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## Children as Witnesses

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## **Children as Witnesses**

### **Definition and summary**

This entry considers children as witnesses in a legal context, i.e. where they testify, as part of criminal legal proceedings, and about events they are assumed to have experienced in their past, leaving to one side their participation in other types of civil or family law proceedings (including immigration law). It will not address children as witnesses of personal, historical or political events more generally (e.g. persecution, war or natural disaster).

The majority of child witnesses called in criminal proceedings today are also victims of the alleged crime, which most frequently is a form of violence (including domestic abuse) or sexual exploitation. Against the backdrop of an historical outline, the entry will capture the key challenges children face as witnesses and consider questions about children as reliable and credible witnesses and the implications for legal practice. These issues prove to be relevant to their participation in those other contexts.

Finally, it will give brief examples of international differences in child witness practice. Please note that the majority of the literature about child witnesses relates to jurisdictions in minority world countries, which thus form the backdrop of this entry. More diversity in this field is crucial and it is hoped in future a broader picture will emerge with a wider range of knowledge and practices being shared internationally.

### **A short history of children as witnesses**

There is no record on children as witnesses in pre-modern times but children's low social status means that it is unlikely they would routinely have been given such a key

role in legal proceedings, just as they would not have had influence in politics for example (unless they were high born). In one of the earliest comments on children as witnesses from the late 19<sup>th</sup> century a US Supreme Court judge noted that children should not be excluded from giving evidence just based on age, but that each judge should establish whether the child knows the difference between truth and falsehood. This is still common practice in some jurisdictions today, but there was (and still is) no overall guidance on how this should be done, meaning it is up to individual judges (or police officers) to determine. An 18<sup>th</sup> century English example reported by John Spencer quotes a Mr. Justice Maule who is persuaded of a young girl's competency as a witness when she confirms that she fears god will send her to hell if she lies. In the 18<sup>th</sup> and early 19<sup>th</sup> century such an expression of 'fear of god', as an indicator of moral maturity, would have been a common measure of child witness' competency (and reliability).

Children, nonetheless, traditionally have had a dubious reputation as court witnesses, and would have been called in exceptional circumstances only. The Salem witch trials are one of the earliest and most notorious set of cases that are routinely cited throughout the 20<sup>th</sup> century as a cautionary tale about child witnesses' lack of reliability. In 1692 Salem (Massachusetts, USA) 19 villagers were convicted of witchcraft and executed based on evidence given by a group of children (even though the children had recanted their evidence during the trial). Particularly in the US literature, this case is often referenced as the root of the deep mistrust legal practitioners hold against child witnesses. Since the early 20<sup>th</sup> century, distrust in children as witnesses by the general public and by the legal profession has been informed by particular understandings of psychological research into child development. In particular, early theories about children's memory and cognitive

development were taken to confirm that children were too “immature” to remember accurately, easily manipulated and prone to confuse fantasy and reality. This continuous mistrust is for example reflected in the minimum age (10 or 14) specified for witnesses in most US States until the mid-1970s, in German courts’ frequent reliance on psychological experts to assess the credibility of child witnesses, and in the corroboration laws that applied in many countries until the late 1980s (e.g. the USA, Australia and England/Wales). These laws admitted children’s testimony only if there was an adult eyewitness who could confirm their evidence.

Attitudes towards child witnesses in Northern America and Europe shifted dramatically as a result of societal change during the 1970s and 1980s. As feminist ideas gained traction there was growing understanding of, and public awareness for, sexual victimization of women and children. In this context there was a realization that existing corroboration laws (and overall reluctance to admit children as witnesses) made it almost impossible to prosecute clandestine crimes such as child sexual abuse where the victim was usually also the only witness. As a result, attitudes and laws in Northern America and Europe gradually changed e.g. allowing children’s uncorroborated testimony specifically in cases of alleged sexual abuse. Subsequently, however, North America as well as Europe (e.g. England and Germany) saw a number of high profile miscarriages of justice in alleged child abuse cases (for example the ‘MacMartin Preschool’ case). These often lengthy cases with multiple defendants rested on evidence given by children that was later found to be unreliable, and shown to be the product of coercive and manipulative questioning by well-intentioned interviewers and parents. Amidst ever growing societal concern about the apparent omnipresence of child abuse, parents and professionals in these cases had become overly zealous in their aim to get children to disclose abuse.

These cases sparked an intense research interest in children's suggestibility (i.e. whether they can be coached or manipulated into remembering or reporting false events), a topic that had so far not been on the scientific agenda. While research by Gail Goodman and colleagues underlined even small children's ability to accurately testify when interviewed appropriately, the attention of the media and the public was caught by the research of Stephen Ceci and colleagues, who showed that under certain conditions children could be made to believe and/or report (even bizarre) events they never experienced. Taken together, these cases and reactions to them (including a heated debate about the ethics of researchers implanting false memories into children), apparently contributed to a renewed atmosphere of disbelief in children's testimony, undermining trust in child witnesses, and making the just prosecution of child sexual abuse more difficult as parents, professionals and potential jury members would be wary about children's statements.

### **Child witnesses' credibility and childhood ambiguity**

Article 12 of the United Nations Convention on the Rights of the Child (UNCRC) provides the international legal foundation for children's right to speak as witnesses. In summary, it requires signatories to allow children who are capable of forming their own views to freely express those views in all matters affecting them, and for them to be given due weight in accordance with age and maturity, particularly in judicial proceedings concerning them. It is clear that the historical ambivalence toward, and doubt in, children as witnesses, resonates within the article. In particular, the UNCRC does not directly convey the right to speak and be heard, but makes it doubly conditional, i.e. their speaking is conditional on a judgment of capability, while 'being heard' is weighted depending on age and maturity.

Sociologist Nick Lee argues that the ambivalence expressed here is not a failure on the part of the Article to recognize children's agency and competences, but is a means to contain and manage the sociological phenomenon that he terms 'childhood ambiguity'. This ambiguity originates in what he calls the 'figure of the child', i.e. a common understanding of children as incomplete, as becomings rather than beings, thus dependent, in need of protection and care but also guidance due to the many deficits they are considered to present as not-yet-adults. As a result the commitment to enable children to speak for themselves, is tempered by concerns about their ability to speak as competent witnesses, as well as by concerns that speaking in legal contexts may be detrimental to their welfare (hence warranting their exclusion in the name of protection).

Courts operate on the assumption that all witnesses require the faculties to observe, remember and accurately report a past event, while appreciating the importance of being truthful. Adults are commonly, by default, considered to have those faculties, while children, due to the way they are understood as provisional, yet to complete their journey to adulthood, would by default be seen as potentially lacking some or all of these faculties; for example due to their lack of cognitive abilities, awareness of social conventions concerning truth telling or a tendency for irrational thinking. This makes them doubly ambiguous witnesses who in court do not just have to demonstrate that their specific witness account is accurate and truthful (something every witness will be tested on), but whose performance will also have to overcome the general doubt in their capacity as a witness that precedes them by virtue of being a child.

Lee argues that Article 12 of the UN convention cannot resolve this childhood ambiguity (as it is inscribed into the general discourses and wider social practices

surrounding childhood in modern societies), but that, by making childhood ambiguity explicit, it places some of the burden of managing that ambiguity onto policy makers and practitioners in individual nation states when it would otherwise rest solely on the shoulders of individual children and child witnesses in particular.

Current international child witness practices can then be understood as diverse attempts to respond to and manage childhood ambiguity. Over the past decades, policy makers in many Northern American, European and Australasian countries have developed various approaches and special measures to honor the promise of facilitating children's testimony and amplifying their voice (e.g. implementing measures like video recordings of witness statements, live video links or specially trained interviewers, experts or intermediaries), while at the same time guarding child witness' welfare (e.g. sparing them open court appearances, adapting the court environment or avoiding hostile cross-examination). The efforts take place all the while making sure children are enabled to give reliable evidence (a fearful child witness may not speak, or get confused and not remember or respond accurately), as well as complying with the respective jurisdiction's legal rules and objectives to guarantee a fair trial based on admissible evidence (which might necessitate hostile cross-examination of child witnesses or their direct encounter with the accused in court).

It is important to note that perceptions of children as witnesses and victims of sexual abuse present an added, often gendered, complexity. Erica Burman and others have argued that discourses around childhood traditionally appeal to core cultural assumptions about origin, (sexual) innocence, goodness and immanence. Here innocence is associated with the idea of (sexual) purity and thus truthfulness. This means that children who, as victims of sexual abuse, do display some sexual

knowledge, fail to comply with the image of the a-sexually innocent and naturally truthful child. So paradoxically the very knowledge implied in their victimization can make them appear less credible. Similar issues arise as a result of implicit expectations of children as victims to appear passive and vulnerable. This means where child witnesses/victims display anger, determination or initiative, or are violent and uncooperative (which is not unusual), this will undermine their perceived credibility as victims and thus witnesses, dramatically lowering their chances to have their case brought to court or even investigated. Adult victims of rape face similar problems.

### **Child witness practice today: international examples**

Criminal legal procedure differs significantly between nation states and even within them. There are two, core models of legal procedure: firstly, adversarial, where a jury of sworn members of the public hears evidence brought by two opposing parties (prosecution and defense), in a court run by a neutral judge, the jury deliberate secretly and declare which side won the argument (e.g. UK, USA, Canada, Australia); and secondly, inquisitorial, where there is no jury but a judge/judges investigate(s) a case as well as hearing evidence brought by prosecution and defense, deliberate(s) and make(s) explicitly reasoned judgments (e.g. Germany, France, Norway). The structure of a legal system has a huge impact on how children are considered and dealt with as witnesses, what opportunities they are given to speak and how what they say is heard and used. Consequently children's experience of being a witness differs dramatically. For this reason any research into children as witnesses is best understood in relation to the context the research is conducted in, i.e. what national legal practice it is based on and designed to inform.

***England and Wales (similar to e.g. Scotland, Northern Ireland, Australia):***

There is no minimum age for witnesses and decisions about competence and credibility initially rest with police and later prosecution when considering the likelihood of a conviction. There is a long tradition of researching and improving child witness practice, implementing a wide range of special measures. These include video recording initial interviews with the police which informs prosecutors' decisions and can later be played in court to replace some of children's testimony, live video-links so children do not have to come into court for cross-examination, and intermediaries to support children while giving evidence.

***Israel***

This is considered unusual as despite having a legal system similar to the USA (where witness' live court appearance is key), all encounters of child witnesses with legal processes are mediated via a trained intermediary. They interview the child using a protocol specially developed in research by Michael Lamb and colleagues, make judgments about competence or the need for expert assessments, frequently appear in court to give evidence and be cross-examined on children's behalf, as well as relating opinions about their testimony. Where children do testify in person special measures such as screens or video links may be used. Still, corroboration laws do not permit a conviction based solely on the uncorroborated testimony of an under 12 year old.

***Germany (similarly e.g. Austria):***

Young, pre-school children are routinely called as witnesses, but police/prosecutors or judges will often request assistance from psychological experts specially trained to analyze the credibility of witness statements (using Statement Validity Analysis,

which has a long tradition in German forensic psychological research and practice). The expert reviews the case files, personally interviews the child witness, analyses the statement and reports back to the prosecutor or live in court. Further, children have a victim advocate who represents them during proceedings, live video links may be used, and the child can only be questioned by the presiding judge (who relays others' question).

***Nordic countries (e.g. Norway, Sweden, Denmark, Iceland):***

The Nordic countries run different versions of an integrated child protection system based on the Barnahus model ('children's house model'). This is considered one of the most far reaching and comprehensive attempts to shape legal practice around children's needs. The Barnahus is a custom built center where specially trained multi-agency teams cover all areas of child welfare and protection. Here child victims/witnesses are interviewed by a trained expert within days of a crime report and this is video recorded so it can be shown in court later replacing children's appearance. Crucially other legal professionals (judge, defense and prosecution) attend this interview from behind a one-way mirror to relate questions for the interviewer to ask, thereby also covering cross-examination, meaning the child will not have to make further witness statements/appearances.

***USA:***

The different US jurisdictions vary greatly in their approach to child witnesses and while there are many research-based recommendations for helping child witnesses (e.g. video recording statements or close-circuit TV links to avoid court appearance), it is usually left to judges' discretion whether they allow them. The Constitutional (6<sup>th</sup>

Amendment) rights of the defendant to confront any witness against them means children usually have to give evidence in open court and will face cross-examination. There is no set age for competence and it is still up to individual judges to establish this e.g. by asking children to explain the difference between truth and lies (as part of competency hearings they may call on experts' views).

### **Conclusion**

Internationally the need to facilitate and support children's access to justice is widely recognized and significant improvements have been made to child witness practice over the past decades. Still, it is also recognized that there are persistent problems with the way children are heard and with perceptions of their credibility. This is reflected in recurrent high profile cases where prolific child abuse has gone undiscovered for years, as well as in the persistent problems researchers report in improving child witness practice. Overall, prosecution and conviction rates for child sexual abuse remain very low, indicating more work is needed to better understand what undermines longstanding efforts to improve practice, and why even though conditions for children to speak and be heard have improved dramatically, we still struggle to listen, remaining unsure what to do with what they say.

Johanna Motzkau

See also

Children's Voices; Children as Victims; Child Sexual Abuse; Children's Rights;

Children as Legal Subjects

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