or her demeanour when giving evidence" (Spencer and Flin 1993:85). In addition, the sections themselves insist that very rigid requirements be complied with, thus limiting the application of the section. For instance, the child must be under the age of fourteen; the section can only be used in the case of certain specific offences; and the court appearance must involve serious danger to the child's life or health. In addition, the accused

or his legal representative must be afforded an opportunity to cross-examine the child. Spencer and Flin (1993:86) suggest that this procedure may be improved if the sections were amended to include videotaped statements so that the court could hear and see the child when the latter gives evidence.

In Scotland it has been possible for a commissioner to take the evidence of a witness on commission since 1980, provided that the accused and/or his representative are present. The evidence will be written down and the transcript will be handed in at the trial. This procedure was also very rarely used in the case of child witnesses and, for this reason, the Scottish Law Commission (1990:15-17) proposed that pre-trial depositions be conducted in the case of children where an application to do so was made to court. The accused must be present during the proceedings, although he would be separated from the child by one-way glass or closed-circuit television. This proposal was enacted as section 33 of the Prisoners and Criminal Proceedings (Scotland) Act, and came into effect on 1 January 1994.

The deposition does not appear to offer any advantage to the procedures already adopted in South Africa. The deposition requires the accused (or his representative) to be present. The child is therefore not protected from confrontation. The deposition is an attempt to protect the child from the adversarial environment of the court and, by implication, means that the evidence will be taken in a place other than the courtroom. However, as the accused is entitled to be present and his presence has been accommodated by the use of one-way glass or closed-circuit television, this means the deposition will have to be taken in a place that has such equipment available. At present, the courts in England and Scotland have closed-circuit television equipment installed. Does this mean that the deposition will have to be conducted using these facilities? Why could this then not be done on the day of the trial?

Since s170A already enables a child to give evidence from outside the courtroom, the deposition does not offer any improvement. In fact, it raises more difficulties. For instance, the Scottish Law Commission (1990:17) insisted that the deposition be conducted as close to the trial date as possible to afford the accused the opportunity to prepare his defence properly. It was argued on behalf of the accused that all available evidence usually only becomes available closer to the date of the trial. The deposition would have to be held after the accused has requested and received further particulars, otherwise he will not be in a position to cross-examine fully, since statements made by other witnesses will generally have application. The procedure introduced by s170A eliminates these difficulties as evidence is given at the trial. The manner in which the deposition will have to be conducted (presence of accused, an opportunity for cross-examination in a setting which has the necessary electronic equipment) amounts to a trial in another form and there is no evidence to suggest that the child will experience any less stress.

In the United States a number of states have enacted provisions which enable judges to authorise the video depositions of child witnesses. The videotaping usually takes place in the judge's chambers or a similar environment and the accused is given an opportunity to cross-examine the child. The videotape is then handed in instead of the child giving evidence personally. The statutes vary from state to state with some states requiring that the child must suffer from severe emotional or mental strain before a deposition may be used, while others simply require that 'good cause' be shown (Myers 1987:387-8).

The videotaped deposition has lost much of its support in the USA because many professionals believe the deposition to be more harrowing than the actual giving of evidence in court, since the deposition is usually conducted in a room that is much smaller than the courtroom and consequently the child ends up much closer to the accused. This is likely to be even more stressful, and prosecutors believe that the videotaped deposition simply substitutes one formal procedure for another (Whitcomb et al 1985:65).

In those countries which are based on an inquisitorial model of procedure, the general procedure adopted for child witnesses is to give evidence by means of deposition. In West Germany the record of a former interrogation by a judge can be read in court in lieu of the child giving direct evidence where all the parties agree. This procedure can also be used where there are "insurmountable impediments" to the child appearing personally (Frehsee 1990:34-5). In France children very rarely appear in court, but are interviewed by the *judge d' instruction* in his chambers and this evidence replaces the court appearance. However, the interview by the *judge d' instruction* must be conducted in the presence of the perpetrator. In Norway the examining magistrate interviews children under the age of sixteen and then compiles a report which is read in court as a substitute for the child's appearance in court (Andenaes 1990:10). In Israel, as well, the child investigator interviews the child and where he believes that it would not be in the interests of the child to appear in court, he compiles a report and this is read in lieu of the child's evidence (David 1990:107).

Hamon (1990:63) has argued that depriving the child of a court appearance (not necessarily confrontation) may be detrimental in itself since it may have the perverse effect that the victim feels 'his' trial has been confiscated from him. This accords with scientific findings discussed earlier that a trial can have a therapeutic effect on children and can form part of the therapy. Depriving the child witness of 'his' trial may only further disempower the child.

In conclusion then, it would appear that the introduction of any statutory provision dealing with depositions for child witnesses is not feasible. The present procedures offered by s158 and s170A of the Criminal Procedure Act 1977 give rise to less problems than those created by the introduction of depositions.

#### **7.4.2.1.2 Closed-circuit Television**

In the United Kingdom s32 of the Criminal Justice Act of 1988 enables a witness, under the age of fourteen in cases of violence and seventeen in cases of sexual offences, to give evidence from another room via closed-circuit television. This system was evaluated over a period and was found to have widespread acceptance amongst the legal professionals involved. The most widely cited reason for this acceptance was that the child's stress was reduced and the quality of the child's evidence improved (Davies 1994:226). The reduction in stress was ascribed to two factors, namely that the child did not have to appear in the courtroom and that the child did not have to face the accused. It therefore had the related benefit that children who would not previously have been able to give evidence, were able to do so via the live link (Spencer 1987b:445). This was found to be especially so when the accused is a member of the child's family (Davies and Westcott 1992:212).

A complaint made by some barristers in the evaluation was that there was a loss of rapport and eye contact with

the child when leading their evidence via the live link. Communication via the live link was an artificial medium and many examples of inept use of the live link were noted during the evaluation. For instance, some barrister did not talk directly into the camera and thereby presented a view of the top of their head to the child (Davies and Noon 1992:25).

Although the child does not have to face the accused in person, the method of closed-circuit television employed in the UK is the use of a two-way system which means that the child still sees the courtroom and the officials in the court. Since the child sits alone in the other room, this may give rise to a sense of alienation and fear as the child in theory is still being forced to face the officials in the courtroom. For this reason the judge has been given a discretion to allow an usher to accompany the child in the other room. However, the usher must be a stranger and it is, therefore, debatable whether this person will in fact be of any assistance to the child (Sharp 1989:95):

"However sympathetic a court usher may be, her appearance in a black gown, the fact that she is unknown to the child and the necessary restrictions upon the usher's ability to relate to the child may, in some cases, produce great difficulties."

In addition, the judge has a discretion which means he can refuse to allow an usher to accompany the child. The section itself gives rise to a number of problems. It is limited to certain offences, has particular age limits, and can only be used in certain courts. An application to use the live link must be made in writing and he will then decide the matter without a hearing. There appears to be some unease because there is no official guidance as to how the judge should exercise this discretion (Spencer and Flin 1990:87). This has resulted in the situation that some judges grant live-link applications while others do not. What is, however, important is that the prosecution does not have to make a special case for the use of the live link because there is a presumption of need (Davies and Westcott 1995:206).

In comparing the procedure introduced by s170A and s158 of the Criminal Procedure Act 1977 with that applied in the United Kingdom, one could argue that children giving evidence in the South African system would be exposed to even less stress and trauma since the child does not have to see the courtroom nor the officials and is, therefore, protected from the adversarial environment.

However, there is merit in the argument that there will be a loss of rapport and eye contact with the child when leading his evidence from the courtroom. The procedure offered by s170A of the Criminal Procedure Act 1977 offers a superior form of communication since the questions are asked via the intermediary who is able to develop rapport and eye contact with the witness. An artificial quality nevertheless remains since the prosecution and defence are not able to develop rapport with the witness, and the intermediary who can develop such rapport has no control over the manner in which the examination is to be conducted. This difficulty will be returned to later when evaluating the role of the intermediary.

The criticism would, however, apply to the provisions of s158 (as amended) of the Criminal Procedure Act 1977. This section enables a witness to give evidence by means of closed-circuit television or similar electronic media. If this section were to be used for a child, the prosecution would have to lead evidence via closed-circuit television

and this would make it very difficult to develop rapport and eye-contact, especially with a young child. This links up with the further issue that the child will be alone in the other room without support. Although s158(4) gives the court the power to allow the use of closed-circuit television subject to "such conditions as it may deem necessary" to ensure a fair and just trial, there is no mention of allowing a support person to accompany the child in the room. It may be argued that the legislature did not intend for this section to be used in the case of children since s170A is available and therefore did not address the question of a support person. In terms of s170A the intermediary would be able to function as a support person. According to Hill and Hill (1987:809-810) a child should be provided with an emotionally supportive person to help the child through the legal proceedings. This could be anyone from a parent, aunt, teacher to a social worker who will be able to lend support. This person would sit with the child while he testifies in the other room. If this person is to provide support, the appointment of a stranger at the trial to fulfill this role will not be successful.

Insofar as the particulars of the section are concerned, s170A appears to be an improvement on its UK counterpart. It is not limited to particular offences and applies to all children, not necessarily complainants, under the age of eighteen. It is not limited to specific courts either. But the UK section is superior in one respect, the prosecution does not have to make a special case for the use of the live link because there is a presumption of need. Section 170A requires an application to be made in court and undue mental stress or suffering need to be proved. However, in practice, a discretion needs to be exercised in both sections and this can give rise to problems in application. Section 158 of the Criminal Procedure Act 1977 reads a little wider and says that a court may "on its own initiative or on application by the public prosecutor order" that evidence be given via closed-circuit television. But again there is a discretion to be exercised and the procedure can only be used if there is the likelihood that prejudice or harm might result.

It is, therefore, proposed that if the court is going to allow a child to give evidence via closed-circuit television in terms of s158 of the Criminal Procedure Act 1977, then the child must be allowed to be accompanied by somebody who can offer support to the child. It is not necessary that the person be a stranger, since the court will be able to view the child and the support person on the monitor and can observe if the person attempts to influence the child in any way.

More than half of the states in the USA have statutory provisions which authorise the use of one-way or two-way closed circuit television in the case of child victims who have to give evidence in sexual offence cases (Bjerregaard 1989:168). The statutes vary from state to state with some allowing only the prosecution and defence counsel to be present with the child in the room, others require the accused to be present as well and others allow the child to sit in the room alone although he may be accompanied by a support person. The Americans believe that the main advantage of closed-circuit television is that it protects the child from having to confront the accused. Admittedly this only applies to those statutes which do not insist that the accused be present in the room with the child, in which case the child is even closer to the accused and perhaps in an even worse position. MacFarlane (1985:147) argues that since the child gives evidence outside of the courtroom, he is less likely to be frightened by the strangers in the court. This argument is debatable since the child in most instances has to sit in the other room with the prosecution, defence and judge who will also be strangers.

With respect to the model where the child sits alone in the other room, MacFarlane (1985:147) argues that the child might feel isolated by being separated from the courtroom and from the person with whom he is communicating. He may, in addition, find it difficult to concentrate on a voice and a face that he views on a monitor. This disadvantage was raised by researchers in the United Kingdom as well and would seem to be a valid criticism. Although this criticism does not apply to s170A of the Criminal Procedure Act 1977 since the child has to communicate with the intermediary, it does bear application to s158 of the same Act (as amended). In terms of this section the child will be allowed to give evidence via closed-circuit television and would, therefore, have to communicate via a monitor or earphones. The sense of isolation can be overcome by allowing the child to have a support person present, as proposed *supra*. However, as far as a young child is concerned, it is going to be very difficult to communicate via a monitor or earphone. The official in the courtroom will not be able to keep a small child's attention. For this reason it is submitted that s158 should not be used for children under the age of twelve. In a recent, as yet unreported, case in the Eastern Cape (Uitenhage) a four year old boy gave evidence via an intermediary in terms of s170A. The boy was the only witness to the murder of his mother. The boy was found to be a very good witness and the accused was convicted on his testimony. However, the child was cross-examined for three hours. It was obviously impossible for a young child to sit still for such a lengthy period and he would frequently get up and wander around the room. The intermediary would then have to draw him back to the table with a puzzle to get his attention. It would not be possible for this to happen via a monitor or closed-circuit television.

Closed-circuit television has not captured much interest in inquisitorial countries since children rarely appear in court. Attention has been focused on avoiding court appearances, therefore the emphasis has been on allowing children to give evidence by deposition which then replaces the court appearance.

Having closely investigated the position in various countries with respect to closed-circuit television, it would appear that s170A of the Criminal Procedure Act 1977 has the fewest disadvantages and the most advantages. For this reason, s170A will be used as basis to work from. The section itself, as argued in much detail earlier, is not flawless. The section grants a presiding officer the discretion to appoint an intermediary and a discretion to use closed-circuit television. Firstly, a distinction needs to be drawn between children who need to give evidence via closed-circuit television and those who need the services of an intermediary. Research has accepted that children experience stress and are often traumatised by having to testify in court, and that this stress has an effect on the accuracy of their evidence and their ability to testify effectively. These findings have been accepted by courts throughout the world, hence the introduction of videotaped depositions, closed-circuit television and countless exceptions to the hearsay rule which have all been introduced in an attempt to protect the child from having to give evidence in court in the presence of the accused.

Despite the fact that the courts have accepted that it is traumatic for children to testify in open court, it is still necessary in each case to prove that the particular child will experience stress. This does not make logical sense. The court in *Klink v Regional Court Magistrate NO and Others* accepted that appearing in court was stressful for children and that s170A did not deprive the accused of his right to a fair trial. Since s28 of the Constitution Act 1996 has emphasised that children need to be protected from abuse and that their best interests are paramount in

all matters, children should be allowed to give evidence via closed-circuit television on an automatic basis. The accused has not been deprived of his right to confrontation, since confrontation gives an accused the right to observe the demeanour of the witness as he testifies. The accused is able to do this by means of the closed-circuit television.

It is, therefore, proposed that all children under the age of eighteen automatically be allowed to testify via closed-circuit television. At this stage only the aspect of confrontation is dealt with and not the appointment of an intermediary. By eliminating the court's discretion, problems relating to the concept of undue mental stress or suffering will also be eliminated. This will remove the need to determine what amounts to undue mental stress or suffering. It will also eliminate the different standards employed between s170A and s158, since the latter only requires 'the likelihood that prejudice or harm might result' and gives rise to the situation that a much higher standard of stress is required to be experienced by children as opposed to adults.

One of the disadvantages of using closed-circuit television highlighted in earlier discussions was the argument that by allowing children to testify out of the presence of the accused, there is a suggestion that the child has a reason not to confront the accused and the latter is guilty. It is argued that this goes against the presumption of innocence. It was for this reason that the Law Commission of Victoria (1988:103) in their Report referred to the proposal of New South Wales that closed-circuit television be used in all cases involving children. Since this procedure would be the standard procedure used in the case of all children it would therefore not imply guilt on the part of the accused as it might do if only used in certain circumstances. The Law Commission of Victoria (1988:105) proposed that all complainants under sixteen in cases involving sexual offences be allowed to testify via closed-circuit television, and that this decision be a matter for the prosecution, thereby eliminating the court's discretion. This approach is supported by Schwikkard (1996:148) who argues that the discretionary nature of s170A of the Criminal Procedure Act 1977 as a whole appears to be to the detriment of children. The discretionary nature of s170A means that those children who give evidence via an intermediary must be viewed as the exception rather than the norm. By removing the court's discretion, it will also eliminate the calling of expert witnesses on an adversarial basis to prove that a particular child has or will experience undue mental stress, as is the position at present in the USA.

#### **7.4.2.1.3 Videotaped Evidence**

Generally videotapes of interviews conducted with children will be inadmissible because they contravene the rule against hearsay, if they are used to replace the child's evidence in court, and because they will amount to a previous consistent statement, if the child does give evidence (Home Office 1989:11). For this reason a number of statutory exceptions have been introduced in accusatorial systems to enable the videotaped evidence of children to be admitted. The videotaped interview that is introduced as a previous consistent statement has already been dealt with under depositions. What remains to be discussed is the introduction of videotaped evidence to replace the whole or part of the child's evidence in court.

In the United Kingdom s32A of the Criminal Justice Act 1991 provides that video recorded interviews conducted with children may be admissible in criminal proceedings and will replace the child's evidence-in-chief provided that the child is available to be cross-examined at the trial. There are a number of limitations on the availability of s32A

in that it only applies to certain crimes, certain courts and is further limited with respect to age. The admissibility of the videotape is not automatic, and the court has the discretion not to admit a recording in the interests of justice.

In practice, therefore, there are two possible ways in which a child witness can give videotaped evidence. The videotaped interview, conducted by a police officer or social worker, will replace the child's evidence in court. The child will then either be cross-examined via closed-circuit television or he will give evidence personally in open court.

In the evaluation of videotaped evidence conducted by Davies et al (1995:12-15) it was found that children experienced less stress and less trauma when allowed to give evidence via videotape and closed-circuit television. Videotaped evidence also provided a practical method of putting evidence before the court which, in the case of a young or traumatised child, would not normally be able to be placed before the court. For instance, the videotaped interview is conducted by a police officer or a social worker trained to interview children. The above evaluation found that in 12% of the cases where the prosecution barrister decided to conduct the examination-in-chief, the case collapsed within minutes of the opening because the child was unable to follow the barrister's questioning, despite the fact that in each of these cases a successful videotaped interview had been conducted (Davies et al 1995:25-31).

The advantages of videotaped evidence used to replace a child's evidence in court were discussed in greater detail earlier. At this stage it is necessary to look at a few disadvantages of the system adopted in the United Kingdom. An important objection to the use of videotaped evidence to replace evidence in person raised by the Pigot Committee was whether it would in fact relieve the stress experienced by children since they would still have to undergo cross-examination. In addition, the defence would have access to the videotape as part of discovery and would therefore be prepared to question the child in great detail about what was said in the videotaped interview with the purpose of exposing the minutest inconsistency (Home Office 1989:19).

A further objection focuses on the time delay between the original videotaped interview and the cross-examination. This would have the implication that a child witnesses may, and probably very likely, have forgotten a lot of detail mentioned in the original interview by the time they are cross-examined. This would have a very negative effect on credibility and increase the pressure on the child, especially if he was unable to remember some of the finer detail. For instance, if in the initial interview the child mentions that he was wearing a blue tee-shirt and, months later, at the cross-examination says the tee-shirt was green, the cross-examiner will focus a lot of attention on this discrepancy. The questions that follow would most likely be phrased as: 'You say the tee-shirt was green? Are you sure? Could you perhaps be making a mistake? Can you still remember what the tee-shirt looked like? You see, the reason I'm asking you this question is because when you were interviewed originally, you said the tee-shirt was blue'.

The purpose of these types of questions is to suggest to the court that they should be wary of accepting the child's evidence, since he is no longer sure of the details. It is meant to raise the following questions in the mind of the

presiding officer: How sure was the child at the time the interview was conducted? If he can make a mistake about these details, it is likely that he could make a mistake about other details as well. And the more doubts raised in the mind of the presiding officer, the less likely the prosecution is to be successful in obtaining a conviction.

These questions will also increase the stress experienced by the child. If he is unsure about the detail and it is being suggested that he either cannot remember correctly or is lying, he is far more likely to have difficulty with the rest of the cross-examination. This can occur even if the child is given the opportunity to refresh his memory from the video before the cross-examination, since he will not be able to 'relearn' what he said in such detail three or even six months before. This is especially so in regard to the finer details or peripheral details of how the assault actually occurred. For instance, if a child was indecently assaulted (offender pushed the child against a wall and put his hands in his underpants) in perhaps a passageway in a house, the cross-examiner would have a fertile opportunity to confuse him with the finer detail. Where exactly were you standing when X touched you? How far away was that from the doorway? And how far was that from the table? If the child gave this evidence a few months before the cross-examination, it would be very easy to trip him up at the cross-examination, create confusion in his mind about the discrepancies in the two versions and then try to suggest to the court that the child is actually unsure of his evidence and in fact all the accused did was pass the child in the passage and accidentally bump against him.

These are problems which can occur when giving evidence in the traditional courtroom situation. How much worse will this be when the giving of evidence is separated from the cross-examination by months. And even the opportunity to refresh the child's memory by means of viewing the videotape will by no means assist children to cope with detailed cross-examination, especially as the child is only given one opportunity to view the videotape and that is when he appears in court for the cross-examination.

In the United States of America there are similar provisions in terms of which the videotape of the child's interview can replace the child's evidence-in-chief in court provided that the child and the interviewer are available for cross-examination (Whitcomb et al 1985:60). The availability of this procedure is not automatic and can only be used where giving evidence in court will be traumatic for the child. In *State v Warford supra* the court held at 581 that the use of a videotape to replace a child's evidence-in-chief would infringe the defendant's constitutional rights and could not be admitted unless there was evidence of "a compelling need to protect the child from further harm". A great deal of argument has gone into what is meant by the phrase "compelling need" and has led to the situation where in many cases an expert witness will be called to give evidence to determine the existence of such a need. The system of videotaping the initial interview and using it to replace the child's evidence in court has attracted some attention in other countries. In Israel, for instance, a regulation was issued which required a youth interrogator to tape-record the interview, unless there were special reasons for not doing so. Harnon (1990:91) argues that the next step in this direction would be to require that the interview be videotaped. It must, however be noted that under this system the child is not required to appear in court or be cross-examined. Such a videotape would form part of the youth interrogator's report. In countries like West-Germany and France there is not the same emphasis on confrontation and consequently videotaped depositions are used to replace the child's evidence in court. Children are not required to appear in court to be cross-examined by the defence.

In conclusion, it would appear, I submit, that the videotaping of an interview with a child witness for the purpose of admitting it in lieu of the child's evidence-in-chief at the trial provided the child is cross-examined at the trial does not offer a way forward for the South African courts. The difficulty for the child in having to be cross-examined on evidence given months beforehand and its consequent effect on the child's credibility, as outlined above, does not make this a favourable option. In addition, the discretionary nature of admitting the videotape results in endless argument as to what is meant by a compelling need, and thus uncertainty.

### 7.4.3 Conclusion

It would appear from the evaluation of the different systems that the amount of emphasis placed on confrontation by accusatorial systems does not seem to be justified. Confrontation is not an issue in inquisitorial systems, and the very fact that accusatorial systems have had to introduce statutory exceptions indicates that there is a fundamental flaw in their approach to confrontation.

The common law principles of our law of criminal procedure and evidence were formulated when the present technology available was not even foreseen. This does not mean that these innovations should be excluded for that reason. This particular argument was raised by the court in *Commonwealth v Willis supra* at 230-31:

"In the Eighteen and Nineteenth Centuries, live testimony was the only way that a jury could observe the demeanour of a witness. The use of videotapes does not represent a significant departure from that tradition because the goal of providing a view of the witness's demeanour to the jury is still achieved. A witness has never been disqualified by mere refusal or inability to look at the defendant. The testimony of a blind victim would not be invalid. The same is true for the testimony of a witness who refuses to look on the accused. By analogy a defendant would not be denied the right of confrontation when a young victim is so intimidated by his mere presence that she cannot testify unless she is unable to see or hear him.

The strength of the State and Federal Constitutions lies in the fact that they are flexible documents which are able to grow and develop as our society progresses. The purpose of a criminal or civil proceeding is to determine the truth."

The Pigot Committee too observed that many of the procedures adopted in the courts, and therefore the rules emanating from these procedures, were developed many years before the technology which is now available and which can enable witnesses to be treated with greater consideration (Home Office 1989:20).

A summary of the proposals suggested above follows. It is proposed that the initial statement made by the child witness to a police officer or social worker be videotaped. This videotape must be admissible at the trial as an exception to the rule against previous consistent statements, although it was pointed out that the latter rule as a whole needs to be reformed. The purpose of admitting this videotape will be to provide the court with an account that was given when the event was still fresh in the child's mind. In addition, it will offer the court an opportunity to evaluate the manner in which the child was interviewed, and assist the court in assessing the child's credibility. At the trial, all children under the age of eighteen should automatically be allowed to give evidence from a room outside the courtroom via closed-circuit television, thus removing the court's discretion and eliminating endless argument as to what is meant by vague concepts such as 'undue mental stress and suffering'. It has been accepted

that all children experience stress when having to testify in court, and especially when they must do so in the presence of the accused, and that this stress has an effect on their memory as well as their ability to testify.

This proposal will, therefore have certain statutory implications. Section 170A of the Criminal Procedure Act 1977 will have to be amended to remove the discretionary nature of the section and to provide that all children under the age of eighteen be allowed as a matter of course to give evidence via closed-circuit television. The question of the intermediary will be addressed next. As far as s158 of the Criminal Procedure Act 1977 is concerned, this section will have to be amended to indicate whether it is applicable to child witnesses under the age of eighteen or whether the court must proceed in terms of s170A when dealing with child witnesses under the age of eighteen. If s158 is to be used for child witnesses under the age of eighteen, then it must make provision for the child to be accompanied by a support person. It is also suggested that it not be used for children under the age of twelve since it will create difficulties with communication and concentration. The better proposal would be for the legislature to indicate clearly that s158 applies to witnesses aged eighteen and over and that s170A applies to witnesses under the age of eighteen. This will eliminate the confusion between the discretionary nature of s158 and the proposed automatic nature of s170A i.e. child witnesses under eighteen can automatically give evidence via closed-circuit television in terms of s170A whereas s158 would require a finding of a likelihood that prejudice or harm might result before a witness could give evidence via closed-circuit television.

The reasons for the introduction of the above proposals have all been argued in detail earlier. However, it should be remembered that the law of evidence, like the legal system as a whole, should adapt itself to changing social requirements and attitudes, always taking into account any countervailing interests (Harnon 1990:92).

## **7.5 Cross-Examination**

### **7.5.1 Basis for the Belief in Cross-examination**

Cross-examination, according to Davies (1993:3), 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. The purposes of cross-examination are twofold. firstly, to elicit information that is favourable to the party conducting the cross-examination and, secondly, to cast doubt upon the accuracy of the evidence given in chief by the witness (*Klink v Regional Court Magistrate NO and Others supra*). This would mean that in the course of cross-examination only questions concerning facts relevant to the issue or to the witness's credibility may be asked (Hoffmann and Zeffertt 1988:458).

In accusatorial systems there is a fundamental belief that cross-examination, and the techniques employed in the course of it, are tools for discovering the truth and assessing credibility. According to Wigmore (1974:1367), it is "the greatest legal engine ever invented for the discovery of the truth" and leaves not a moment's doubt in the mind of any lawyer as to its effectiveness:

"Not even the abuses, the mishandlings, and the puerilities which are so often found associated with cross-examination have availed to nullify its value. It may be that in more than one sense it takes the place in our system which torture occupied in the medieval system of the civilians. Nevertheless, it is beyond any doubt the greatest legal engine ever invented for the discovery of the truth. However difficult it may be for the layman, the scientist, or the foreign jurist to appreciate this, its wonderful power, there has probably never been a moment's doubt upon this point in the mind of lawyers of experience. ... If we omit political consideration of broader range, then cross-examination, not trial by jury, is the great and permanent contribution of the Anglo-American system of law to improved methods of trial procedure."

This passage from Wigmore highlights the strength of this belief, referring to cross-examination as "the great and permanent contribution" of the accusatorial system to trial procedure. Carson (1995:4), however, argues that this fundamental belief is unchallenged and based upon "anecdote and supposition rather than upon evidence". For instance, a witness may make a lot of mistakes in cross-examination, which could lead to his evidence being disbelieved by the court, but it in no way proves that the witness was lying. The person may simply "be very poor at being a witness rather than as a truth-teller" (Carson 1995:4). How does it assist the court in its truth-finding role to rely upon questioning techniques which serve only to demonstrate that a particular witness is fallible under cross-examination? These techniques are accepted because the standard of proof in legal matters is based on persuasion rather than scientific proof as pointed out by Hart (1963: Introduction):

"The problem arises because 'legal reasoning' about facts is based upon persuasion to a much greater extent than is the case with more formal and scientific systems of proof."

Cross-examination is often regarded as a feature of an adversarial system which enables it to claim superiority over the inquisitorial system. However, adherents of the latter system have often accused the adversarial system of giving an "exaggerated efficiency" to the right of questioning. They argue that cross-examination bends and distorts the evidence by means of suggestive questions and that justice cannot prevail in an atmosphere where witnesses are influenced and badgered (Gorphe 1927:90). In fact, Davies (1993:xxxii) emphasises that words are weapons and the outcome of a case depends on confrontation between one side's witnesses and the other's lawyer, which he describes as a "battle". He finishes off with the following imagery (Davies 1993:397):

"..then it is incumbent upon the advocate to cross-examine in such a way that the witness is damaged or neutralized to some degree."

It is often assumed that the tradition of cross-examining a witness is of ancient origin. In fact, in English criminal proceedings it is a very recent development. The procedure used to be for the judge to examine the witnesses and this they did by allowing the witnesses to tell their stories freely in their own words. It was only in the course of the 18th century that the practice developed of having barrister prosecute and defend (Spencer and Flin 1990:79).

It is obvious that in order to protect the accused there has to be some examination of the witness's credibility and his motivation to tell the truth, but this does not mean that it can only be done by traditional cross-examination as we know it.

## **7.5.2 Effect of Cross-examination on Children**

The medium of exchange in the courtroom is a particular language which is so steeped in legal tradition that it falls outside the normal language repertoire of adults and, even more so, of children (Brennan and Brennan 1988:31). In addition to this, and operating at the same time, are the emotional stresses and fears which the child experiences when having to be questioned about traumatic events in an adversarial environment that traditionally does not differentiate between children and adults. What needs to be investigated then is the distance between the child's language capacity and the language of the courtroom. In fact, the questions which need to be addressed are set out succinctly by Brennan and Brennan (1988:41):

"What language features particular to the courtroom contribute to the mismatch between children's language abilities and the language of lawyers? How and why are these language characteristics employed by members of the legal profession and how justifiable is their usage? ... What provisions are made for relatively inexperienced language users who appear as witnesses?"

A number of techniques employed in cross-examination give rise to serious difficulties in comprehension for the child witnesses. The following serves simply to highlight a few of the difficulties children encounter with cross-examination.

### **7.5.2.1 Communicating in an Adversarial Environment**

In court the normal conventions of communication are subservient to a set of procedures which have been established over generations. Brennan and Brennan (1988:31) explain that these conventions are not only foreign but also intimidating and confusing. They list the following examples to show how court procedures dominate language usage: the fact that the person examining the child often faces the bench while questioning the child; that questions are directed through the bench; that questions are interrupted by procedural objections; that discussions of what the child has been asked and how the child has replied are discussed at length while the child remains present; and that the alleged perpetrator sits in a special place while this is happening and frequently says nothing. The court provides a prescriptive environment within which the scope for responding is very limited. The child witness has to cope with these limitations and translate the formalities of the environment into linguistic terms in order to deal with the language of the courtroom. Within this environment the child has little room for negotiation or manoeuvre. In addition, the environment is alien to the child's previous experience of language where words have been used to learn about, explore, test and generally establish relationships. Children are confronted with this change in the use of language and they quickly became "the victims of a set of language rules which prohibit them from expressing themselves in a meaningful and truthful way" (Brennan and Brennan 1988:31):

"The courtroom context and the language in particular reinforces quickly in the child's mind their role as the victim in the proceedings and members of the court do little to contradict this."

A child's experience of language does not prepare him for interactions on an adversarial basis. Ordinary conversation includes various language forms, such as questions, descriptions, narratives etc. In the courtroom only one of these forms is used - various people will ask questions and the child will have to answer.

"In cross-examination however, the order of the speakers is fixed in advance and whatever else is accomplished interactionally their discourse must be fitted into the mould of the question answer sequence. This means that in contrast with spontaneous conversation, there is no negotiation over their right to speak or what may be said" (Danet 1980:449).

There is no provision for the child to address the court on certain questions which he does not understand or to negotiate the direction of a line of questioning.

A very good example of this is found in *S v Nozakuzaku supra* where the thirteen year old complainant was giving evidence at a trial for rape which took place two years after the offence was committed. In this case the prosecutor objected to the fact that the girl was being forced into a yes/no reply and the magistrate had to admit, albeit reluctantly, that this technique was part of cross-examination:

"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."

Forcing a yes/no reply can create a distortion of the truth as in the following example where a thirteen year old girl tried to explain that she was not sure, but the defence insisted on her choosing yes or no as a reply. The case is *S v Els supra*:

"Attorney: Did she say she made a statement to the police?  
 Child: No, but I don't think she did because her mother doesn't even know about this.  
 Attorney: You say you do not know or you do not think she did. Is it yes or no?  
 Child: No."

Originally she was not sure whether her friend made a statement to the police, but she ends up saying no, because her options to reply have been limited to yes or no.

By implication adversarial examination is aggressive; it is the weapon with which the battle between the two parties is fought. The casualties, of course, are the witnesses. As Davies (1993:155) instructs, it is often good to begin 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 measure to begin to break down their confidence".

Davies (1993:61) also refers to silent cross-examination as a possible technique. It is 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, and he describes the manner in which this is to be achieved as follows:

"He will stand and look intensely at the witness with scorn or derision on his face for some time and then as if to say 'what's the point, you'll probably continue your lies if I take the trouble to question you,' he waves him off the stand."

Davies (1993:72) goes on to suggest to prospective cross-examiners that they should begin their observation of the witness from the moment the witness enters the courtroom, because "witnesses are particularly vulnerable" at that stage, and these observations can disclose a great deal about the witness. He then goes on to advise how this can be done:

"Often a witness will bring a friend or family member to court for support ... If you recognise 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."

And this is behaviour that is advocated in the search for the truth! It would appear from the above 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. This approach has a devastating effect on adult witnesses, how much worse will the effect be on children. The witness is perceived as being the prey and treated likewise, as can be seen from the following advice given by Davies (1993:88-89):

"the advocate in his cross-examination must be subtle in the way that he leads the witness to a trap ... After the initial point is made the advocate must not let up. It is not enough to merely ensnare the quarry; rather, the quarry must be held in the trap and allowed to squirm for a sufficient time to make a forceful, and, hopefully devastating, impact on the jury."

And then, finally, the witness must be destroyed (Davies 1993:175-6):

"Destroying the witness attacks him at every possible level of his life and seeks to place him in such a repugnant light that, not only does the jury disbelieve him, but they may bend over backwards to find a solution in the case that serves to deliver an insult to the witness."

It is submitted that this environment is not conducive to the discovery of the truth, especially where a child witness is concerned. In addition, the child is being questioned in a hostile environment about often, very intimate and emotionally-laden events. The following is an excerpt from the Eastern Province Herald Saturday, 24 August 1996 where an adult rape victim was cross-examined by the accused, and serves to highlight the trauma that is often experienced by victims in this situation:

"Julia Mason, a 34-year-old mother of two, said she felt as if she had been raped all over again by Ralston Edwards who insisted on defending himself. The serial sex offender was allowed to cross-examine his victim in minute and intimate detail at his trial. Making it worse, was that on every day of the trial, Edwards wore the same grubby clothes he wore the night he repeatedly raped Mrs Manson in a 16-hour ordeal in his squalid London flat."

The victim broke down several times and on one occasion fled from the courtroom. She explained that the cross-examination forced her to relive every moment of the rape. The investigating officer in charge of the case was of the opinion that the accused "had enjoyed every minute of it" and was obviously getting some kind of sexual gratification from the cross-examination.

"After the trial Mrs Mason said: 'I was raped once by Edwards, and again by the British justice system.'"

### 7.5.2.2 Purpose of Asking Questions

Questions asked in a courtroom are not asked for the same reasons that questions are asked generally in society, and children do not understand the purpose for which questions are being asked in court. They are accustomed to being asked questions because people are interested in their replies, and are not prepared for questions that are aimed at manipulating their replies (Brennan and Brennan 1988:60).

In court a child will be faced with two types of questions. The first are referred to as elaborate questions, and are usually used in examination-in-chief. These questions offer the child an opportunity to explain, expand and describe events and are also known as 'open questions' e.g. Can you tell us what happened? The second type of questions is restrictive in nature and also referred to as 'closed questions'. In the latter type of questions the options for response are so restricted by the manner in which the questions were phrased that the child has possible responses already set out for him. These questions appear to be clear and precise, requiring a particular answer. Often they restrict the child to a yes/no reply and effectively remove the child's right to offer any more information (Brennan and Brennan 1988:60). As seen from the example *supra* in *S v Nozakuzaku*, the child is not given an opportunity to discuss the content of the question. These restrictive questions are a tool of the cross-examiner and relentlessly used to achieve his aim. Davies (1993:150), in his book for student cross-examiners, instructs them as follows:

"The specific objectives of cross-examination must be pursued in the most direct line possible. this means controlling the witness and the pace of the examination; otherwise, the cross-examination is ineffective. Control can best be accomplished by asking questions that require a 'yes' or 'no' answer. The ideal cross-examination is achieved when the advocate is testifying and the witness is reduced to agreeing or disagreeing with what the advocate says."

Further on in his manual Davies (1993:203) remarks as follows on this point:

"Because control of the witness is crucial to any successful cross-examination, the advocate must develop the skill of phrasing questions in such a way as to limit the ability of the witness to elaborate on his answer."

The child is, therefore, forced to agree, disagree or maintain that he does not know. As Brennan and Brennan (1988:60) explain, the question is phrased in such a way that the child is forced to respond to rather than answer the question. The questions do not require an answer from the child and demand no information. They require only a response.

In cross-examination the defence is obliged to place his version of events before the witness. This is usually done in the form of statements. These statements confuse children since they do not know what response is required from them, especially as no question has been asked. The following examples of this technique were taken from *S v Nozakuzaku supra*.

- "I'm going to put it to you that you are fabricating this now Tuliswa. That the impression that you gave to this Court the whole time was that that vehicle was locked and that you never unlocked or attempted to unlock that vehicle."
- "Now, if your aunt said to the Court yesterday that it is a busy shebeen that and while she was there she saw people coming in and leaving the shebeen and she described that she can't say how many but she gave the indication that they were a lot of people. What would you say to that?"
- "Now I'm going to put it to you that if necessary there will be people that will say when you told the police inside the charge office at Motherwell, giving a description when or where and how you were raped, you told the police you were raped at the Smirnoff board at Zwide."

Unless the child understands what the purpose of a question is or why it is being asked, it is impossible for the child to make an accurate contribution.

As mentioned above, cross-examination has two purposes, namely to test the credibility of a witness and to find further details which will assist the questioner's own case. Examples of questions used to test credibility would be: "You've made up this story because you do not like your stepfather and you do not want him to live with you", or "I put it to you that you are lying". These questions antagonise witnesses, causing them to become angry or distressed. According to Spencer and Flin (1990:225) this puts the witness in a state of stress which causes him to become confused, and he may even contradict himself. They object to the use of cross-examination as an instrument for discovering the truth in that its two purposes conflict with each other. Questions that are aimed at testing credibility will cause witnesses to become angry and confused, and this will not enable them to provide further details accurately. The ability to create confusion could, according to Spencer and Flin (1990:226-7), be reduced "if cross-examiners had to keep questions designed to test the honesty and sincerity of the witness separate from questions designed to elicit further information in two distinct phases of the examination". In practice, a cross-examiner moves from one point to another which confuses the witness and this undermines the whole value of cross-examination as a tool to discover the truth.

### 7.5.2.3 Leading Questions

Earlier when the research relating to children's suggestibility was discussed, the findings demonstrated that children are capable of providing highly reliable evidence provided they are interviewed correctly (McGough 1991:115). However, a number of the studies showed that children, especially young children, were susceptible to suggestion when certain interviewing techniques were employed. The most obvious method of suggestion was the use of leading questions. The results of the studies showed that the way in which a question was phrased could determine the accuracy or inaccuracy of the response (Dale, Loftus and Rathbun 1989:274). The position is summarised as follows by Cohen and Harnick (1980:209):

"Suggestive or leading questions can have effects at all age levels. In particular, leading questions may provide witnesses with responses in instances where they have no recollection of the actual events. This type of interrogation would obviously be avoided in the elicitation of eyewitness testimony."

Despite these findings, the use of leading questions is a technique employed in cross-examination and gives rise to serious difficulties with comprehension for the child witness. The anomaly 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, despite this, leading questions are allowed when a child is being cross-examined. This seems to imply that it is all right to suggest answers to a child during cross-examination and thereby make their evidence unreliable. This has the following ridiculous result:

"Suggestive questions produce unreliable information - except when asked by lawyers in cross-examination." (Spencer and Flin 1990:224).

According to Carson (1995:3) it does not make sense to allow leading questions to be used in court when they have effectively been banned in all other stages of investigation because they have the propensity for producing false evidence.

A further problem with leading questions, according to Carson (1995:6), is that they are "particularly effective with people who are unassertive". This would apply specially to children who are being cross-examined in an adversarial environment by adults. As discussed in detail earlier, interviewer bias and repeated questioning do affect the suggestibility of children especially when they are linked to leading questions. Both of these techniques feature in cross-examination. The interviewer in this case would be the accused or his representative and he is obviously partisan. In fact, one of the purposes of cross-examination is to elicit evidence favourable to your case. In addition, cross-examiners often repeat their questions. The following example taken from *S v Nozakuzaku supra* highlights the manner in which repeated questioning can be used to confuse and undermine a child witness:

"Now can you tell His Worship what time did you go to Zwide that evening? --- I cannot recall.  
 Can you recall what time you went to NU6, Motherwell? --- It was still light when we went there.  
 To the NU6? --- Yes.  
 What time did you go to the shebeen? --- We went there when we returned from Zwide.  
 Yes, but can you tell His Worship more or less what time did you go to the NU6, Motherwell,  
 that particular shebeen where you say that Nozakuzaku raped you? --- I do not know.  
 Was it very dark then or was it light? --- It was light.  
 And when Nozakuzaku raped you was it light or was it dark? --- It was dark there at the back of  
 the house.  
 Yes, but now over all, over all now, was it at night or was it during the day? --- It was in the  
 night.  
 In the night. Can you tell time? --- It was very late in the night already."

Twice the child explains that she does not remember the time. However, after asking her five times what the time was, the cross-examiner succeeds in getting her to change her evidence from not knowing, to agreeing that it was light to saying that it was dark and very late in the night. And all in the pursuit of truth! The cross-examiner succeeds admirably in highlighting to the court that the child is not a credible witness, but this is in fact not so. The child has been questioned in a manner which has been proved by research to elicit confusion and inaccuracies. It

would appear clear, as pointed out by Flin (1991:23), that legal rules and procedures are based on an inaccurate or outmoded knowledge of developmental psychology.

#### **7.5.2.4 Peripheral Matters**

Peripheral questions are those questions which do not deal with the direct issues in a case, but rather which deal 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 rather than when dealing with matters that are of central importance (Spencer and Flin 1990:225). Despite these findings, the defence is allowed to put leading questions to children about peripheral matters, which will have a dramatic effect on the child's credibility. For instance, an attorney may ask a series of relatively unimportant peripheral questions, the purpose of which is simply to try to cause the witness to make a mistake, rather than focusing on central issues. It ought, therefore, not to be surprising that witnesses, especially child witnesses, make mistakes about matters which they do not regard as important. Leading a witness into making such mistakes should not be regarded as a means to discover the truth or test the credibility of a witness (Carson 1995:4).

Questions of this type are actually improper. Authority for this is found in *R v Baldwin* (1925) 18 Cr App R 175 where Lord Hewart CJ set out the position as follows:

"It is right to remember in all such cases that the witness in the box is an amateur and the counsel who is asking questions is, as a rule, a professional conductor of argument, and it is not right that the wits of the one should be pitted against the wits of the other in the field of suggestion and controversy. What is wanted from the witness is answers to questions of fact."

In *S v Nozakuzaku supra* the court questioned a thirteen year old rape victim about certain details relating to the offence, which had taken place two years previously. The rape had occurred at a shebeen which the child had visited in the company of her aunt. The details of the drinking that took place in the shebeen had no relevance to the actual rape which took place outside the back of the shebeen, yet the court put the following questions to the child, even though the rape had occurred two years previously:

"What section of the shebeen? --- At the front. She was at the front.  
Is that now where all the people drink? --- Yes.  
Was she sitting there or standing there or what was she doing there? --- She was seated.  
And what was she doing? --- She bought beer now and then.  
How many beers did she drink while you were there? --- They were many.  
How many beers did she drink whilst you were still there? --- Five."

#### **7.5.2.5 The Use of Language in Court**

Language is fundamental to the legal profession and the court appearance is seen as a verbal contest between parties (Viljoen 1992:65-6). It is this specialized language which creates problems for the layman. Children especially experience major problems with the language used in the course of giving evidence in court. In 1979 Charrow and Charrow (1979:1321ff) identified certain features of language that were specifically court-related. These were

refined by Brennan and Brennan (1988:62) who concentrated on thirteen features of legal language that had implications for the child witness. In 1993 Brennan (1993:38) added two more features and these were further elaborated by Kranat and Westcott (1994:16) to include thirteen more features that were present in lawyer-child communications. Carson (1995:5) divided the major problems which children have with court language into three broad categories. The categories suggested by Carson will be adopted here with the other features incorporated where relevant. The three broad categories are as follows:

- age-inappropriate vocabulary;
- complex syntax;
- general ambiguity

### *Age-inappropriate vocabulary*

This would include the use of words which do not fall within the child's language repertoire. Every profession has language conventions which are particular to it. Law happens to be one of the professions which uses vocabulary and technical terms that are specific to its discipline. Children, who are relatively inexperienced language users, experience the specificity of legal language as very difficult to comprehend (Brennan and Brennan 1988:68). For instance, in *Riggs v State*, 235 Ind. 499, 135 N.E.2d 247 (1956) a twelve year old girl was asked whether she had sexual intercourse with a certain Hiram Riggs to which the girl replied 'yes'. There was no evidence placed before court that the child understood the meaning of the phrase "sexual intercourse". She gave no details of the acts. The court concluded as follows at 249:

"A child of 12 is not competent to give her conclusion of 'sexual intercourse' without showing her understanding of details supporting such conclusion, while at the same time a more mature person with more knowledge of such matters might be qualified."

Not only do children lack an understanding of certain words, but they also have misconception about certain words. For instance, in a study conducted by Aldridge (1996), she found that the two most common misconceptions amongst British children were the meanings of the following two words: victim and prosecutor. There was general confusion as to who the victim was, and the prosecutor was the person who 'gave out the punishment'.

This problem was highlighted in the case of *R v Willoughby supra* where a nine year old girl was abducted and then indecently assaulted by a stranger. A few weeks later an identity parade was held and the girl pointed out the accused. At the trial the defence suggested that she had only identified Willoughby because the police had told her that the attacker would be at the identification parade. The police said that they had told the girl 'a suspect' would be present at the identification parade. In cross-examination the defence asked the child: "Did they tell you the attacker would be there?" The girl replied that they had and this was used to discredit her evidence. Could one in all certainty say that a girl of nine would be able to understand the significance of the difference in meaning between the word 'suspect' and 'attacker' in this context.

The following examples of the use of difficult and/or technical language were isolated in the cross-examination of the child witness in *S v Nozakuzaku supra*:

- "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 the question Tuliswa is, my *Learned Friend* when she *led you in evidence in chief*, she *put* two questions to you."

### **Complex syntax**

This category includes a number of linguistic features found in legal language which create difficulties for children. Legal language is riddled with the use of the negative expression. The grammatical structure of these negatives, and their position in a question conform to a set of rules which children do not have access to. The following example given by Brennan and Brennan (1988:63) illustrates the confusion created:

- "Q. Now you had a bruise, *did you not*, near one of your breasts, do you remember that?  
A. No."

By inserting the phrase 'did you not', three questions are generated within the one question. The child is then confronted with three possible questions, and it is unclear which one the child should respond to. In the above example, for instance, the possibilities are: did you have a bruise? was it near your breast? do you remember that? This linguistic technique is closely aligned with multi-faceted questions, which occur when a number of sub-questions are subsumed into one question. In such a case the witness is not sure which question should be answered, and if a reply is hazarded nobody else knows which question has been answered (Carson 1995:6).

Language used by cross-examiners is sometimes very compact and a lot of information is squeezed into one question. Consequently legal language contains a large number of embeddings. This occurs when a question contains a series of qualifying clauses. The following are a few examples taken from *S v Nozakuzaku*:

- "When you discussed the place where you were raped as well as the way in which you were raped by the accused, you informed the police - there's a person by the name of Gani, I don't know if you recollect Gani, but in his presence you said you were raped in Zwide at the Smirnoff board."
- "Would you agree with me that according to the statement that aunt Ethel made in your presence and what I read to you now, certain passages, she didn't make mention that you informed her that you were taken behind the shebeen."

These constructions do not follow the normal pattern of speech conventions and are more like Latin. It is unlikely that children will be able to understand these multiple clauses (Brennan and Brennan 1988:76). The above are also examples of long questions which create difficulty, especially for children. Even the courts have accepted that these questions are confusing and create ambiguity, as was pointed out by the court in *S v Gidi supra* at 540:

"Questions should be in a form understandable to the witness so that he may answer them properly. Multiple questions, that is to say, interrogation which poses a series of questions for simultaneous answer should be avoided because they tend to confuse. The witness may answer the last question, but forget what the others were, or the answer may be ambiguous because of uncertainty which of the series of questions is being answered. Long and involved questions would be avoided when short and simple questions suffice."

A frequent technique employed in cross-examination is the use of the passive voice. This tends to objectify the doer

of the action, making him appear anonymous, and has the added danger that it confuses children (Brennan 1993:41). As discussed earlier, children acquire language in simple components: subject-verb-object, and this is the limit of what they are capable of understanding. A test used to assess a child's ability to understand syntax is to let the child say something, then count the number of words that his sentence contains. This will be the maximum number of words that the child is capable of understanding in a sentence, and all questions addressed to that child should only contain that number of words (Saywitz 1996).

### ***General ambiguity***

The vagueness, deliberate or otherwise, of cross-examiners in phrasing questions contributes to the confusion experienced by children. For instance, when a statement does not take the clear form of a question, the witness may not interpret it as a question and therefore not feel it necessary to reply (Carson 1995:6). Hypothetical questions also create a great deal of difficulty for children. These are questions which require children to evaluate, a skill which they do not develop until at least ten years of age, as discussed earlier when investigating the developmental psychology of children. The following are examples from *S v Nozakuzaku supra*:

- "Now if one can see the vehicle from the entrance and you were standing there at this vehicle, would you agree with me it would be easy to see when Nozakuzaku took out a pistol?"
- "Now would you agree with me or let's ask you the question differently. Was there any reason why he should've put the pistol back in his belt?"

Multiple guess questions offer the witness a choice of more than two answers e.g. "When you came into the room, did you sit down or stand or walk around?" The child may be confused by the choices available, especially if the selection covered does not include what really happened (Carson 1995:6).

This ambiguity can create confusion in communication. Lawyers are not aware how literal children are in their interpretations and this can lead to problems. The following example of an interchange which took place during cross-examination is quoted by Cashmore (1991:198):

Defence: And then you said you put your mouth on his penis?  
 Child: No  
 Defence: You didn't say that?  
 Child: No  
 Defence: Did you ever put your mouth on his penis?  
 Child: No  
 Defence: Well, why did you tell your mother that your dad put his penis in your mouth.  
 Child: My brother told me to.

At this point, it looked as if the child had completely recanted her earlier testimony about the sexual abuse and had only fabricated the story because her brother told her to. However, the experienced prosecuting attorney recognised the problem and clarified the situation.

Prosecutor: Jennie, you said that you didn't put your mouth on daddy's penis. Is that right?  
 Child: Yes  
 Prosecutor: Did daddy put his penis in your mouth?  
 Child: Yes  
 Prosecutor: Did you tell your mom?  
 Child: Yes

Prosecutor: What made you decide to tell?  
 Child: My brother and I talked about it, and he said I better tell or Dad would just keep on doing it."

Carson (1995:10) refers to a few further instances where vague and ambiguous questions may give rise to confusion. Very often a child is asked whether 'anything' happened. Vague questions like this are usually used when the questioner is trying to avoid a leading question. If the child is unsure what the questioner is referring to or what time reference is being referred to, then the child may answer 'no'. For instance, if the child were to be asked: 'Did anything happen when your father called you into the room?' The child may think that the question only relates to the instant that he came into the room. If the child replied 'no', this could create problems if something did happen in the room after that.

Confusion is also created when one is asked whether one 'knows' someone. It is difficult to determine what degree of 'know' is required. It would be very easy to challenge the credibility of a child who answers that he 'knows' someone, when he actually is using the words in a loose way, such as 'know about'. This is exactly what happened in *S v Mathebula supra* where the accused asked the child whether she knew him (172I-J), and she replied that she did not. The court interpreted this to mean that she did not recognise the accused as the perpetrator.

This kind of confusion gives rise to stress on the part of the child witness, as the following description of the cross-examination of a nine year old girl by Giles (1989:6) indicates:

"The defence attorney spent one and a half hours asking increasingly complex questions about only the first of the six or seven alleged assaults. These questions became increasingly complex in terms of space, time, relative position, causality, intent and probability. He induced a phobic response to questions about who said what by questioning with unusual intensity details of exactly which words were used and their meaning. Over time the child began to hesitate before reporting on what was said. These pauses were interpreted as implying deceit or lack of complete honesty on the part of the child. She became increasingly anxious, unable to connect with her original statement, and began to make impetuous comments in order to obtain short-term relief from the mounting stress."

The above is a very brief summary of some of the techniques of cross-examination which cause difficulties for child witnesses:

"[O]ne only needs to witness a single instance of the cross-examination of a child witness to realise that the procedure is ill-suited to children. It is easy to confuse a young child with the use of age-inappropriate language, long and circuitous questions, and a confrontational style. The adversarial system creates as many problems as it solves in the area of child abuse." (Yuille 1989:191)

### 7.5.3 The Position in South Africa

Both the South African courts and the legislature have accepted that children experience difficulties with cross-examination in the traditional courtroom, hence the introduction of s170A of the Criminal Procedure Act 1977 which created the intermediary. In *Klink v Regional Court Magistrate NO and Others supra* Melunsky J made the following observation at 411E:

"it is sufficient to say that I am quite convinced that a child witness may often find it traumatic and stressful to give evidence in the adversarial atmosphere of the courtroom and that the forceful cross-examination of a young person by skilled counsel may be more likely to obfuscate than to reveal the truth."

The intermediary was, therefore, introduced to assist the child witness by removing all hostility and aggression from a question and by changing a question, where necessary, so that it would be more understandable to the child. However, in the earlier evaluation of the intermediary's role, a number of problems were raised. The power of the intermediary was argued as being very limited, since an intermediary was nothing more than an interpreter and the court could insist that the intermediary repeat the question exactly as it was phrased.

A further disadvantage of the present system is that the intermediary does not have the authority to comment on a question and give his opinion as to whether a child understands a question or not. The intermediary is powerless to intervene and argue that questions should not be asked in a particular sequence or not phrased in a certain manner. The real problem is that the intermediary is not an expert witness, but only an interpreter.

Having investigated the relevant aspects of developmental psychology and the acquisition of language by children, it becomes clear that children are not able to give accurate evidence when cross-examined in an adversarial environment. All accusatorial countries have accepted this fact, hence the introduction of statutory exceptions to ameliorate the position of the child witness. It is submitted that statutory exceptions created on an *ad hoc* basis simply give rise to further confusion and, sometimes, place the child in an even worse position, as has happened in the United Kingdom. It does not make sense to modify a system to suit children when the system does not support children. In such a situation it is the system itself which needs to change. Accusatorial cross-examination does not enable children to give evidence accurately and effectively. For that reason it is proposed that children be questioned within an inquisitorial framework.

From the research that has been conducted on the interviewing of child witnesses, it would appear that this is a highly specialised field requiring trained specialists to carry out these functions. It does not seem feasible to train magistrates, judges and prosecutors to this level of competence since child witnesses only form a small proportion of their duties. In addition, it would not be possible to insist that defence counsel be trained and it is the defence counsel who are responsible for conducting cross-examination.

The European Convention on Human Rights gives an accused the right to have evidence examined. This does not mean that the accused himself or his representative are entitled to examine the witness in person. In most

inquisitorial countries this is done by an examining magistrate or, in the case of children, by specially trained police officers. It is, therefore, proposed that a skilled interviewer be used during all stages of the investigation, from the pretrial stage all the way through to the actual trial. This appointment would assist the child by allowing rapport to develop between the child and the interviewer as well as enabling the child to provide the court with an accurate account of events. The latter advantage was described by Benedek and Schetky (1986:1228) as follows:

"In addition, a pool of professionals trained in the relevant psychological and legal technical skills might avoid the confusion created by the improper use of leading questions, language that the child cannot understand, and techniques designed to harass and intimidate a young child."

The skilled interviewer's role would start with the initial investigative interview. He would meet the child and conduct the initial interview, which would be videotaped and later admitted at court. At the trial, the interviewer will sit with the child in the other room which has been linked to the court via closed-circuit television. He will lead the child's evidence himself and examine any discrepancies or confusions that may arise from the evidence. It will be his function to ensure that the child's evidence be placed before the court in the most accurate form possible. In addition, the child will already have been met and interviewed by this person before so this should contribute to a reduction in stress. The child will also be interviewed in a developmentally appropriate manner, which should eliminate the fear and stress created by cross-examination. This interview will be viewed by the accused, his representative and the court, thus introducing an element of the accusatorial system. This will enable the court to watch the interview and object if the interviewer perhaps asks a leading question or acts in an inappropriate manner. In this way the accusatorial 'day in court' is still preserved and the child is not deprived of making a contribution at the trial while at the same time the accused's rights are also protected in that he can watch the demeanour of the child while the latter is testifying and can also hear the way in which the child is being interviewed. The interviewer would have to be linked to the courtroom by means of earphones in the event that the court may wish to communicate with the child or interviewer. When the interviewer has placed the child's evidence before the court, the defence and the court will be afforded an opportunity to raise any matters that have not been covered in the evidence or which may have appeared inconsistent. This must not be viewed as an opportunity to cross-examine the child, and the court will have to guard against this danger. It will only be an opportunity to raise any matters that have not been covered or which have created confusion. The interviewer will then examine the child further on these aspects. By the term 'examine' is meant the placing of evidence before the court and questioning the child in detail about any aspects of the case which appear inconsistent. If, at the end of the interview, the child is unable to provide an account of events or provides an inconsistent account, then the court will take this into account when weighing up the evidence. By implication the defence will not be able to put their version to the child, but it has already been shown that children do not understand the purpose of this technique and young children especially are not able to place themselves in a position where they can view matters from another perspective.

This proposal of interviewing the child combines aspects of both the accusatorial and the inquisitorial model. The examining of the evidence is done by one person, in much the same way as is done by the examining magistrate in inquisitorial systems. However, aspects of the accusatorial system have been assimilated, namely affording the defence an opportunity to view the child and hear while the child is giving evidence, and to put further matters to the interviewer. In addition, this proposal requires a professionally trained person to interview the child, since this

was one of the problems experienced in inquisitorial systems *supra*, namely that examining magistrates were not trained in the intricacies of child interviewing.

This proposal has certain implications. It is essential that the interviewer be professionally trained to conduct an investigative interview with children. This proposal requires the creation of a specialist who will interface between law and psychology and form a link between the two disciplines. This training will include knowledge of developmental psychology so that the interviewer will be able to assess the developmental level of the child he is interviewing and interview accordingly. In addition, the training must also focus on the psychology of abuse so the interviewer has a knowledge of how victims of abuse react i.e. non-disclosure, recantation etc. Thorough training will be required with respect to the acquisition of language by children so that age-appropriate questioning techniques can be employed. An essential component of this training would include aspects of procedure in court. The interviewer would require a basic knowledge of criminal law and procedure so that he knows what information needs to be elicited from the child i.e. that in the crime of rape, for instance, it is necessary to prove that penetration took place. The interviewer will need to know this so that when he interviews the child, he will focus on certain details that are relevant. Rules of procedure are also important since he will have to understand the rules relevant to investigative interviews. Practical training will also be essential and the interviewer will have to have experience in interviewing children. Harvey and Daun (1993:9) suggest that in order to conduct an interview with a child, an interviewer should have a knowledge of child development, children and communication, child memory and suggestibility, children and sexuality and the psychology of victimisation. They need a thorough knowledge of investigative interviewing procedures as well as the law relating to child witnesses and certain aspects of substantive law, such as the elements of offences, for instance. In practice, universities would be able to introduce a Masters Degree programme which would amount to an interface between law and psychology. A similar programme has been introduced by the Open University in the United Kingdom.

Two further points need to be noted at this stage. If the child witness is viewed in an ecological perspective, then it becomes clear that the child requires preparation for the court process so that he will understand what his role is, why he is being interviewed, the implication of telling the truth etc. Also, judicial officers need to undergo training so that they have an understanding of certain aspects of the child witness and can understand why and how the investigative interview is to be conducted. These two aspects will be returned to.

This proposal will have an effect on s170A and s158 of the Criminal Procedure Act 1977. It has already been proposed that s170A should provide that all children under the age of eighteen automatically be allowed to give evidence via closed-circuit television. Since research has shown that children *per se* have great difficulty in understanding court language, the use of an intermediary for children below a certain age would also appear necessary. If all children have difficulty with court language, it does not make sense to require that undue mental stress or suffering must be proved. In order to obtain an accurate account of events from a child witness it is essential that the child understands what is required of him. It is, therefore, proposed that an intermediary be appointed in all cases where a child witness is twelve years or younger. The intermediary would be the skilled interviewer referred to above. To avoid confusion, I shall refer to this person as the child expert. This will be an automatic procedure and will not involve an exercise of discretion by the court. However, in the case of children

aged thirteen and older the court will have a discretion to appoint a child expert if there is evidence that the child may have difficulty in comprehending questions. This discretion is important, because there may be a thirteen or even fourteen year old witness, for instance, who is a special needs child and will have difficulty with comprehension. The standard employed must not be so high and so rigid that in practice it tends to exclude its use. A commonsense approach needs to be adopted. If a child is going to have difficulty understanding a question, then justice demands that a method be adopted which will enable the child to understand what is being asked.

In addition, the section will have to set out that the examination of the witness will be conducted by the child expert himself, that the court may intervene where necessary, and that the defence may have an opportunity to raise any issues with the court that may appear to be unclear from the evidence. The section should also set out the training and or qualifications that a person would have to have in order to qualify as a child expert. This qualification can be standardized by the Minister of Justice in liaison with universities in much the same way as has happened with regard to interpreters. The Institute of Interpreters offers a qualification through various participating universities to interpreters. The course content of this qualification would have to include the subjects listed *supra*. The status of the child expert should be changed from that of an interpreter to more of an expert who can assist the court by eliciting an accurate account from a child using scientifically approved methods.

It is for the above reasons that it is strongly recommended that s158 not be used for child witnesses since it will deprive them of the assistance of such a child expert. Although it may provide the same result for witnesses aged sixteen or seventeen perhaps who do not require the assistance of a child expert, the resultant confusion would best be eliminated by insisting that s170A be used for all witnesses under the age of eighteen and s158 apply to witnesses aged eighteen and older.

It is envisioned that the child expert be attached to the Ministry of Justice on a full-time permanent capacity. By creating such an office, the Ministry will enable the child expert to become experienced at the task he is to perform. One of the deficiencies of the present system is that, because intermediaries are only appointed for a particular trial and from such a vast array of persons, there is very little opportunity for them to specialise in the skill of interviewing children. The creation of an office of the child expert would promote specialisation. Oates (1990:133) argues that this specialisation has become necessary.

"It may be that the time has come for the development of a speciality in child law where those undertaking this speciality have some training in developmental psychology, child development, and experience in interviewing children."

It would also enable these proposals to be carried out as effectively as possible. When the police receive a complaint where a child may be a potential witness, they would contact the child expert who would visit the child, introduce himself and arrange for the initial interview to be videotaped. The arranging of pretrial preparation of the child would remain the responsibility of this expert. The prosecution would contact the child expert with details of the trial. At the trial this person would lead the child's evidence. It will not be possible for this system to work on *ad hoc* appointments because there will be untold confusion in trying to discover which expert conducted the initial interview and whether that person was available again at the trial. Although it is not essential for the same child

expert to conduct the initial interview and the trial interview, it has already been argued that this would be to the advantage of the child. The child expert will have an opportunity to gain the child's confidence and this will decrease a great deal of the unfamiliarity of the situation for the child.

Initially, in the discussion of an ecological approach it was suggested that the more links that can be created between the different microsystems, the better the position for the child will be. The position will therefore be strengthened by allowing the child expert to form a link between the microsystem comprising the child and his family and the microsystem of the court.

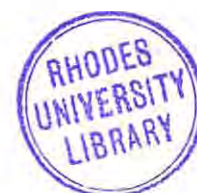
As far as manpower is concerned, a centre the size of Port Elizabeth would require at most the services of two such experts, and their responsibilities would extend to smaller surrounding towns and villages. Larger centres, such as Cape Town and Johannesburg would require more such posts to be made available, but the implications are not overwhelming. The availability of these persons would free already overlaid police and social workers.

#### 7.5.4 Conclusion

Cross-examination is seen as the most crucial time in court for the child witness, especially where the witness is a victim of abuse. The purpose of cross-examination is to attack the credibility of the child witness by displaying inconsistencies and to discover any evidence that might assist in proving the accused's innocence in a context within which all the details of the case are examined microscopically. In order to achieve this purpose, certain language devices are used with very few modifications being made to the format or language of cross-examination when the witness is a child. In fact, this is set out clearly by Brennan and Brennan (1988:61) as follows:

"Questions of linguistic appropriateness, comprehensibility and concern for the psychology of the child witness are peripheral at best, and totally exploited at worst. The language format of cross-examination has a linguistic life of its own, independent of the age or status of the witness."

Research relating to child witnesses has focused a great deal of emphasis on the rights of the accused in the criminal justice process. With the introduction of s28 of the Constitution Act 108 of 1996 it is necessary also to take cognisance of a child's rights as set out in the section. It is, therefore, necessary to balance these rights when evaluating cross-examination. The accused's rights to employ techniques of cross-examination must be weighed up against the linguistic rights of the child witness. A mismatch between the language of the court and the language understandable to the child does, according to Brennan and Brennan (1988:61), very little to preserve the rights of children or to arrive at the ultimate truth. It is essential, therefore, to modify the system to assist the child in providing the court with an accurate account as well as to ensure that the accused is accorded a fair trial. Modifications need to be based on scientific research, and it is for this reason that it is proposed that a professional interviewer conduct the examination of the child at the trial while the defence is afforded an opportunity to view the interview and object, where necessary.



## **7.6 Rules of Evidence**

One of the aspects of the accusatorial system which also presents a hindrance in the prosecution of cases where a child is the witness is the proliferation of technical rules of evidence. Although the elaborate rules of evidence have been linked to the presence of juries, they nevertheless remain part of rules of procedure despite the fact that presiding officers are now professionally trained. Since the emphasis is placed on the admissibility of evidence, strict rules are employed to exclude certain types of evidence rather than to admit all evidence and assess the weight to be attributed, as is done in inquisitorial systems. The rules of evidence which are of particular relevance to child witnesses have already been evaluated in detail. All that remains to be done is to summarise the main criticisms and the proposals which have been suggested.

### **7.6.1 The Competency Rule**

The ecological perspective adopted in this study focused on children as sources of information. It is, therefore, essential to focus not only on the social and physical context in which the child has to provide information but also on the child's capabilities. The rules relating to competency in various jurisdictions were investigated and then available research relating to the developmental psychology and memory of children was evaluated. It is now necessary to determine whether the legal rules of competency are based on modern scientific principles.

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 (Benedek and Schetky 1986:1225). To determine the above it is necessary to discover whether the child has adequate cognitive skills to comprehend the events he has witnessed and be able to communicate his memories of the event in response to questions (Melton 1981:75). The test of a child's competency, therefore, involves four fundamental issues: firstly, the child must have the mental capacity at the time of the occurrence to observe and register the event; secondly, the child must possess memory which will be sufficient to enable him to retain an independent recollection of the observations made; thirdly, the child must have the capacity to translate the memory of these observations into words; and, fourthly, the child must possess sufficient intelligence to understand the obligation to tell the truth (Stafford 1962:313). Therefore, to assess a child's competency to testify, an assessment will have to be made of the child's moral, cognitive and emotional capacities to give evidence (Melton 1981:75).

In the United Kingdom the Pigot Committee were of the opinion that the competency requirement was only useful if it could be used to ascertain whether a child was able to give a truthful and an accurate account in court, and they felt that the competency test in England did not achieve this. The weight of modern research has shown that children are no less accurate than other witnesses, and the Committee was, therefore, of the opinion that the courts should consider any relevant understandable evidence, and whether evidence was coherent or consistent was a factor to be taken into account when weighing up the evidence. Consequently the Pigot Committee proposed that the competency requirement applying to children be dispensed with completely (Home Office 1989:48-9) This proposal culminated in S52 of the Criminal Justice Act 1991 which insisted that all children under the age of fourteen give

their evidence unsworn, thus dispensing with the need for an inquiry into whether the child understands the oath. It also repealed s38(1) of the Children and Young Persons Act 1933, which means that the judge no longer has to be satisfied that the child has sufficient intelligence to give evidence and understands the duty to speak the truth before he can allow the child to give evidence. Children, therefore, are in the same position as adults. They no longer have to undergo a competency examination, but if at any stage the court becomes aware that the witness cannot communicate intelligibly, then a competency examination will become necessary.

The position in the United States of America is governed by Federal Rule 601 which provides that every person is competent to be a witness. The intention of the legislative drafters was, according to Myers (1987:63), to remove the emphasis on competency as a prerequisite for giving evidence. Commentators on Rule 601 have suggested that the Rule was designed "to curtail the need for preliminary inquiry into witness competency" so that the jury simply have to evaluate the evidence in terms of its weight and credibility. This Rule does not mean that the court will not decide issues of competency. It presumes witnesses to be competent so the traditional preliminary examination into competency is no longer required. However, if at any stage of the trial a witness would appear to be incompetent, then the court still has the discretion to hold an inquiry (Myers 1987:65).

In West Germany and France children under the age of sixteen give unsworn evidence. They may not take the oath and in this way the distinction, and consequent confusion, between sworn and unsworn evidence is eliminated. In Norway, as well, there is no specific competency requirement. In each case it will have to be determined whether the child has sufficient understanding and ability to express himself (Andenaes 1990:12).

### **7.6.1.1 Criticisms of the Competency Rule in South Africa**

In South Africa the competency of witnesses is governed by s192 of the Criminal Procedure Act 1977 which provides that a witness is presumed to be competent and compellable to give evidence in criminal proceedings subject to any other exclusions. Since s162(1) provides that every witness must give evidence under oath the court will have to determine whether a child understands the nature of the oath. If not, the court may proceed in terms of s164 which enables a witness, who does not understand the nature of the oath, to be warned to speak the truth. It will then have to be determined whether the child understands the nature of the warning.

In South Africa competency examination of children remains, despite the fact that it has been dispensed with in most other jurisdictions. In evaluating the competency examination earlier, the following criticisms were highlighted. It was argued that the competency examination did not test the real basis of competency, namely the child's ability to observe, remember and communicate. The examination was aimed at only one aspect, namely the ability to distinguish between truth and lies.

The second criticism related to the manner in which the competency examination is conducted. Competency examinations were extracted from various cases to highlight the cursory manner in which they were conducted. Statements were put to the children without attempting to frame them in a way understandable to the child and abstract concepts were used without explaining them. In *S v T supra*, for instance, a five year old child was told

to speak the truth ("waarheid"), without an indication of what this meant. Often the courts have simply asked the child whether the child knows what it means to tell the truth and the latter replied in the affirmative. This was accepted without any examination being conducted to determine whether the child actually understood the concept. Other competency examinations did not refer to the concepts of truth and lies at all, and the children were simply asked how old they were and what school they went to.

Thirdly, the language employed in the competency examination does not attempt to reach the linguistic ability of the child. 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.

A further criticism levelled at the competency examination is that it focuses on whether the child understands the distinction between truth and lies, but this is no guarantee that the child will in fact be truthful. The latter is a moral concept i.e. is there a consciousness of the duty to speak the truth (*Woji v Santam Insurance Co Ltd* 1981(1) SA 1021 (A) at 1028D). The present competency examination does not address this issue and since, according to Melton (1981:79), a child's behaviour is influenced primarily by the rewards, punishments and models available in a given situation, the gravity of speaking the truth will have to be impressed upon the child.

Hoffmann and Zeffert (1988:376) have argued that the distinction between sworn and unsworn evidence has lost much of its importance, and this leads to the next criticism. The distinction between sworn and unsworn evidence creates the perception that a child who is capable of understanding the oath will be developmentally more advanced (and therefore a better witness) than a child who does not understand what it means to give evidence under oath. Examples of where the court accepted such perceptions were quoted earlier. All that needs to be repeated here is the fact that the perception created may not necessarily be true, as was pointed out in *R v Manda supra* where Schreiner JA at 1633 explained that a child may not be able to understand what is meant by the oath, but may nevertheless "appear to the court to be more than ordinarily intelligent, observant and honest".

This raises the question of how a presiding officer makes a decision as to whether a child will give sworn or unsworn evidence. The competency examinations conducted in *S v Cilliers* earlier illustrate this problem. The two boys, aged eight, were asked the same questions (and even more) than the eleven year old. All the answers were correct yet the eight year olds were warned to tell the truth while the eleven year old was allowed to take the oath.

The final criticism relates to the fact that the competency rule has not kept pace with the scientific research available. These findings were summarised earlier and only the conclusions need to be repeated. Competency involves aspects of cognitive, moral and language development as well as a child's ability to remember. In addition, a child's competency is affected by the perceptions which the child has of the court process.

Research has shown that children as young as three are capable of giving accurate evidence (Jones and Krugman 1986:253). Children pass through stages in their cognitive, moral and language development, and an understanding of these stages enables children to be questioned in a developmentally appropriate manner. Research studies have also shown that storage capacity, insofar as memory is concerned, 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 (Werner and Perlmutter 1979:56). What is important, however, is how to retrieve this memory. Interviewing a child is a very specialised skill and certain techniques can affect memory. It was for this reason that it has been proposed that a skilled interviewer conduct the entire examination of children. The conclusion that was reached from the evaluation of recent research was that the present laws relating to children's competency and credibility are based on questionable assumptions and standards from the past and need to be re-evaluated in the light of recent research.

### **7.6.1.2 Recommendations**

As a general rule, children possess most of the characteristics necessary to serve as competent witnesses. They have the capacity to observe, are intelligent, are able to remember, can distinguish between fact and fantasy and are able to appreciate the duty to speak the truth. What remains a hurdle for the child is the ability to communicate in an adversarial environment (Perry and Wrightsman 1991:195). The effect of communication in this environment is explained by Brennan (1994:53):

"In a combative arena where the format for questions is determined by the questioner, who is also the more sophisticated and skilled language user, inequalities in language usage and expertise must confer lower status on the respondent. Any confused responses given by the child, the inevitable tearful and emotional breakdowns, and any examples of conflicting information offered, all confirm the child's lack of credibility within the corporate mind of the court ... the fact remains that the credibility of the child witness is systematically destroyed by a combination of language devices and questioning styles."

If a child is offered an environment which is non-threatening in which to tell his story; if a child is questioned in a developmentally appropriate manner using proven scientific methods (i.e. avoiding repeated and leading questioning to minimise suggestion); and if a child is questioned using linguistically appropriate language, then a child will be a competent witness and as accurate, if not more so, than an adult. This again highlights the importance of adopting an ecological approach. Competency cannot be evaluated in isolation since it relates to all other aspects of the trial. As explained by Cashmore (1991:193), the competence of children to interact with the legal system is a function of the competence of those dealing with them within that system.

It is, therefore, proposed that, in line with the approach adopted in other countries, the distinction between sworn and unsworn evidence must be dispensed with for children since it does not serve any valid purpose. This must be done, as in the UK and the USA, by the introduction of a statutory provision which provides that all children under a particular age must give unsworn evidence. This will have the effect of removing the perception that children who give sworn evidence are better than those who do not. In addition, it will eliminate the competency examination to determine whether a child understands the nature of the oath or not. With respect to the age of the child to which this provision will apply, in the UK children under fourteen give unsworn evidence while in inquisitorial countries this has been extended to children under the age of sixteen. It is submitted that the competency of a child to give evidence is very much dependent on the way in which communication with the child takes place. Therefore, if a

child is going to need a child expert, it is suggested that that child give unsworn evidence. Since it has already been proposed that all children aged twelve and younger automatically be examined by a child expert, it is submitted that all children under the age of thirteen give unsworn evidence.

The introduction of a provision such as the one suggested may still give rise to a competency examination. The court will then hold an examination to determine whether a child understands the difference between the truth and a lie before warning the child to give unsworn evidence. To prevent this situation from arising the above suggested statutory proposals should also contain a section expressly stating that s192 of the Criminal Procedure Act 1977 also applies to children, in that children are also presumed to be competent unless the contrary is proven. This will mean that a child who appears in court will be assumed to be competent and will be warned to speak the truth in a developmentally appropriate manner. If, in the course of the child's evidence, it becomes clear that the child is incompetent, then the child will be treated like any other witness who becomes incompetent in the course of a trial. Any inconsistency on the part of the child will relate to credibility and will be taken into account when assessing what weight is to be accorded to the child's evidence.

Competency examinations will still arise where, for instance, it becomes clear in the course of giving evidence that a child cannot remember or cannot communicate. The presiding officer will then have to conduct a competency examination. It is suggested that presiding officers receive sufficient training to conduct competency examinations that are meaningful and based on scientific principles rather than cursory questions that have very little, if any, relevance to competency. The Law Reform Commission of Victoria (1988:94) recommended a competency test, for instance, for witnesses of any age which provided that a witness would be competent to give evidence if he or she understood that he or she was under an obligation to tell the truth and could give a rational reply to questions about the facts in issue.

In addition, it is also proposed that child witnesses who have to go to court undergo pre-trial preparation so that they can be assisted in understanding the distinction between truth and lies and so that the duty to speak the truth can be impressed upon them.

### **7.6.2 The Cautionary Rule and Credibility**

Traditionally children have been regarded as untrustworthy or unreliable witnesses and a rule of practice arose which developed into a rule of law and required that the court had to warn itself of the dangers involved in accepting a child's evidence. In some jurisdictions corroboration was automatically required while, in others, corroboration was only necessary if the court was not satisfied with the witness's evidence after it had warned itself of the dangers involved in the evidence of a child. This rule of practice, known as the cautionary rule, applied not only to children but also to complainants in sexual cases. The dangers involved in a child's evidence can roughly be divided into three main criticisms: children tell lies; children cannot distinguish between fact and fantasy; and children are highly suggestible.

As a result of the criticisms which were levelled against the duty to warn, these warnings were either modified or completely abandoned in other jurisdictions. The rules relating to corroboration were abolished in the USA in the 1970s and Australia abolished them in the 1930s. New Zealand has prohibited judges from giving warnings, as has the state of Victoria in Australia. In 1987 the Canadian Criminal Code abolished the corroboration requirement relating to children and forbade any warning to be given (Spencer and Flin 1993:214).

In the United Kingdom the Pigot Committee recommended that the corroboration requirement and the warning be abolished since "[e]xisting safeguards which apply in all criminal cases are ... sufficient". They felt that any additional rules relating to this particular class of persons were "neither necessary nor desirable" (Home Office 1989:57). On the basis of these recommendations, s34 of the Criminal Justice Act 1988 was introduced which abolished the common law rule that a judge must warn about the danger of acting on the evidence of children, whether sworn or unsworn. Section 34(2) of the Criminal Justice Act 1988 provides:

"Any requirement whereby at a trial on indictment it is obligatory for the court to give the jury a warning about convicting the accused on the uncorroborated evidence of a child is abrogated in relation to cases where such a warning is required by reason only that the evidence is the evidence of a child."

For a time the cautionary rule was still applicable to children insofar as they were complainants in sexual cases, but in terms of s32 of the Criminal Justice and Public Order Act of 1994, which came into force on 3 February 1995, the warning in sexual offences has also been abolished.

### **7.6.2.1 The SA Position: Children and the Cautionary Rule**

In South Africa the dangers inherent in a child's evidence were summarised in *S v S supra* as follows: a child's memory is unreliable; children are egocentric; children are suggestible; children have difficulty in distinguishing fact from fantasy, and complaints of rape are fundamentally suspect.

Having evaluated the available research findings on children's ability to testify, it becomes clear that the cautionary rule is another instance where the courts are operating on premises that have long been discounted by scientific findings. Modern findings on the suggestibility of children have discovered that young children are suggestible but no more so than adults. Children were found to be as accurate witnesses as adults, sometimes even more so. However, they were found to be susceptible to suggestion when interviewed using suggestive techniques. The same findings were found with adults too. There is no scientific evidence to support the belief that children are *per se* more suggestible than adults. It was for this reason that it was proposed that a skilled interviewer (a child expert) examine a child's evidence to ensure that suggestive techniques are not employed in the examining of the evidence. The factors giving rise to suggestion were discussed in detail *supra*.

As far as distinguishing fact from fantasy is concerned, it is rare for children to imagine that they have been physically or sexually abused, unless children suffer from paranoid or manic psychosis, but even in these instances it is rare for children to have delusions of sexual abuse (Nurcombe 1986:476). Rather, children are vulnerable to

suggestion and this could give rise to false memories, as in the case where children undergo certain types of therapy or are interviewed using suggestive means. Ceci and Bruck (1995:225) point out that adults also display similar memory problems in these situations and they discuss available research on adults which indicates that adults too can come to believe false memories.

As far as lies are concerned, children and adults both tell lies, and there is no available evidence to support the belief that children are more prone to lie than adults. Many experts believe that it is much easier to detect lies in young children than older children or adults and, according to Feldman and White (1980:128), this would account for the belief that they lie more frequently. It would, therefore, seem that the basis upon which the courts regard the evidence of a child with suspicion does not accord with modern scientific findings. Recent research, accepted by the court in *S v S supra*, has concluded that children are no less credible than adults insofar as suggestibility, memory and the distinction between fact and fantasy is concerned (Hammond and Hammond 1987:3).

The cautionary rule relating to children was criticised in great depth earlier when evaluating the South African position. These criticisms will be briefly summarised here for the sake of completeness. The standard employed in the case of children makes it almost impossible to convict where the only witnesses are children. The courts do not simply warn themselves of the dangers and determine whether any are applicable to the case before them, rather they raise the standard employed in the case of children, requiring almost that a child needs to be a perfect witness. Although corroboration is not essential, the fact that the evidence of children is to be viewed as suspicious results in corroboration becoming necessary in every case.

A further criticism levelled against the warning is the fact that the courts scrutinise every child witness for possible dangers without a basis being presented for so doing. Although a court is not supposed to hypothesise as to probable causes without an evidentiary basis being laid, the courts nevertheless do so when applying the cautionary rule. In fact, other than ensuring that the evidence of children is treated with suspicion, these principles do not assist in any way in evaluating the reliability of this type of evidence. There is no scientific basis in terms of which evidence can be evaluated, and this task is left to the discretion of individual judges, the opinions of whom differ vastly as to the reliability and accuracy of children's evidence. Since there is strong empirical research available that children are no more unreliable than adults as witnesses, the South African Law Commission's (1989:34) vague belief in the cautionary rule as having been developed over many decades and having been founded on the practical experience of legal professionals will have to be re-assessed.

#### **7.6.2.2 The SA Position: Complainants in Sexual Offences and the Cautionary Rule**

A detailed review of the cautionary rule relating to complainants in sexual cases was made *supra* and a number of criticisms were levelled at the rule. These criticisms will be summarised here for the sake of completeness.

The motivation and basis for the cautionary rule appears to be threefold: charges of a sexual nature are easily laid; there are a multiplicity of motives; and charges of this nature are difficult to disprove (Olckers 1992:427). There is no empirical data to support the contention that in cases of this nature more false charges are laid than in any

other type of crime. In fact, according to Frank J in *S v D supra* the available evidence indicates the contrary. Empirical studies indicate that these cases are under-reported and that the incidence of false reports in cases of rape was 2% - exactly the same as that for other crimes.

Different motives may exist for laying false charges, but this would apply to any offence and not only to cases of sexual assault. In fact, Frank J in *S v D supra* was of the opinion that the existence of such hidden motives depended upon the fertility of the presiding officer's imagination (516D). It would also be unfair to say these are cases that are difficult to disprove, since there is no onus on the accused to disprove. The onus is on the State to prove and this is almost impossible where the only witness is the complainant. As in the case of children, the standard employed in evaluating the evidence of a witness in a sexual case is higher than that used for other witnesses, as was emphasised in *S v F supra*. This difference in standards was also referred to in *S v D supra* where Frank J, in applying the cautionary rule in a rape case, added that:

"Had the charge against the appellant been, for instance one of theft, requiring no more than the ordinary high but not exceptional standard of careful scrutiny ... the verdict of guilty must have stood." (515A)

Finally, this rule has been criticised as discriminating against the victim and implies that the evidence of women must automatically be approached with suspicion (Hoffmann and Zeffertt 1988:579). In *S v D supra* the court severely criticised the use of the cautionary rule in sexual offences, holding that it served no purpose other than to discriminate against female complainants and was therefore contrary to the Namibian Constitution (516F-G).

### 7.6.2.3 Recommendations

Other jurisdictions, including the UK and the USA, have dispensed with the cautionary rule in relation to children and complainants of sexual offences since it has no rational basis and is not supported by any empirical evidence.

In South Africa a number of cases have urged that a common sense approach to the cautionary rule be adopted, but this has proved difficult in practice because it has been left up to the discretion of individual judges. It is submitted that the ordinary onus of proof employed in criminal cases is sufficient security against wrongful convictions. Labuschagne (1992:136) argues that the fact that the court needs to prove a conviction beyond reasonable doubt means that there is no need for the cautionary rule. The ordinary onus affords adequate protection for the accused, and the case of *S v D supra* offers an excellent example of how this would work in practice. The nature and circumstances of each case must be considered, including whether the child or the complainant is a single witness or whether there is evidence before the court which may suggest the child is fantasising or the complainant has a motive for laying a false charge. However, the final test must be the same whether the crime is one of theft or rape.

It is therefore proposed, along the lines of the approach adopted in the UK, that a statutory provision be enacted which would abolish the cautionary rule applicable to child witnesses and complainants in sexual offences. This

would also be in accordance with the Constitution Act 108 of 1996, section 28 of which has placed a positive duty on the state to protect children from abuse and neglect and ensure that their best interests are paramount. It will also eliminate any discrimination with respect to complainants in sexual cases.

It would however, appear from the cases that the perception of children as being unsatisfactory witnesses is so ingrained that when a child does give a detailed account of events this in itself is regarded as highly suspicious, as happened in *R v J* 1958 (3) SA 699 (SR). It will be of no assistance if the legislature were to introduce a statutory provision abolishing the cautionary rule and legal personnel continued to hold the same perception of children as unreliable witnesses. A statutory innovation will not change the perceptions of people and for that reason it is strongly urged that court personnel receive training with regard to scientific research on children's evidence and capabilities.

### **7.6.3 The Hearsay Rule**

A detailed analysis of the hearsay rule was attempted *supra* at 5.7. in terms of which s3 of the Law of Evidence Amendment Act 45 of 1988 was studied with reference to case law. The approach of the courts to the admission of hearsay in terms of this section was highlighted, and its effect on the hearsay statements of child witnesses was evaluated.

The above analysis was sufficiently detailed that no purpose would be achieved by repeating the details here. All that remains to be done is to provide a brief summary of the proposals that were forwarded. Although a strong argument was made out for the reception of the hearsay statements in terms of the discretion given to the presiding officer by s3(1)(c) of the above act, it was felt that the matter would still remain in the discretion of the court and courts may be very wary to admit hearsay statements emanating from children, due to issues of competency and the cautionary rule.

Additional statutory provisions admitting the hearsay statements of children in certain circumstances was also not thought to be acceptable, since this would result in a situation very similar to that created by s3 (1)(c) *supra* in terms of which the presiding officer would have to exercise a discretion again. Instead, it was proposed that all that was needed was a common sense approach. In order to convict an alleged perpetrator in a criminal case, the accused's guilt must be proved beyond a reasonable doubt. To determine whether the guilt has been proved beyond a reasonable doubt, the court evaluates the evidence that has been placed before it. If the evidence is unreliable, the court will be unable to convict. In order to determine whether guilt has been proved beyond a reasonable doubt, all relevant evidence should be placed before the court. The court, in evaluating the evidence, will accord the necessary weight to the evidence. Obviously, in assigning the weight to be attributed to the hearsay evidence of a child, the court would look at the source of the evidence, the age of the child, his possible competence, why he is not giving evidence etc.

My submission, therefore, is that all hearsay statements emanating from child victims should be admissible. This is the position in other inquisitorial countries, and it has not been alleged that accused are wrongfully convicted in

this system as opposed to the accusatorial systems. The ordinary rules of evidence would apply. The evidence would have to be relevant in order to be admissible. The mere fact that the evidence will be admissible does not mean that the accused will automatically be convicted. There will have to be evidence before the court which proves the accused's guilt beyond a reasonable doubt. The fact that evidence is hearsay is a factor which should go to weight and not to admissibility.

The problem, however, is that the rules relating to hearsay statements need to be reassessed on a holistic basis. The introduction of a special statutory provision requiring the hearsay statements of child witnesses to be admissible may create the impression that these hearsay statements carry more weight than other hearsay statements. The recommendations here apply to the hearsay rule in general and it is proposed that the law relating to hearsay be revised and a common sense approach be adopted. Relevant evidence ought to be admissible. The fact that evidence amounts to hearsay is a factor which will affect the weight to be attributed to that evidence and not its admissibility. In the meantime, however, magistrates and judges should be urged to admit the hearsay statements of children in terms of s3 (1)(c) where this is applicable for the reasons argued earlier.

If a wholesale re-evaluation of the law relating to hearsay is not possible, then a statutory exception would have to be introduced, declaring the hearsay statements emanating from children to be admissible and that the hearsay element of these statements would go to weight and not admissibility.

### **7.7. The Preparation of Children**

Research findings on the perceptions of children have highlighted the need to prepare children for an appearance in court to enable them to give evidence effectively. Personality research and theory strongly suggest that child witnesses will find the legal process to be less stressful and their performance as witnesses will be improved if they are prepared sufficiently for the experience (Melton and Thompson 1987:219).

A number of studies referred to earlier found that the majority of children who testified in court experienced stress as a result of their participation in the process. The reasons given by the children for these negative emotions included, amongst the more obvious fears such as confrontation and retribution, anxiety due to a lack of information while waiting to go to court, not being warned about delays or that the accused's family and friends would be in the waiting room and not understanding why certain questions were asked in the course of cross-examination (Sattar and Bull 1995:1-2). Children may not understand the purpose of the trial, the decision-making process involved, and the functions of the professionals. They may misunderstand the reason for their court involvement, believing that the aim of the trial is to find out who's guilty - the accused or themselves (Cashmore 1991:194-5). Saywitz and Nathanson (1993:620), in their study on children's perceptions of stress, concluded that certain characteristics of the court environment do interfere with a child's evidence and increase the stress experienced by them. They suggested that the results of their study highlighted the need to develop innovative methods for preparing children for their court appearance. Christiansen (1987:707) is also of the opinion that one of the solutions to problems associated with child witnesses is the introduction of preparation procedures which will acquaint the child with the environment and the purpose of the trial.

### 7.7.1 Pre-trial Preparation

Pre-court preparation programmes aim to demystify the courtroom through education and thereby address and reduce fears. The purpose of these programmes is to reduce the stress which the child experiences by empowering the child. This will have the consequent result that the child will be able to testify more effectively at the trial (Saywitz 1996). The most famous empowerment programme was conducted by Dezwirek-Sas (1992:189) at the London Family Court Clinic in Ontario, Canada. The project ran for three years and included an empirical evaluation of the project's outcome. It was found that providing children with a pre-court preparation programme led to children giving better evidence in court. Crown attorneys rated the behaviour of the prepared children as significantly superior to that of the controls. Also, providing children with stress reduction technique training enabled the children to develop better coping strategies when they experienced anxiety. Dezwirek-Sas and colleagues judged the project to have been an overall success.

To be effective, a preparation programme would have to include the following sessions, based on the programmes used in Canada and summarised by Harvey and Daun (1993:78-105):

#### *Preparation for the Oath or Warning*

This will depend very much on the legal requirements that must be complied with. In countries where a child will have to undergo a competency examination, children will have to be prepared for the oath. Where there is no competency examination, the preparation will have to focus on the distinction between truth and lies and the importance of telling the truth. The topics that need to be covered would include the following (Harvey and Daun 1993:78-9):

- the oath;
- what the Bible is;
- what a promise is;
- examples of promises;
- what the truth is;
- what a lie is;
- what the difference is between telling the truth in the courtroom or somewhere else;
- the type of questions the judge will ask.

This section of the preparation can also assist in determining whether the child is capable of giving evidence and has an understanding of the concepts necessary to do so. For example, the child could be asked simple, factual questions to probe short-term and long-term memory capabilities. These questions would obviously be unrelated to the alleged incident the child is going to have to testify about (Perry and Wrightsman 1991:254).

#### *Preparation re Parts of the Body*

Where the child must give evidence about a sexual offence, it is necessary to learn what names the child uses for body parts. Children may describe body parts with terminology which is different from that which adults use.

Harvey and Daun (1993:83) offer the following example to illustrate the confusion that can arise:

"During one investigative interview, a child complainant had stated that her father had put his penis into her 'bum'. Before the preliminary hearing, the Crown counsel discovered that the child called her vagina a 'bum'. The indictment had to be changed to delete the anal intercourse charge. Her mother had called the vagina the 'little bum' and the buttocks the 'big bum'."

This is not to be regarded as an opportunity to instruct the child in the correct terminology to be used. Where the child uses a euphemistic term for a body part, this must not be corrected as it may give rise to allegations of coaching or suggestion. To avoid the latter allegation the child should be asked to give the names for all body parts without particular focus on the genitals.

### ***Preparation for Trial***

Children need to be told what will happen at the trial. The process needs to be explained to them in a manner understandable to them. This can be done by means of role-playing, puppets or stories, always ensuring that the details of the child's own incident are not alluded to. The functions of the various role-players must also be explained to children. This would also include a visit to the courtroom so the child can be shown where he will sit and where the questions will come from.

### ***Preparation for Cross-examination***

The following topics must be discussed with child witnesses to prepare them for cross-examination (Harvey and Daun 1993:101):

- the purpose of cross-examination;
- when cross-examination will take place;
- what form it will take;
- how the child might feel;
- what the child can do if those feelings arise;
- what the child can or cannot do.

### ***Preparation of children re possible reactions***

Children have common fears about testifying in court, which have been compiled by professionals who work with child witnesses. Preparing children for dealing with these fears can be done by asking children to list their fears of going to court and then working through these fears with the child. The following are some of the common fears that need to be addressed (Harvey and Daun 1993:103-3):

- The child may cry on the witness stand.
- The child may get mixed up and say something wrong.
- The accused will give the child hateful looks.
- The accused will be acquitted.
- The child may laugh out of nervousness.
- Untold secrets may be discovered.
- People will find out.

- The child may not want to be responsible for the accused going to jail.
- The child may lose control.
- The child may go to jail.

In dealing with these fears, children need to be offered ways of dealing with these situations if they should arise. For instance, the child may be afraid he gets mixed up and says something wrong. It should then be explained to the child that he can admit to being confused or wrong etc. The legal process will be a little easier for children if their fears about it have been allayed in advance.

### ***Debriefing***

After the child has given evidence, the child will have to be debriefed. The child will probably have questions about the trial or require an explanation of what took place. It would be appropriate at this stage to do something with the child to reduce stress levels, such as giving the child a courage badge or certificate to colour in (Harvey and Daun 1993:57).

The above is simply an example of the kind of preparation programmes offered to children in Canada and the United States. Obviously any programme would have to be adapted to suit the situation in South Africa and make it applicable to our courts and our children.

### **7.7.2 Conclusion**

The need to prepare children for a courtroom appearance has been accepted by research and a number of these programmes are offered to child witnesses in the United Kingdom, the United States and Canada. In fact, there are already a few preparation programmes being conducted on an *ad hoc* basis in South Africa by organisations such as Childline and by social workers. The danger of these programmes, however, is that they are not standardised and there is no guarantee that suggestion has not taken place. These programmes are offered by people from a social science background and they would probably not have knowledge of legally inadmissible techniques that are best avoided.

It is proposed that all children who have to give evidence in a criminal trial take part in a pre-trial preparation programme. It is further proposed that this preparation programme be standardised so that the same programme can be offered at all centres and so that dangers of coaching and suggestion can be eliminated. It is further suggested that the programme be based within the Ministry of Justice so that the courts are seen to embrace the programme.

It is important that preparation be distinguished from coaching to avoid the possibility or appearance of contamination (Saywitz and Snyder 1993:124). In addition, the preparation process must be fair to the accused, which is why Christiansen (1987:713) suggests that a trained professional conduct the preparation of child witnesses to eliminate the above possible criticisms. For instance, a professional will be trained to avoid any conduct that may

be perceived as 'bribery' i.e. taking a child to a favourite restaurant or treating him to ice-cream (Harvey and Daun 1993:50). It is therefore, recommended that the child expert proposed above be responsible for the preparation programmes within his jurisdiction. This will enable him to follow the matter from the initial statement taking all the way to the trial. He will become acquainted with the child's abilities and the child will gain confidence from dealing with one person as opposed to a number of different individuals.

## 7.8 Training of Legal Personnel

A number of proposals recommended earlier have suggested that judicial officers must undergo training in order to deal competently with all aspects of the child as witness. If training is not provided for judicial officers, many of the proposals forwarded will remain ineffective.

"The English judge is a professional decision-maker, he is a respected lawyer but, unless he sits in the Family Division of the High Court he is a generalist not a specialist. He has forensic skills inculcated by years of practice at the bar but also lacks both knowledge and skills which might be thought desirable for someone making decisions about children. His background will have provided him with very little experience about children and families except those he may have acted for in the past. His own education will have separated him from the start from ordinary families and probably from common patterns of family life." (Masson 1988:141)

It is important that judicial officers make informed decisions, not ones based upon opinion or emotion or legal precedent alone. Technology is advancing at a rapid rate and as scientific knowledge accumulates, it should be disseminated and used in the service of public good. This cannot happen unless officials are educated with respect to new knowledge made available in other disciplines (Perry and Wrightsman 1991:180). The solution to the problems associated with child witnesses lies in the interface between law and psychology, and it is important that legal personnel be exposed to this knowledge, as explained by Myers (1995:267):

"Finally, lawyers in practice and in academia must realize that they do not have all or most of the answers to poverty and child abuse. Such problems lie at the interface among psychology, sociology, economics, and law. The only realistic way to achieve solutions is for lawyers to abandon the professional élitism to which they sometimes fall prey and join forces with their colleagues in other helping professions. By working together, solutions will emerge."

The need for judicial officers to receive training to deal with child witnesses has been voiced from a number of quarters. In their Report the Law Commission of Victoria (1988:20) mentioned that a number of submissions received, criticised legal practitioners and members of the judiciary for the unnecessary difficulty and stress they caused for child witnesses. Some of the matters complained of were easily capable of being remedied, like knowing when to give the child a break or offering the child some water. Birch (1992:275) also suggested that all people involved in the trial process needed to receive training in how best to handle a child witness. An obvious example of this arose in the Zimbabwean case *S v S supra* where Ebrahim JA castigated the trial court at 60D-I for their insensitivity in allowing a little girl to testify about the intimate details of her rape to a courtroom full of male officials:

"Regrettably, instances of lack of professionalism were evident in the conduct of this trial. My main criticism is the court personnel. All the principal officials were male. This despite the fact that it must have been known well in advance that a female juvenile would be appearing in that court on that day as a complainant in a serious rape case. It surely would not have been impossible to arrange for a female prosecutor or magistrate to officiate or to have a female presence of some sort. As it happened, no criticism can be made of the conduct of either the prosecutor or the magistrate, both of whom appear to have been patient and solicitous of the wellbeing of the complainant and her companion who gave evidence on her behalf. But surely those responsible for physically allocating cases and courts must be aware of the embarrassment likely to be felt by a little girl when relating the detailed descriptions of the perpetration of a rape required by a court of law. Such embarrassment can only be exacerbated when the evidence must be given before an exclusively male audience because:

- (1) the discussion of intimate sexual matters in the presence of members of the opposite sex is normally taboo;
- (2) the absence of a female listener means that a female witness who has been sexually abused lacks any substantial sympathetic support. No male person can possibly understand the feelings of a female victim. It is thought probable that even very young complainants feel this almost instinctively; and
- (3) it is likely that a woman or girl who has been recently or badly abused will associate, if only subconsciously, all males with her assailant.

An all-male audience is, therefore, unlikely to encourage a complainant to give full and objective evidence."

The Law Commission of Victoria (1988:21) concluded that difficulties experienced by child witnesses could to some extent be alleviated by appropriate judicial intervention and recommended that educational material be prepared for judicial officers on issues relating to children as witnesses.

Because of the central role played by judges in controlling trial proceedings, it is especially important that judges be educated adequately regarding the special issues attendant on working with children as legal witnesses. In fact, Yates (1987:479) suggests that the most expeditious and positive changes of the legal system might be attained through the education of the judiciary:

"Through the judge's discretionary powers, child witnesses may be seen in chambers, granted recesses, or be accompanied to the courtroom by a familiar supportive adult. The judge may caution attorneys who question children inappropriately and may speak directly to the child. The court may appoint a special attorney with a background in child development to examine the child. This attorney would use questions supplied by the other attorneys and would have the right to object to questions that might confuse or be unduly upsetting to the child."

Although the specific recommendations referred to in this quote have already been dealt with, the focus of the matter is what powers judges and magistrates have and what they could do if they were educated regarding the psychology of child witnesses.

For instance, it has already been argued that children have great difficulties with the language used in court and that researchers argue that even young children are capable of being effective, competent witnesses if they are interviewed in a manner which takes proper account of their abilities and needs (Bull 1992:5). Experts in the interviewing of child witnesses have indicated how these interviews need to be conducted and what techniques affect the reliability of a child's evidence. It is not suggested that judicial officers become experts in this field. Rather, what is required is a knowledge of available research which will assist them in evaluating, not only the child's

evidence, but also the way in which the child has been interviewed. Judges need to be encouraged to take a more proactive role in the management of cases. The Royal Commission on Criminal Justice commented that the cost-effectiveness of further judicial training could not be questioned and specifically recommended the introduction of inter-disciplinary courses (Carson 1995:2). In fact, Walker (1993:63) argues that lawyers bear the final responsibility of enabling children to tell what they know and judges "act as the last gatekeepers for clear communication in their court". In order, therefore, to act as an effective 'gatekeeper' judges need to know how children perceive, remember and report events.

They need to know why leading questions may be particularly problematic for child witnesses. They need to understand why children often recant their statements after allegations have been made and how to assess the credibility of statements made by children. Without such education, judicial officers cannot render informed decisions in cases in which children are witnesses.

Spencer and Flin (1989:1602) suggest that lawyers need to know what other disciplines can teach them about the features of a child's evidence which suggest that the testimony may be true or false. This is especially relevant to a number of approaches adopted in other countries. For instance, a detailed discussion was attempted earlier regarding the topic of statement validity analysis, which was pioneered in West Germany and which has attracted a great deal of attention and research in England and in the United States. The available research on the detection of deception and the judgment of the credibility of children's statements has shown that there is no such thing as 'lie behaviour' even though surveys have shown that people do believe that these indicators do exist. Research has also shown that people's ability to discriminate successfully between truthful and deceptive statements is only slightly better than chance level. Statement validity analysis is a technique which involves the analysis of a statement according to a set of 19 reality criteria which describe certain qualities of its content. The underlying theory is that a child witness will not be able to fabricate a statement with these qualities, so if these criteria are found in a statement it is likely to be based on genuine personal experience (Bull 1994:333). A number of studies have examined the effectiveness of statement validity analysis and found the procedure to be reliable. If judicial officers were exposed to this type of research, it would be able to assist them when attempting to evaluate the credibility of child witnesses. Again, it is not suggested that judicial officers become experts in this field, but if they have an understanding and working knowledge of the reality criteria used in statement validity analysis it would contribute towards adopting an informed approach to the evidence of children.

Statement validity analysis depends on obtaining an account from the child which is uncontaminated by inappropriate interviewing techniques (Bull 1995:240). This again emphasises the need for an ecological approach when dealing with the evidence of children. Statement validity analysis can only be used when the child has been interviewed in a non-leading, non-suggestive way, otherwise the criteria are no longer valid. Therefore, statement validity analysis can only be used where the first interview with the child has been conducted by a professional and the court has a record or videotape of the interview available to ensure that the interview was uncontaminated. However, disseminating this information to legal professionals will go a long way in assisting them to evaluate the credibility of a child on a scientific basis rather than on emotions and perceptions, which research has shown are not very accurate.

Finally, court personnel dealing with child witnesses need to be educated in matters of child psychology and cognitive development in order that their perceptions regarding children as witnesses can be re-assessed. Gothard (1992:115), a judge of the Fifth Circuit Court of Appeal in Louisiana, says that his experience has shown that judges show the same general biases against children and believe most of the prevalent myths about child sexual abuse:

"Too many judges have no understanding or knowledge of the dynamics of this problem; even worse, they have no compassion or empathy for the child victims."

Education will be a vital step in changing the perceptions which court personnel have with regard to child witnesses. It is only through education and training that this paradigm shift can be achieved. This was, in fact, one of the recommendations of the Pigot Committee (Home Office 1989:67):

"We suggest that a fundamental change of attitude towards children in the legal context is now required. The professional training of judges and lawyers could usefully address some issues in child psychology and cognitive development."

Knowledge can contribute to a profound understanding of the dynamics of child sexual abuse and its effect upon children. This knowledge and understanding can then be applied in a compassionate yet thoroughly legalistic manner to cases involving children. In view of the above, it is proposed that all court personnel dealing with cases which involve child witnesses should receive general education regarding child development and the dynamics of abuse as well as specialised training in interviewing children. They should also be kept abreast of the latest scientific developments in other fields.

The implementation of such training need not involve any additional resources. Magistrates and prosecutors are required to undergo certain in-house training programmes. A section of these courses could be devoted to a study of child witnesses. Update courses could be arranged for judges, magistrates and prosecutors on a regular basis to keep them abreast of latest developments. This need for training was further endorsed by Ebrahim JA at 60B-C in *S v S supra*:

"A rational decision as to the credibility of a witness (especially a child witness) can be arrived at only in the light of a proper analysis by means of testing it against likely shortcomings in such evidence. ... To reach an intelligent conclusion in such an analysis it is necessary to apply, as they do, a certain amount of psychology and to be aware of recent advances in that discipline. This will undoubtedly mean an increase in the workload of judicial officers and the machinery of justice generally, but ways must be sought of accommodating this, as it is the price to be paid for professionally administering justice in an increasingly complex society."

## 7.9 Conclusion

The aim of this research was to investigate whether it was at all possible to reconcile the image which the law has of children as "vulnerable, unformed, dependent creatures needing protection" with the necessity of obtaining an accurate, reliable account of events (King and Piper 1990:57). Is it possible to obtain accurate evidence in an adversarial environment while at the same time protecting the child witness from further trauma and ensuring that the accused is afforded a fair trial in terms of the Constitution Act 108 of 1996?

In an attempt to answer this question an ecological systems approach was adopted in terms of which children were viewed as sources of information. The adoption of an ecological perspective requires that attention be focused on the child's developing capacities in the context of the family as well as the social and physical contexts in which information is sought from children. This involved an investigation of various microsystems, exosystems and macrosystems. An ecological approach is based on the premise that any single action in one system will have an effect on another system to which it is linked. It was, therefore, essential that the child witness in the adversarial system be studied on a holistic basis. It was not possible to view different aspects of the trial or different rules of evidence in isolation. The challenge lay in developing an approach to children in the legal system that was fair to the children and respected their developmental needs while simultaneously being fair to an accused and respecting the latter's rights (Gabarino and Stott 1989:291-315).

Since the microsystem relating to the child himself involved the child's developmental, cognitive and language abilities, it was necessary to access the field of psychology in an attempt to answer questions relating to a child's competency and credibility. This approach was highlighted by King and Piper (1990:58):

"The problem that the law has faced has therefore been how to bring the evidence of young children before the court in a form that is likely to result in conviction and how, at the same time, to protect the child from the ill-effects of criminal procedures both outside and inside the courtroom which, according to some psychologists, have a more deleterious effect on the child than the abuse itself. Unable to solve such problems through its own internal communications, the law has turned to other discourses and to other institutions in its truth-constructing endeavours ... Enter social workers, forensic psychologists and child psychiatrists ready to assist the law by producing from behavioral science knowledge and procedures to solve these problems."

The interface between psychology and law is essential if the dilemma of the child as witness is to be solved.

The macrosystems including constitutions, conventions and adversarial procedures were investigated. The legal microsystem comprising legal rules, confrontation, cross-examination and the need for public trials was evaluated in terms of modern research findings on the cognitive, moral and language abilities of children. The resultant findings were that children are not able to give evidence effectively in an adversarial environment with all aspects of the trial causing problems for child witnesses.

In an attempt to find a solution that would be fair to both the child witness and the accused, the following model was proposed for dealing with a child witness in the criminal justice process:

- The Ministry of Justice need to create the office of an intermediary or skilled interviewer. It is suggested that the term 'intermediary' be replaced by a more appropriate title, since this official will no longer simply be an interpreter but will be more of a child expert. For present purposes, this official will be referred to as the child expert. The office of the child expert will be housed in the Ministry of Justice and will be a permanent office with appointees in all centres.
- The child expert will have to hold a qualification as determined by the Ministry of Justice in conjunction with participating universities. This qualification will include aspects of child development, the psychology of abuse, relevant law and specialised training in the interviewing of children.
- The child expert's duties will begin when he is informed by the police that there is a child witness in a particular case. The child expert will arrange to meet the child after which he will set up the taking of the initial statement. The child expert will conduct the interview with the child. This interview will be videotaped and the videotape will be admissible later at the trial.
- The child expert will be responsible for conducting pre-trial preparation programmes for all children who have to testify at a trial. These pre-trial preparation programmes must be standardised and be based on empirical research.
- All children under the age of eighteen will automatically give evidence via closed-circuit television and will thus be spared the traditional confrontation with the accused. All children under the age of thirteen will automatically be examined by the child expert in a room other than the courtroom. The expert witness will examine the child's evidence on an inquisitorial basis. There will be no cross-examination of the child by the defence although the defence may ask that certain matters be addressed which were not dealt with.
- All children under the age of thirteen will give unsworn evidence and will only be warned to speak the truth in a developmentally-appropriate manner. In addition, all children will be assumed to be competent unless the contrary is proved. When a competency examination does become necessary it must be conducted in a meaningful way and must be based on scientific principles.
- Once the child has been examined by the child expert to the satisfaction of the court, the child will be allowed to step down and can then be debriefed by the child expert.
- The cautionary rule applicable to children and complainants in sexual cases must be abolished, and the credibility and evidence of children be evaluated on the basis of scientific research.
- Rules relating to hearsay evidence and previous consistent statements must be abolished.

- Finally, all court personnel who deal with child witnesses must receive general education regarding child development, the dynamics of abuse and specialised training in the interviewing of children.
  
- Since children will not give evidence in court, it does not appear necessary to change the rules relating to a public hearing.

The proposed model involves a move away from traditional adversarial procedures and incorporates a number of aspects of the inquisitorial system. But this should not necessarily be considered a negative move. The aim of a trial is to arrive at the truth using procedures that are fair to all parties involved. The SA Law Commission (1989:28) accepted that if such a drastic change was needed, then the mere fact that the change would be of such a drastic nature would not stand in the way of reform:

"If the interests of the entire community - including those of the accused and the child - were to demand such a solution, then the mere fact that the said solution is of a drastic nature would not stand in the ways of law reform."

In conclusion, this approach was endorsed by the Canadian court in *Regina v Toten supra* at 58:

"The public adversarial process is, however, a means to an end - the ascertainment of truth - and has virtue only to the extent that it serves that end. Where the established process hinders the search for truth, it should be modified unless due process or resource-based considerations preclude such modification."

## 8. SUMMARY OF RECOMMENDATIONS

### *Proposal 1*

It is proposed that, in dealing with the child witness, an ecological systems approach be adopted in terms of which all amendments and proposals must be viewed. This approach to child witnesses as a source of information demands that the focus be turned inwards to the child's capabilities and outward to the social and physical contexts in which the information is sought from children.

### *Proposal 2*

It is proposed that children who have to give evidence be removed from the adversarial nature of the trial and be allowed to give evidence outside of the court.

### *Proposal 3*

It is proposed that the initial statement which the child witness makes to the child expert must be videotaped and this videotape must be admitted in court as evidence at the trial.

### *Proposal 4*

It is proposed that the common law rule against previous consistent statements be repealed by a statutory provision. The normal rules of evidence (i.e. relevance) should remain the guiding principle for admissibility. The provision should also include a section stating that the videotaped interview containing the child's initial complaint or statement may be admissible at the subsequent trial.

### *Proposal 5*

It is proposed that if the court is going to allow a child to give evidence via closed-circuit television in terms of s158 of the Criminal Procedure Act 1977, then the child must be allowed to be accompanied by somebody who can offer support to the child.

### *Proposal 6*

It is proposed that s158 of the Criminal Procedure Act 1977 not be used in the case of child witnesses under the age of thirteen since communication and concentration will be hampered by using earphones or a monitor.

### *Proposal 7*

It is proposed that all children under the age of eighteen automatically be allowed to testify via closed-circuit television, thereby eliminating the court's discretion in this respect.

### *Proposal 8*

It is proposed that a child expert be used during all stages of the investigation, from the pre-trial stage all the way through to the actual trial.

***Proposal 9***

It is proposed that the child expert, referred to above, undergo professional training in the fields of developmental psychology, acquisition of language by children, psychology of abuse and a knowledge of law and procedure. Universities should be approached to introduce a Masters Degree programme which would cover the above aspects.

***Proposal 10***

It is proposed that a child expert be appointed automatically in all cases where a child witness is twelve years or younger. In the case of children aged thirteen and older, the court will have a discretion to appoint a child expert if there is evidence that the child may have difficulty in understanding court language. The section will empower the expert to conduct the entire examination of the child witness, allowing the court to maintain a discretion to intervene where necessary.

***Proposal 11***

It is recommended that s170A set out the qualification and training required for a person to act as a child expert. It is proposed that a standard qualification be required which will be decided upon by the Ministry of Justice in conjunction with the various universities involved. This will require the provisions, as set out in the Government Gazette with respect to who may act as a child expert, to be repealed.

***Proposal 12***

It is proposed that an office of the child expert be created which would fall under the Ministry of Justice. The person assigned to this office would be responsible for interviewing all child witnesses and for organising necessary court preparation.

***Proposal 13***

It is proposed that s170A of the Criminal Procedure Act 1977 apply to all witnesses under the age of eighteen while s158 of the same Act apply to all witnesses aged eighteen and older.

***Proposal 14***

It is proposed that a statutory provision be introduced which provides that all children under the age of thirteen must give unsworn evidence, and need only be warned to speak the truth in a developmentally-appropriate manner.

***Proposal 15***

It is further proposed that the above statutory provision also contain a section which expressly states that s192 of the Criminal Procedure Act 1977 also applies to children and that children are presumed to be competent unless the contrary is proven.

***Proposal 16***

It is proposed that presiding officers receive sufficient training to conduct competency examinations that are

meaningful and based on scientific principles.

***Proposal 17***

It is proposed that child witnesses undergo pre-trial preparation so that they can be assisted in understanding the distinction between truth and lies and so that the duty to speak the truth can be impressed upon them.

***Proposal 18***

It is proposed that a statutory provision be enacted which would abolish the cautionary rule applicable to child witnesses and complainants in sexual offences.

***Proposal 19***

It is also proposed that court personnel receive training with regard to scientific research on children's evidence and capabilities to remove any perceptions of unreliability or untrustworthiness that might exist in the minds of court personnel.

***Proposal 20***

It is proposed that the law relating to hearsay as a whole be revised and a common sense approach be adopted. Relevance is the basis of admissibility. The fact that evidence amounts to hearsay is a factor which will affect the weight to be attributed to that evidence and not its admissibility. If a wholesale re-evaluation of the law relating to hearsay is not possible, then a statutory exception would have to be introduced, declaring the hearsay statements emanating from children to be admissible and that the hearsay element of these statements would go to weight and not admissibility.

***Proposal 21***

It is proposed that all children who have to give evidence in a criminal trial take part in a pre-trial preparation programme.

***Proposal 22***

It is proposed that the preparation programme be housed within the Ministry of Justice and be standardised so that the same programme can be offered at all centres and so that dangers of coaching and suggestion can be eliminated.

***Proposal 23***

It is proposed that the child expert be responsible for preparation programmes within his jurisdiction.

***Proposal 24***

It is proposed that all court personnel dealing with cases which involve child witnesses should receive general education regarding child development and the dynamics of abuse as well as specialized training in interviewing children. They should also be kept abreast of the latest scientific developments in other fields.

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