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Children as Vulnerable Witnesses

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Content

- ◆ Memory
- ◆ Suggestibility
- ◆ Delayed disclosure
- ◆ Children with disabilities
- ◆ Impact of stress & trauma
- ◆ Questioning techniques
- ◆ Competency testing
- ◆ Permissible expert evidence
- ◆ Judicial intervention

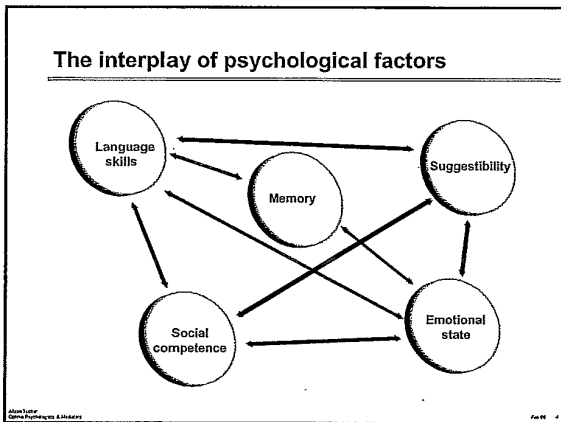
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Witness testimony

“Sexual abuse is a very private, well-concealed crime typically involving only the victim and perpetrator, with no witnesses. We are reliant on contemporaneous or retrospective verbal disclosure ... The child or adult’s verbal disclosure is typically the primary, if not the only, evidence that abuse occurred”

(Pipe, Orbach, Lamb & Cederborg, 2007)

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Skills required by a child witness

A child witness has to have the *memory* skills to:

- ♦ Encode information about an event
- ♦ Store / retain that information
- ♦ Retrieve that information
 - BUT ALSO the *comprehension* skills to understand the questions
 - AND the *verbal* skills to describe the event and the context
 - AND the *cognitive* skills to differentiate between what happened and what didn't
 - AND the *social* skills to withstand 'social desirability' influences
 - AND the *emotional* self-regulation skills to cope with stress

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Skills required by the interviewer 1

The quality of a child's evidence is significantly determined by the competency of the adult asking the questions.

The interviewer needs to:

- ♦ Understand the child's developmental level and intellectual capacity
- ♦ Use language the child can understand
- ♦ Structure questions in a way that supports reliability

... cont'

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Skills required by the interviewer 2

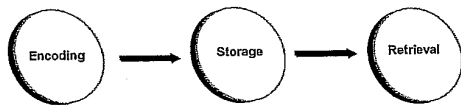
The interviewer also needs to:

- ♦ Listen closely to the answers the child gives
- ♦ Clarify misunderstandings
- ♦ Understand the possible impact on the child of the context (family, cultural, social)
- ♦ Identify when the child's level of stress is impacting on cognitive functioning

Alan Turkul
Senior Psychologist & Mediator

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Memory: the retention of experience



Procedural memory: *"how things work"*
events and their context

Semantic memory: *"what things are"*
our world knowledge

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Senior Psychologist & Mediator

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Memory retention

Memory retention is affected by factors such as:

- ♦ meaningfulness of the original event
- ♦ existing knowledge and how the event was understood
- ♦ re-experiencing the event, or remembering it
- ♦ age at the time of the event
- ♦ general intelligence
- ♦ passage of time

Alan Turkul
Senior Psychologist & Mediator

Memory retrieval

Memory retrieval is affected by factors such as:

- ◆ what was paid attention to at the time of the original event
- ◆ understanding of what memory is being sought when questioned about the event
- ◆ competing memories of similar events
- ◆ motivation to retrieve that particular memory

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Consistent findings about memory:

- ◆ Children can accurately retain and recall memories of significant events, particularly central details
- ◆ Passage of time affects memory retention and recall, particularly of peripheral details
- ◆ Children's abilities to retain and recall memories improve with age
- ◆ Intelligence level affects memory
- ◆ Prior knowledge influences how events are experienced and what details are attended to

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Memory: Implications for practice

CASE STUDY

What assumptions might be made by a judicial officer / jury about Janet's memory capacity?

Might these assumptions be different if Janet was younger at the time of disclosure (8 years old, Counts 1-3)?

From your experience, how would you challenge such assumptions?

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Suggestibility:

the tendency to change memories and beliefs in response to questioning

Suggestibility can occur due to social factors, e.g.

- > suggestive and misleading questions
- > compliance
- > the influence of a perceived adult authority figure

And to cognitive factors, e.g.

- > misperceptions at the time of the event
- > false information subsequently incorporated when memories are recalled
- > the brain's tendency to merge similar events

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Consistent findings about suggestibility:

- ♦ young children are more suggestible than older children and adults
- ♦ suggestibility harder to evoke when event is personally significant, even in young children
- ♦ strength of memory for an event may be less than strength of new, suggested information
- ♦ children are more suggestible to misleading information from an adult authority figure
- ♦ false reports can be due to a combination of social and cognitive factors (such as suggestibility and weak memory for event)
- ♦ children with disabilities can be more vulnerable to suggestibility - need to know level of intellectual functioning and nature of disability before questioning

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Versus lying: the intention to deceive

"A conscious act of distorting the truth, with the deliberate goal of deceiving the questioner."

- ♦ true information can be withheld (an act of omission), or false information can be given (an act of commission)
- ♦ children and adults lie
- ♦ with children, motivations for lying include avoiding punishment, keeping a promise, avoiding embarrassment or shame, getting a reward, being accepted, protecting a loved one

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Suggestibility: Implications for practice

CASE STUDY

What assumptions might be made by a judicial officer / jury about Janet's level of suggestibility?

Might these assumptions be different if Janet was younger?
 > Would you be more concerned?

How would you challenge such assumptions?

What about claims that Janet is lying?

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Delayed & Fragmented Disclosure

Failure by a child to disclose at the time due to:

- ♦ not understanding the significance of the event
- ♦ embarrassment, shame, self blame
- ♦ fear of reprisals (punishment, harm to others, abandonment)
- ♦ perceiving that they won't be believed
- ♦ believing they have to keep their promise not to tell
- ♦ lack of adult support

Fragmented disclosure is common for similar reasons.

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Case example Sjoberg & Lindblad (2002); Cederborg, Lamb & Laurall (2007)

Confirmed sexual abuse:

- first incident when 4 years old; final incident when 11
- 4 videotaped incidents, including 'severe abuse'
- perpetrator a relative

Boy, 12 at time of interview

- 1.5 years after final incident
- under-reported what happened, each time
- blended information from the different incidents
- said he did not think about telling, was afraid to, tried to forget
- said he didn't want to participate / didn't understand
- (In fact played an active role, made suggestions)

Researchers hypothesised minimisation due to shame

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Findings about delayed disclosure

Some findings

- ♦ retrospective study of adults (n=319) who reported childhood sexual abuse. 22% did not disclose abuse during childhood. (Bottoms et al, 2007)
- ♦ review of 21 studies with evidence of sexual abuse (STDS), consistently low disclosure rate (Lyon, 2007)
- ♦ e.g. 10 year old girl who was pregnant, interviewed 7 times yet did not disclose (Horowitz, 2007)

Current need for specific interview techniques for reluctant children.

Janet Taylor
Centre for Psychological Studies

Delayed disclosure: Implications for practice

CASE STUDY

What assumptions might be made by a judicial officer / jury about Janet's delayed disclosure?

What about if her disclosure was fragmented / incomplete?

How would you challenge such assumptions?

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Centre for Psychological Studies

Children with disabilities:

factors that can impact on ability to give evidence

Cognitive factors, such as ...

- ♦ memory & language skills
- ♦ general intelligence level
- ♦ information processing style & time

Social factors, such as ...

- ♦ more vulnerable to the influence of perceived authority figures
- ♦ more prone to using avoidance strategies
- ♦ difficulty with conversational exchanges
- ♦ unusual demeanour

Environmental factors, such as ...

- ♦ vulnerability to distraction

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Centre for Psychological Studies

Child witnesses with disabilities

- ♦ intellectual (e.g. Downs Syndrome, autism, brain injury)
- ♦ sensory (e.g. profound visual impairment, hearing difficulties)
- ♦ learning (e.g. dyslexia)
- ♦ behavioural (e.g. conduct / attention deficit disorders)
- ♦ emotional (e.g. significant depression / anxiety disorders)

DPP anecdotal random sample of files, 2009

- 5 out of 65 witnesses identified with a disability
- 14 y.o. with Downs Syndrome
- 15 y.o. with intellectual disability
- 14 y.o. & 15 y.o. with learning disability
- 15 y.o. with serious mental health issues

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Children with disabilities:
ability to give evidence

- ♦ recall of past events can be accurate, but incomplete
- ♦ narrative account can be idiosyncratically organised
- ♦ wide range of cognitive capacity with any disability - each witness needs individual evaluation
- ♦ evaluation needs to account for type of questioning in criminal justice system
- ♦ extent of disability may be hidden by a higher level of social functioning

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Children with disabilities:
ability to give evidence ... cont'

- ♦ more questioning needed to provide structure for recall
- ♦ increased risk of suggestibility given more questioning
- ♦ increased vulnerability to suggestion due to social factors
- ♦ more suggestible than same aged children, but can be equivalent performance to children of same mental age

(e.g. Ruegg, 2002; Saywitz et al, 2007)

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Children with disabilities:
 implications for practice

- ♦ How do you know the child witness' mental age (not their chronological age)?
- ♦ How does their disability affect their ability to give a narrative account / their demeanour?
- ♦ How is the judicial officer / jury to be informed?
- ♦ What scope is there for special provisions:
 - communication aids?
 - special interview techniques?
 - an intermediary to 'interpret' between the child and the Court?

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Giving evidence: the stress response system

The *hyper-arousal* stress response

- ♦ known as the 'flight / fight' response
- ♦ e.g. blood redirected from the brain to the muscles, rapid breathing, increased heart rate, increased adrenalin, emotionally reactive

The *dissociative* stress response

- ♦ known as the 'freeze' response
- ♦ e.g. blood redirected away from the limbs, slowed breathing, slowed heart rate, increased endogenous opioids, emotionally numb

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Giving evidence: the stress response system cont

- ♦ when under threat (real or perceived), the stress response system will take over
- ♦ physiological changes due to the stress response system can significantly impair capacity to use whole of brain
- ♦ regain full cognitive capacity when perceived threat is removed and recovery has occurred

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Giving evidence:
managing children's stress responses

- ♦ familiarise the child with the physical environment
- ♦ educate the child about the 'ground rules' of proceedings
- ♦ use developmentally sensitive language - verbal & non-verbal
- ♦ provide a supportive environment
- ♦ help the child self regulate (prevention)
- ♦ notice when dys-regulation takes place (intervention)

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Giving evidence: the impact of trauma

When there is severe or enduring exposure to threat, our stress response system can become hyper-sensitised.

This can result in traumatic hyper-arousal symptoms such as

- ♦ intrusive memories (e.g. flashbacks)
- ♦ intrusive emotional states (e.g. humiliation, guilt)
- ♦ persistent symptoms of arousal (e.g. startle response, sleeping difficulties)

There also can be traumatic dissociative symptoms ranging from brief disengagement (spacing out), to detachment / numbing, to amnesia

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The enduring effects of trauma & abuse

Positive developmental outcomes are compromised in children (& adults) if the damage of trauma & abuse is not repaired:

- ♦ Continued elevated stress responses / post-traumatic effects
- ♦ Entrenched cognitive distortions
- ♦ Altered emotionality & poor emotional self-regulation
- ♦ Impaired self-reference & identity issues
- ♦ Disturbed social functioning & dysfunctional relationships
- ♦ Avoidance of life's typical challenges

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Stress & trauma: Implications for practice

CASE STUDY

How would you know if Janet became unduly stressed giving evidence?

What would you do?

How would you know about any effects of trauma & abuse on Janet?

How would you convey this knowledge to the judicial officer / jury?

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Questioning of children

"The most important factor... in eliciting reliable and detailed information from a child about an event or a situation... is the questioning technique"

"The central aim... is to obtain an account of the event or situation in the child's own words, with as little specific prompting as possible from the interviewer"

(Powell & Snow, 2007)

David Carter
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Memory recall

Varying in the cognitive effort and ability required, & the extent of questioning:

Free recall

- most complex
- 'internally' need to recall the whole event
- 'externally' no or minimal questioning

Reconstruction recall

- recall segments of the event
- 'internally' can prompt the recall of other segments
- 'externally' can be questioned to recall segments

Recognition recall

- easiest
- 'externally' are questioned - all options offered

David Carter
Child Psychology & Welfare Jan 08 23

Open ended questions (Powell & Snow, 2007)

- ♦ accuracy is enhanced if children can give a 'free narrative' account (uninterrupted other than by general prompts / open ended questions)
- ♦ open ended questions can be 'broad':
 - "Tell me everything you can remember about..."
 - "Start at the beginning"
 - "What happened next?"
- ♦ open ended questions also can be 'deep':
 - "Tell me more about the part where..."
- ♦ 'minimal encouragers' can keep a narrative account going

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Specific questions

- ♦ after the narrative account, specific questions need to be used to get more detail
- ♦ wh- questions (*what, who, where, when*) as well as *how, did*
- ♦ move back into a narrative account when possible, using a follow up open-ended question
- ♦ repeat what the child said, to link them to that part of their account. "You said xxx. Tell me more about that"
- ♦ Be careful with *when* questions in children under 8 years, and *why* questions in children under 10 years
- ♦ If using a closed question (yes / no), follow up with a more open question

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Difficult questions

Use of the negative

- ♦ "Now you had a bruise, did you not, near one of your breasts, do you remember?"
- ♦ "No" (12 yo)

Multifaceted questions

- ♦ "Now do you say that whatever it was that happened, or whatever it was that happened to Dianne, you were in the toilet at the time and you obviously heard something, did you?"
- ♦ "Yes" (11 yo)

Specific and difficult vocabulary

- ♦ "See, daddy did not interfere with you on this day, did he?"
- ♦ "No" (7 yo)
- ♦ Prosecutor intervenes "...and you know what Mr Smith means when he says interfered with you"
- ♦ "No"

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(Brennan & Brennan, 1988) Page 41

Questioning children: Implications for practice

CASE STUDY

From your experience, how would you elicit a free narrative account from Janet?

How do you shift between open ended and closed questions?

How would you intervene if Janet was asked difficult questions under cross examination?

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Competency

"Competency is about the essential issue of children being permitted to give evidence, given their tender years and the basic question of whether they have sufficient intellectual development to give a rational account, and at the same time understand the obligation to tell the truth"

(Ball, 1995)

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Competency: children's capabilities

- ♦ children have the capacity to tell the truth from a young age
- ♦ harder to define abstract concepts of truth and the duty to tell the truth
- ♦ understanding of the moral obligation to tell the truth usually develops around 9-10 years of age
- ♦ concrete examples help differentiate between truth and lies - as an abstract concept, 'truth' is difficult to define
- ♦ some research that young children promising to tell the truth reduced lying in experimental situations
- ♦ a child promising to tell the truth may be sufficient indication that they understand the necessity of telling the truth (independent of whether or not they will be truthful).

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Competency testing: 'rapport' phase

Judicial officer could:

- ♦ introduce participants
- ♦ explain the Court set up
- ♦ encourage a narrative report about familiar topics (but maybe not)
- ♦ explain the rules of the Court regarding truth and lies
- ♦ explain other rules of the Court:
 - say if don't know the answer,
 - ...if don't remember,
 - ...if don't understand the question
 - ask for a break if needed

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Competency testing: truth vs. lying phase

STEP 1: Knowing the difference between truth and lying

- ♦ "I want to talk to you about what it means to tell the truth or to tell a lie. What do you think a lie is?"
- ♦ Look for a response where a lie is something that didn't happen. Either the child refers to this or you do.
- ♦ "If I said xxxx, is that a lie or what really happened?"
"What makes that a lie?"

STEP 2: Court tells child the importance of telling the truth

- ♦ "It's very important that we both talk about things that have really happened"
- ♦ "Do you think it's important to only tell me what really happened?"
- ♦ "Is is a good thing or a bad thing to tell a lie?"

STEP 3: Child promises that they will not tell any lies in Court / that they will only tell the truth in Court

(Wilson & Powell, 2001)

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Oath-Taking Competency Picture Task (Lyon-Saywitz)

Reality story

A picture: Two boys standing before a judge, with an object such as an apple above the judge's head. One boy has a 'talk bubble' with an apple in it above his head, the other has an orange.

e.g. "Now listen to what the boys are saying to the judge. One says it's an apple, one says it's an orange. One of the boys is telling the truth and one of the boys is lying. Point to the boy who is lying"

Morality story

A picture: Two children standing before an adult (a doctor, a grandmother, a judge, a social worker).

e.g. "One of the children is telling the truth and one them told a lie. Which one is going to get into trouble"

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Competency testing of children:
 implications for practice

- ◆ How do you determine a child's ability to differentiate between truth and lies?
- ◆ Are you ever expected 'on behalf of' the judicial officer to assess this?

David Lundy
 Senior Psychologist & Trainer

Permissible expert evidence

Educative / general expert testimony
 "knowledge derived from scientific research that gives an appropriate context for understanding specific evidence in a given case"

Diagnostic / specific expert testimony
 based on an examination of the child

David Lundy
 Senior Psychologist & Trainer

Permissible expert evidence

- ◆ not needed when can rely on "the ordinary experience of the trier of fact"
- ◆ BUT a review of five studies (1992-2005) re beliefs of lay people and jurors about children alleging sexual abuse:
 - easily manipulated to make false reports (>50%)
 - physical evidence of sexual abuse (>50%)
 - exhibit bizarre sexualised behaviour (41%)
 - cannot remember well enough to be reliable witnesses (31%)
 - inconsistencies are evidence of lying (29%)

(Cossins, 2008)

David Lundy
 Senior Psychologist & Trainer

Permissible expert evidence vs. directions

- ♦ Directions re children's abilities as witnesses, e.g.
 - even very young children can accurately report things that happened to them in the past, but may not in the same manner or to the same extent as an adult
 - inconsistent or incomplete accounts of events do not mean that a child is fabricating
 - when deciding how much weight to put on a child's evidence, consider the way in which they were questioned
- ♦ Directions re children's responses to sexual abuse, e.g.
 - no single set of symptoms or behaviours that all sexually abused children display
 - physical symptoms of sexual abuse are infrequent
 - delayed disclosure and retractions are not uncommon

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Child Psychology & Welfare (Crossin, 2008) p. 48

Judicial intervention: implications for practice

- ♦ From your experience, what is effective judicial intervention?
- ♦ Whose role is it to prevent verbal interactions that cognitively (e.g. through confusion) or emotionally (e.g. through intimidation) impair a child witness' ability to give evidence?
- ♦ Whose role is it to monitor the child witness' stress response (e.g. ask for breaks)?
- ♦ Who is responsible for educating the jury? How far can prosecutors go?

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