

Child Sexual Assault - Are there Alternatives to Court Action?

DISCUSSION GROUP L

Ferry Grunseit
Child Protection Council New South Wales
Regional Consultant, Child Abuse and Neglect
New South Wales

As child sexual assault is a crime in New South Wales, it is likely that, soon after disclosure, victims of this crime will become involved with the processes of the criminal justice system. In most other forms of child abuse and neglect, children neither have to bear witness nor be a part of court proceedings.

Children who come before the courts are disadvantaged and will continue to remain so, irrespective of changes which may be brought about in procedure from time to time. Adult victims of unprovoked attacks do not blame themselves for the assault but respond spontaneously and retaliate, or report the assault demanding justice and retribution. Children who have been sexually assaulted by an adult behave quite differently. They usually keep the abuse secret, hold themselves responsible for it, feel guilty and are afraid to tell the truth about their experiences and to ask for help. Children want to keep out of trouble and to avoid punishment. They also do not expect to be believed by adults.

A child who has experienced sexual assault usually discloses it long after the event, often tentatively and at a critical time in the child's life, perhaps when the child is in conflict with the family, or more specifically with the father. Often the child is then seen as deceitful and vindictive (Summit 1983).

In the Australian criminal justice system law there is a presumption of innocence - proof of guilt must be beyond reasonable doubt. Yet in a child sexual assault case, many facts important to the child's future may be inadmissible in evidence, because they are considered prejudicial to a fair trial. Thus evidence of previous abuse, previous abusive behaviour by the suspected perpetrator, the suspect's own background of abuse and neglect, and the family's background of violence can never be revealed in a criminal case.

The contest between the parties is harsh and adversarial. It is therefore naive to expect kindness, latitude and consideration for so-called 'innocent' children. Children go into the ring on equal terms with everyone else and even though at the end of the battle the defending lawyer may regret the trauma suffered by the child involved in the case, the child will often emerge from the court sadder, more bruised and not greatly impressed by the adult world and the administration of justice. The very innocence and immaturity of children mitigate against them when they confront jury, judge and an array of unsmiling, doubting and hostile adults. Paranoia is easily evoked in a court environment and children are particularly vulnerable.

In criminal cases the interest of the accused is paramount and to the lawyers the child is just another hostile witness. Where the evidence presented cannot establish the guilt beyond reasonable doubt - a frequent outcome in alleged sexual assault - the accused must be acquitted. However, the way in which the evidence is presented by the prosecution and the competence and fierceness of the defending lawyer may be crucial in convincing a court and jury that the accused is innocent.

It was recently reported by a morning paper that the police found a man, known to be a habitual paedophile, in bed with a twelve-year-old boy. Though the medical evidence proved homosexual intercourse, the accused's lawyer stated that his client would 'strenuously deny and defend' all charges. The two teenagers involved told a fantastic story of sexual and physical abuse, combined with strange quasi-religious erotic rites. Though they could not conceivably have fabricated such a bizarre story, the jury did not believe them.

Four trials involving sexually abused children seen at the Royal Alexandra Hospital for Children Protection Unit had to be aborted or rescheduled; one because of a language problem, a second because of a flawed question asked by a lawyer, a third because of a question about the expertise of a medical witness, and a fourth because the jury failed to agree on the verdict.

The primary concern of the defence is to see that the accused is acquitted and in order to achieve this goal the defence will use any means available to it. Many published studies show that children are intimidated, bewildered and even terrified by what goes on in a police station or a courtroom (Jones & Krugman 1986). Indeed many adults feel the same. Certainly all the courtroom trappings, the judge's bench, the witness stand, the sombre black robes, the wigs, the strict rules of procedure, all these things are designed to create an atmosphere of authority and utmost seriousness - to elicit truthfulness by instilling awe and fear.

From an early age children are taught to obey, respect, and also to fear adults. They are often made to feel guilty and they learn to expect retribution for their misdeeds, without much differentiation between major and minor transgressions. It is therefore easy for a magistrate, barrister or judge to intimidate a child. All that is needed is a little persistence, obfuscation, a stern look, a harsh word or an impatient tone of voice. Courts have never been kind to children - until the beginning of this century children of tender years were incarcerated in adult prisons in both the United Kingdom and in Australia.

Reliability of Child Witnesses

Adults have always considered children to be unreliable witnesses. Yet children cannot conform to adult criteria applied to their evidence. There are myths enshrined in legal history that children often lie or make up stories, that they cannot discern the difference between reality and fantasy, that they cannot remember events correctly, nor relate events and times reliably.

Numerous papers have been written and many studies done (Nurcombe 1986; Goodman 1981 and 1984; Johnson 1984; Davies 1986) which do not confirm this convenient belief. In cases where either the child retracts the statement or admits that they have made up the whole story of abuse, subsequent revelations of fresh abuse often show that the change of mind was a defensive mechanism, allowing the child to survive and illustrating the child's despair at being disbelieved.

Medical Evidence

Medical evidence is considered to be very important in cases coming before the courts. Yet there is not always unanimous agreement as to what is or is not a normal finding.

Hendrika Cantwell (1983) reported that a vaginal opening greater than 4 mm (VO+) was indicative of child sexual assault. The observed enlargements proved to be a reliable prediction in 74 per cent of the cases where there was a positive history of child sexual assault (in 70 of 95 girls examined). Cantwell (1987) states that, in 1983, six girls who were originally reported to have a VO+ but a negative history were re-examined by her because of a new allegation of child sexual assault. These girls retracted their previous false denial, stating that they had experienced sexual abuse prior to their first examination. False denial is more likely than fabrication of a complaint and therefore a second examination may be in the interests of the child, provided there are other cogent reasons for subjecting a child to this unpleasant experience more than once.

However, it should be remembered that in the majority of cases of child sexual abuse there is no positive medical evidence of abuse.

Children's Language

The latest study on 'Child victims under cross-examination' (Brennan & Brennan 1988) shows that children's language is not the same as adult language. Children often do not understand the meaning of questions asked in ways acceptable to adults. They certainly fail to understand much of what is asked and said in court hearings. Children report facts but use different ways of describing them. A three-year-old who said 'man put needle in my bottom' meant that the little girl's brother had several times stuck his finger in her anal orifice. A young girl described full intercourse yet the medical evidence did not confirm this. She was not lying, but rather told what she believed had happened to her. In fact she was describing vulval or simulated intercourse. One girl told such a story but refused examination. Her story was not believed and no further action was taken. Some time later she again reported child sexual assault and this time it was confirmed by corroboration and medical examination.

There is no reliable past or recent evidence that children often fabricate stories about abuse, despite some anecdotes about children making up such stories. They rarely make up stories which are going to result in their exclusion from the family, in being hated by siblings, relatives and parents, in sending their father to gaol and their mother to a psychiatric ward, and in finding themselves in foster care or in a refuge. Yet this is the picture which is so often put before the court.

Despite recent changes to the law regarding evidence given by children, some judges still feel that the jury ought to be warned that the unsworn and uncorroborated evidence of children must not be given the same weight as that of an adult.

Young children are trusting, innocent and easily influenced by adults. They are taught to obey adults and to submit to their authority. They are taught 'to be good'. The child will repeat exactly what they have been taught (Jones 1985). Rather than telling the whole story of an experience of abuse, the child may repeat only fragments of it, or may remain altogether silent. This is especially likely to occur under pressure in court.

For a long time our response to the occurrence of child sexual assault has been to ignore it, then to deny it, or to say that it is uncommon (Grunseit & Ford 1985). When a particularly brutal sexual assault occurs people become enraged and demand instant retribution. There are demands for castration of offenders and for the death penalty to be reintroduced for such crimes. The demand for retribution is so loud that the previous New South Wales Government responded by legislating for very long gaol terms in child sexual assault cases. The 1985 Crimes (Child Assault) Amendment Bill provides for twenty years' gaol for sexual intercourse 'in its broadest sense' with a child under the age of ten. A father or teacher faces ten years gaol for intercourse with a ten to sixteen-year-old. The courts rarely impose maximum sentences and even when they do, offenders usually only serve a fraction of the sentence. Despite claims that these laws have great merit, there has so far been no decline in child sexual assault.

Prison does not alter behaviour nor does it benefit the child. Some critics of intervention in child abuse claim that all that intervention achieves is to complete the disintegration of a very damaged family. The recent introduction of minor modifications to the court environment and other cosmetic changes to the system are unlikely to help children significantly. Even if all the latest advances in technique and technology are adopted, we are left with an adversarial system which does not care about children. The recent cases of child sexual assault in California (*the McMartin case*, Summit 1986) and in the United Kingdom (The Cleveland Inquiry 1988) in which expert evidence was ultimately shown to have been unreliable, prove that there has been a strong reaction by defending lawyers in child sexual assault to the type of evidence submitted by the prosecution. Thus the children and their families in these cases have been subjected to a great deal of trauma, while the cost to the taxpayer is considerable and the end result not beneficial to anyone. In Australia, expert evidence was seriously attacked in the notorious Azaria Chamberlain case and it is likely that a lot of so-called expert opinions about matters relating to sexual abuse will be vigorously challenged in the future as a result of what happened here and overseas.

Sexual assault is rarely witnessed. Only the perpetrator and the victim know what took place. New technology used in gathering evidence of such abuse makes this process more intrusive than previously. For instance, the use of anatomically correct dolls distresses some children, especially if they have not been sexually abused. A whole new industry has been created which is very good for bureaucrats, doctors, lawyers, the police and film makers but which is of doubtful value to children. Inexperience in investigating child sexual assault may lead to unnecessary further distress and enthusiasm is no substitute for professional competence.

What Alternatives are There?

Some professionals believe that many cases of child sexual abuse should be decriminalised. Even now most cases of child sexual assault are dealt with in the same way as other forms of child abuse and neglect, are not prosecuted at all, or unsuccessfully prosecuted. The child victims rarely benefit in any way.

What needs to be achieved in these cases is that:

- abuse should stop forthwith;
- the child should be protected from further abuse;
- the child should be helped to cope with what has occurred;
- the child and other family members should be rehabilitated;
- offenders should receive 'treatment' as well as punishment;

- where there is good reason to suspect that sexual abuse is occurring, the child should not be removed from the family but the suspected perpetrator should be separated from the child.

If these goals could be achieved by negotiation and agreement, without the ordeal of court appearances for the child, then so much the better. R. Krugman, editor of *Child Abuse and Neglect* states:

I would emphasise that the criminal prosecution of a case of sexual abuse should be a secondary aim for paediatricians. The primary aim is to protect children ...

and later he states:

One of the greatest mistakes we can make is to proceed only with criminal prosecution and forget that it is the juvenile court that is in place to protect children (1987).

I would like to see court action either through the Children's Court or the Family Court without the child appearing as a witness, or with the use of a child advocate who can speak on behalf of the child in court. Recently passed laws dealing with domestic violence could ensure that the suspected offender is removed from the child's home until the matter is resolved through investigation and assessment of the known facts.

Alternatives to Court Action

Offenders should be given the incentive to admit their guilt and to seek treatment for their unacceptable behaviour. So far the pre-trial diversion program, modelled on that developed in Sacramento, has not yet begun in New South Wales. When introduced, it will initially cater only for twenty-five offenders, presumably because of cost. It will not be possible to draw any conclusions about the merits of this treatment from such a small number of participants.

Although there are more than 200 treatment programs for offenders in the United States of America, the available analysis of benefits is inconclusive. The Giaretto Program (Giaretto 1982) is one which treats sentenced offenders who pleaded guilty. Such a plea ensures that child victims need not appear as witnesses in court. If Giaretto is to be believed (Giaretto, Giaretto & Sgroi 1977; Giaretto 1977), the system used by his group in Santa Clara County has been successful in 90 per cent of cases (after fifteen years of experience in treating large numbers of offenders and their families), and this system should be examined more closely with a view to its possible adaptation in Australia.

Conclusion

Through a process of education it should be made clear to all adults, males in particular, that sexual activity with children is wrong and can never be justified. Children are incapable of giving informed consent so the responsibility always rests with the older person.

Adults must learn to believe children when they disclose about sexual assault. However, neither the reporting nor the prosecution of cases of sexual assault will bring about a significant decrease in its incidence.

During the delay between reporting and the resolution of the case, children often receive no treatment. This may seriously interfere with their recovery. Not infrequently, children are abused again during that time. The emphasis for the future should be the prevention of child sexual assault through a change in the perception of adults about children and their rights.

Resolutions

The discussion group made the following resolutions:

- the discussion group did not want child sexual abuse to be decriminalised;
- the pre-trial diversion system to be introduced in New South Wales was not thought to be a good alternative for offenders in that it was untried and may ultimately not prevent the appearance of children as witnesses in court in a significant number of cases;
- the Giaretto humanistic approach appeared to be more acceptable although one had reservations about its high rate of success (90 per cent);
- the Giaretto approach is not an alternative to criminal court action but an alternative to the child being involved in the court system;

- two alternatives which could be tried apart from that of the child advocate used in Israel were suggested:

- Suspended prosecution

Admission of guilt by offender. The offender agrees to abide by a number of undertakings, such as leaving the house and staying away from the victim;

The approach is more of 'a social or humanistic' one as regards family, victim and perpetrator but if the undertakings are broken, prosecution follows;

- An inquisitorial system similar to that operating in France where on the best available expert evidence the child would be unduly affected by the court experience;

The child's statement would then be recorded on a video and a 'friend' would appear to give the evidence;

- the need for changing the perception our society has about children and about their rights was emphasised;
- the 'cultural' response to child sexual abuse was also highlighted and the group felt that we must endeavour to change this attitude by education of all people, not only professionals;
- the criminal justice system is wanting when it comes to dealing with children. As it is not sacrosanct and could be changed if society demands, it should be changed so that children are not disadvantaged to such an extent by the system when they appear in courts of law.

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