

**CHILD WITNESSES IN THE CRIMINAL JUSTICE SYSTEM IN SOUTH
AFRICA: AN OVERVIEW OF PROPOSALS FOR REFORM**

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1 Introduction

Dramatic changes regarding the position of child witnesses were introduced into our criminal justice system in 1993. Although the reform measures have improved the lot of children in court, some time has elapsed and thorough research has been done on this subject. As a result of such research certain deficiencies of the present regime have been exposed and various proposals for reform were made. The object of this paper is to discuss certain rules of evidence and criminal procedure applicable to the testimony of children which are in need of further reform. The following topics will be discussed: (1) the use of intermediaries; (2) admissibility of pre-recorded video-taped statements; (3) children's competency to testify; (4) the application of a cautionary rule to child witnesses.

2 The use of intermediaries

2.1 Introduction – contents/protection of child

Section 170A of the *Criminal Procedure Act*¹ is the most important enactment in South African law to protect child witnesses against procedural abuse. For our discussion regarding possibilities of reform the following provisions are relevant:

- (1) The court may appoint a competent person as an intermediary through whom all examination, cross-examination and re-examination shall take place if it appears that testifying would expose a witness under the age of 18 years to “undue mental stress or suffering”.²
- (2) The court may direct that the child witness shall give his evidence in a place other than the courtroom (a) which is informally arranged to set that witness at ease; (b)

¹ *Criminal Procedure Act* 51 of 1977.

² Section 170A (1) and (2)(a) *Criminal Procedure Act* 51 of 1977.

which is so situated that any person whose presence may upset that witness, is outside the sight and hearing of the 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 device, the intermediary as well as the child witness during his testimony.³

The section is not restricted to charges of sexual abuse or physical abuse and it is not limited to victims. It can be invoked in all criminal proceedings and the protection offered also applies to non-victim witnesses under the age of 18 years. In practice, however, the section is most often invoked in sexual abuse cases where the child happened to be a witness for the prosecution.⁴

Section 170A *Criminal Procedure Act* 51 of 1977 has improved the protection offered to the child witness who is unable to convey adequately his/her testimony due to fear, alienation and anxiety in that it reduced the stress and suffering experienced by the child. This is achieved by removing the child from the court environment and by removing any direct confrontation between the child and the accused. Although much of the stress experienced by child witnesses has been relieved by this section, it is still open to criticism on various grounds. Due to thorough research by various South African jurists the past few years certain problems with the wording and practical application of the section have been identified and several suggestions for reform have

³ Section 170A (3) *Criminal Procedure Act* 51 of 1977.

⁴ Murdoch Watney 1998 *THRHR* 432; Cassim 2003 *CILSA* 75, 81.

been made.⁵ One may say that it is generally accepted that the section requires revision.⁶

The different suggestions for reform will be discussed very briefly. This paper is restricted to the following two aspects, namely (1) the discretionary nature of the section and the test that has to be applied, and (2) the function and role of the intermediary.

2.2 Discretionary nature of the section and meaning of “undue mental stress or suffering”

The procedure in section 170A *Criminal Procedure Act* 51 of 1977 is not automatic. It is only applicable if the prosecution makes an application for the appointment of an intermediary, and for a direction that evidence should be given in a separate room via electronic media. The courts are not obliged to appoint an intermediary and may do so only when it is convinced that a witness under the age of 18 years will be exposed to “undue mental stress or suffering” if he testifies at such proceedings. It therefore appears that an intermediary may only be appointed if such intermediary is necessary to overcome the stress and suffering which the child witness will experience by testifying in court.⁷

⁵ See for instance Müller 1999 *THRHR* 244, 256.

⁶ In *Klink v Regional Court Magistrate* 1996 3 BCLR 402 (SE) 408B-C the court remarked that “the section may well require revision having regard to possible anomalies that may arise in its application”.

⁷ Müller 1999 *THRHR* 244; Schwikkard 1996 *Acta Juridica* 159; Cassim 2003 *CILSA* 72; Steytler *Constitutional Criminal Procedure* 349.

If the application is opposed, an expert witness should be called to give evidence about the possible effect of a court appearance on the child.⁸ If it is unopposed the prosecutor should supply the court with the necessary information in order to enable the court to make an informed decision.⁹ However, in practice an intermediary has been appointed on occasion simply on the grounds that the witness is a minor and even though the prosecution did not show that the witness will be exposed to “undue stress or suffering”.¹⁰ In *S v Mathebula*¹¹ on the other hand, the trial court was criticized because it did not consider the question as to whether or not child witnesses would be exposed to undue mental stress or suffering.

The discretionary nature of section 170A *Criminal Procedure Act* 51 of 1977 and the test to be applied have been criticised on the following grounds. The problem appears to be that testimony through an intermediary is viewed as the exception rather than the rule:

1. There is no definition of the expression *undue mental stress or suffering* and also no guidelines which a court should take into account. As these concepts are by their nature extremely vague and difficult to give content to it is uncertain as to what will amount to “undue mental stress or suffering” and how acute the mental stress or suffering must be before it can be classified as undue.¹² This may give rise to

⁸ The position in South Africa is not clear, but in the United States only expert witnesses can be called. Müller 1999 *THRHR* 248; Murdoch Watney 1998 *THRHR* 432-433.

⁹ Murdoch Watney 1998 *THRHR* 432-433.

¹⁰ Müller 1999 *THRHR* 246 refers to the unreported case of *S v Els* ECD case no. SH 6/29/95.

¹¹ *S v Mathebula* [1996] 4 All SA 168 (T).

¹² Schwikkard 1999 *SACJ* 259 discusses *S v F* 1999 1 *SACR* 571 (C) and *S v Stefaans* 1999 1 *SACR* 182 (C) in order to illustrate the dangers of conferring a discretion on judicial officers in areas where they may not have the competence to exercise their discretion.

inconsistent decisions with resultant injustices. One court may find that certain factors amount to undue mental stress or suffering, while another may not come to the same conclusion on the same facts.¹³

2. The fact that the witness would merely suffer the ordinary stress experienced by persons who testify in court or by complainants in sexual offence cases is not sufficient to justify the use of the procedure. The section can only be implemented if the witness would suffer more stress than that ordinarily experienced.¹⁴ Yet research has indicated that even the ordinary stress suffered by a child when testifying in an adversarial environment is undue.¹⁵
3. On the other hand, if a child experience no trauma or stress from testifying in court, but is unable to understand the language employed in court because he/she is too young, section 170A *Criminal Procedure Act* 51 of 1977 would not be applicable and the child would not be able to make use of an intermediary.¹⁶
4. Section 158 *Criminal Procedure Act* 51 of 1977 provides for witnesses older than 18 years (for example rape victims or victims of violent crimes) to testify by means of closed circuit television or similar electronic media without actually being present in court.¹⁷ While the application of section 170A *Criminal Procedure Act* 51

¹³ In *S v F* 1999 1 SACR 571 (C) the court denied an application in terms of s 170A on the grounds that the witness (complainant in a rape case) would in any case suffer stress even if she testifies through an intermediary. See Schwikkard 1999 *SACJ* 262 for criticism on this decision.

¹⁴ *S v Stefaans* 1999 (1) SACR 182 (C) 187b-d; Müller 1999 *THRHR* 245.

¹⁵ Schwikkard 1996 *Acta Juridica* 159; Schwikkard 1999 *SACJ* at 262. Schwikkard refers to research done by Goodman G and Helgeson V “Child sexual assault: Children’s memory and the law” (1985) 40 *University of Miami Law review* 181.

¹⁶ Müller 1999 *THRHR* 247-248.

¹⁷ See Müller and Tait 1999 *SACJ* 60-61; Murdoch Watney 1996 *THRHR* 441.

of 1977 is limited to witnesses younger than 18 years, section 158 may be employed if the witness is older than 18 years. Section 158 will not be of assistance to young children as they will not be allowed to testify with the assistance of an intermediary. If they need an intermediary they should make use of the procedure in section 170A.

The anomaly is that the test which has to be complied with in order for section 158 to be invoked is not nearly as stringent as the test laid down in section 170A. The court should only be convinced that it should be in the interest of justice to receive evidence via electronic means, or that it will prevent the likelihood that prejudice or harm might be experienced by any person testifying at the proceedings, or that it would be convenient to do so, or that it would save costs, or that it would prevent unreasonable delay.¹⁸ Clearly, this distinction between the tests to be applied in terms of the two sections is unacceptable since it would be more difficult for a child to make use of the procedure in terms of sec. 170A than it would be for an adult (or even an accused) to make use of the provisions of sec. 158.¹⁹

As a result of this criticism it has been suggested that subsection 170A (1) *Criminal Procedure Act* 51 of 1977 should be amended in the following respects:²⁰ (1) all child witnesses under 18 years of age should be allowed to testify in a separate room via electronic means;²¹ (2) it should be mandatory to appoint an intermediary in all cases in which the witness is under the age of 13 years without the need to show “undue mental

¹⁸ Sec. 158(3) *Criminal Procedure Act* 51 of 1977.

¹⁹ Müller and Tait 1999 *SACJ* 61.

²⁰ Müller 1999 *THRHR* 256-257.

²¹ The discretion to make use of a separate room should be removed and it should be compulsory to use a separate room.

stress or suffering”;²² (3) if the child is 13 years or older, the court should retain its discretion to appoint an intermediary if it appears to be *in the interest of justice*. In deciding whether or not it would be in the interest of justice to implement the procedure, a court should take several factors into account, for example: the child’s need to be protected, the child’s ability to communicate properly, the age and maturity of the child, intelligence, sex and personality of the child, the nature of the evidence which the child may have to give, the nature of the alleged offence, the relationship between the accused and the child and the fact that such procedure would assist the court to obtain a full and candid account of the events.²³

It had also been suggested that there should be no standard at all, that youth alone should be sufficient to necessitate the use of an intermediary. All witnesses under 18 years of age should automatically be allowed to give evidence through an intermediary.²⁴ This approach is not supported because a presumption that all child victims of sexual abuse suffer from emotional stress when testifying in the accused’s presence may prevent the court from making an individualised assessment. Furthermore, if the procedure is applied in all cases it may lead to lengthy delays and probably more acquittals.²⁵ The first approach is rather supported because (1) it takes account of the fact that the procedure in terms of section 170A *Criminal Procedure Act* 51 of 1977 infringes the accused’s right to a fair trial and that such infringements

²² A court should not have a discretion in this regard.

²³ Müller 1999 *THRHR* 247. She refers to the Scottish Law Commission *Report on the evidence of children and other potentially vulnerable witnesses* 1990 46 and Kriegler *Suid-Afrikaanse Strafproses* 1993 433 where one can find guidelines which a court should take into account.

²⁴ Schwikkard 1996 *Acta Juridica* 148 at 159.

²⁵ Schwikkard 1996 *Acta Juridica* 159.

should be limited as far as possible,²⁶ and (2) because some standard for defining the circumstances under which an infringement of the rights of the accused should be justified is applied. A definite standard²⁷ is justified precisely because it takes account of the accused's rights and it allows the court to make a case-by-case assessment.²⁸ After all, the question as to whether or not an infringement of the accused's rights is justified depends upon the circumstances of each case, for instance the importance of the accused's rights, the purpose of the procedure, the age and developmental stage of the child. A case-by-case determination is necessary to find a balance between the competing rights of the accused, the rights of children and the interests of society.²⁹

A definite standard is also applied in the United States of America. In Maryland, for instance, the court may allow the child to testify away from the accused's presence if it concludes that the child would suffer unreasonable and serious mental and emotional harm or trauma to the extent that the child's ability to communicate reasonably is affected. In *Maryland v Craig*³⁰ the court required the state to show (i) that the use of one-way closed-circuit television is necessary to protect the welfare of the child witness; (ii) that the child witness would be traumatised by the presence of the

²⁶ One should proceed cautiously when the accused's constitutional rights are at stake so as not to allow the exceptions to swallow the rule.

²⁷ Which implies that not all children qualify as of right.

²⁸ Cassim 2003 *CILSA* 74 refers to Bloe 1991 *Southern University Law Review* 275-291.

²⁹ Brannon 1994 *Law and Psychology Review* 447 maintains there is insufficient research to determine which methods best protect both the child victim and the accused. He advocates a case-by-case determination.

³⁰ *Mary Land v Craig* 497 US 836, 111 L Ed 2d 666 (1990).

defendant (and not just the courtroom generally) and (iii) that the state is furthering an important public policy.³¹

2.3 Function, duties and powers of intermediary

The functions of the intermediary are twofold:³² (1) to protect the child against the hostility and aggression inherent in cross-examination. This is achieved, for example, by the fact that the witness does not have to face the person who asks the questions and also cannot hear him.³³ Questions by the prosecution or the defence counsel which are intended to intimidate and confuse the witness are conveyed to the child by the intermediary. (2) The second function of the intermediary is to convey the content and meaning of the questions of the prosecution or the defence to the child in a manner which is understandable to the child so that she/he could answer them properly. In doing so the intermediary may ignore the *ipissima verba* of the original question and may re-phrase the question in such a way that the child understands what is being required as long as the general purport of the question is conveyed.³⁴ This means that – subject to the court’s final control – any question put by the prosecutor or the defence may be “blocked” by the intermediary in the sense that the intermediary may “relay” the question to the witness in a different form.³⁵

However, section 170A has been criticised because the intermediary’s powers are unnecessarily limited with the result that she will not always be effective in assisting

³¹ Also see Cassim 2003 *CILSA* 74, 81 and Van der Merwe 1995 *Obiter* 206 for a discussion on this case.

³² Müller 1999 *THRHR* 251; Van der Merwe 195 *Obiter* 202; Murdoch Watney 1998 *THRHR* 434.

³³ The mere fact that the child does have the company of someone who can engage his or her attention ensures that the child is at ease.

³⁴ Sec. 170A(2)(b) *Criminal Procedure Act* 51 of 1977; *Klink v Regional Court Magistrate* 1996 3 BCLR 402 (SE) 411I-J.

³⁵ Van der Merwe 1995 *Obiter* 197, 202.

the child.³⁶ For example, the intermediary does not have the power to comment on a question, or to object to certain questions being asked, or to object to the way in which questions are phrased, or to suggest that questions be put in a particular sequence, or to give an opinion as to whether a child understands a question or not.³⁷ Although the intermediary does have the authority to convey the general purport of the question to the witness, she may not change the meaning of the question and may be directed by the court to put the original question exactly as it was phrased, or to make another attempt at conveying the general purport of the original question.³⁸ Müller therefore suggests that rules of practice be formulated and implemented as to the procedure to be followed by intermediaries.³⁹

If the court has the power ultimately to control and determine the question, the purpose and function of the intermediary could be questioned. It is therefore suggested that the role of the intermediary in South African law should be clarified as there is no certainty in this regard. In *Klink v Regional Court Magistrate*⁴⁰ the intermediary has been described as an interpreter who relays questions to a young person in a form and manner consistent with the mental and emotional development of that child in a way which is understandable to the child to participate effectively in the judicial process. But this is not quite correct because there are important differences between an

³⁶ Van der Merwe 1995 *Obiter* 200; Müller 1999 *THRHR* 252.

³⁷ Müller 1999 *THRHR* 252.

³⁸ Sec. 170A(2)(b) *Criminal Procedure Act* 51 of 1977. In deciding whether to intervene, the court should bear in mind that the intermediary was introduced not to weaken or erode intelligent, meaningful and penetrating cross-examination, but rather to limit aggression and intimidation towards the child witness. See Van der Merwe 1995 *Obiter* 202 for other factors that the court should take into account when deciding whether or not to intervene.

³⁹ Müller 1999 *THRHR* 254.

⁴⁰ *Klink v Regional Court Magistrate* 1996 3 *BCLR* 402 (SE) 411I-J.

interpreter and an intermediary.⁴¹ The intermediary can also not be appointed as an assessor because it may be in conflict with the adversarial nature of our system.⁴² One of the principles of the adversary system is that the trier of fact may not descend into the arena.

Actually the intermediary is more than merely an interpreter. She is an expert officer of court who is appointed to assist the child witness who will be exposed to undue mental stress and suffering if he/she testifies. The intermediary should also assist the presiding officer who is not trained to interview children and who does not understand the way in which children reason, to understand and evaluate the child's testimony.⁴³ The intermediary should at the same time also act in the interest of the accused as she does not represent the child or act on behalf of the prosecution against the accused.⁴⁴ It is therefore important for the intermediary to be unbiased and to play a neutral role. She must display the necessary impartiality despite her close contact with the child witness and the inevitable rendering of some emotional support to the child during the latter's testimony.⁴⁵

In order for her to perform her duties properly her powers should be extended. For instance, she should be able to structure the interrogation in a way that most benefits the child and the judicial process. The reliability of children's evidence depends

⁴¹ Murdoch Watney 1998 *THRHR* 439-440. The intermediary is also not a party to the proceedings nor an expert witness.

⁴² McEwan 1988 *Criminal Law Review* 813 suggests that the intermediary be appointed as an assessor.

⁴³ The intermediary should communicate and explain to the court the evidence given by the child.

⁴⁴ Müller 1999 *THRHR* 254.

⁴⁵ She should also be acceptable to all parties and there should not be any relationship between the intermediary and the witness. Murdoch Watney 1998 *THRHR* 433.

crucially on how they are questioned.⁴⁶ However, the adversarial system and the function of the intermediary necessarily imply that there should be limitations and restrictions on the intermediary. The parties – and not the intermediary - control the witness and may confine the witness (and the intermediary) to those aspects of the case which they wish to probe.⁴⁷ The intermediary cannot be allowed to conduct his or her own independent questioning of the witness. Her power to interfere can only be exercised in response to questions put by the parties. Ultimately it is the presiding officer who takes control of the proceedings, the parties and the intermediary and assures that the rules of procedure and evidence are observed.

The neutral role of the presiding officer in an adversarial system has been blamed for the fact that, notwithstanding the provisions of section 170A, children are still traumatised when giving evidence.⁴⁸ It has therefore been suggested that it is rather the powers of the presiding officer to examine and protect witnesses that needs to be reviewed rather than the position of the intermediary. McEwan prefers the examination of a child witness to be conducted by an experienced judge because he is a practised interrogator and has no preconceptions or preference.⁴⁹

It should be realised, however, that the presiding officer's power to curtail cross-examination which is harsh, aggressive offensive, humiliating, misleading or tormenting, or which consists of leading or suggestive questioning, or protracted

⁴⁶ Schwikkard 1996 *Acta Juridica* 161-162 with reference to Saywitz K and Snyder L "Improving children's testimony with preparation" in Goodman and Bottoms.

⁴⁷ In an adversarial system the opposing parties are in principle responsible for selecting and adducing evidence in support of their respective cases.

⁴⁸ Müller 1999 *THRHR* 258; Schwikkard 1996 *Acta Juridica* 148 at 155 and 162.

⁴⁹ McEwan 1988 *Criminal Law Review* 813. The judge could sit with an assessor or have the benefit of expert evidence to ascertain the child's credibility.

questioning is limited in an adversarial system. The problem is that the dividing line between this kind of cross-examination and admissible sharp and aggressive cross-examination is sometimes very vague and presiding officers are extremely cautious not to cross the line. If the limit is indeed exceeded, the proceedings may subsequently be found to have been irregular. Presiding officers therefore prefer to caution sharp cross-examiners and questions are only disallowed if it is clear that the limits of propriety have been exceeded.⁵⁰ Furthermore, although the court may put questions to witnesses in the form that it thinks fit, the nature of such question must be such that the court is not perceived to be descending.

In other words, the neutral role assigned to presiding officers together with the principle that cross-examination must be allowed means that they cannot interfere more actively and fulfil some inquisitorial role. They are therefore not in a position to protect child witnesses who are still subjected to aggressive and intimidating examination which was neither necessary nor conducive to ascertaining the truth. The appointment of an intermediary should provide better protection, provided their functions are redefined and their powers are extended.⁵¹ Participation by intermediaries in the administration of the criminal justice system rests upon the same philosophical or ideological basis upon which other non-lawyers – like lay assessors in South Africa and jurors in other countries – are called upon and permitted to participate: enhancement not only of the general legitimacy of the system, but also the fact-finding process.⁵²

⁵⁰ *Report of the SA Law Commission on the Protection of Child Witnesses: Project 71* (1991) par. 2.8-11 and 5.84-49.

⁵¹ Van der Merwe 1995 *Obiter* 196; Murdoch Watney 1998 *THRHR* 431.

⁵² The use of intermediaries adds a new dimension to the ways in which the legitimacy of the system and the search for the truth can possibly be promoted or reinforced. Van der Merwe 1995 *Obiter* 202.

2.4 Other problems relating to section 170A of the *Criminal Procedure Act 51 of 1977*

The following practical problems are experienced with the implementation of the procedure provided for in section 170A *Criminal Procedure Act 51 of 1977*. Obviously the suggestions to overcome these difficulties will have practical and financial implications:

- Ideally, intermediaries should have certain qualities and knowledge of several disciplines. For example, they need an understanding of the developmental stages through which children pass; they should be able to communicate with a child in a manner which the child will understand; they should have a clear understanding of the psychological effects of testifying and the incidental stress; they should have some insight into the law. Our problem is that although intermediaries are professionally qualified in one or other way, they are not all trained to communicate with children unless they specialise in this field.⁵³ No additional qualification or training which will equip them to carry out the functions of an intermediary is required. It has therefore been suggested that the qualifications and practical training of the intermediary needs further consideration.⁵⁴
- Another problem relates to identification in court. 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 where identity is in issue.⁵⁵ However, this

⁵³ The list of people who may be so appointed was set out in GN R1374 GG 15024 of 30 July 1993 (*Reg Gaz* 5127). Also see Müller 1999 *THRHR* 250. Educational psychologists are regarded as the ideal intermediaries, since they are trained in the techniques of interviewing children.

⁵⁴ Müller 1999 *THRHR* 253.

⁵⁵ In *S v Mathebukla* [1996] 4 All SA 168 (T) the accused's conviction was set aside because the witness was not afforded the opportunity to identify the accused.

should not be a problem if the proceedings are conducted in such a way as to allow the witness to see the accused on a television monitor only after the child has given evidence. In this way any effect it may have on the child's ability to testify may be eliminated.⁵⁶

- A last problem is that it is uncertain whether the intermediary should be allowed to meet the child before the trial in order to give the child the opportunity to become familiar with her, to gain the child's confidence and to put the child at ease.⁵⁷ This may give rise to allegations by the defence that the child has been prepared and that there is the danger of suggestion.

The next topic that will be discussed is the admissibility of pre-recorded video-taped statements. Although not directly connected to the use of intermediaries, pre-recorded video-taped statements may be used to supplement the procedure in section 170A of the *Criminal Procedure Act 51 of 1977*.

3 Pre-recorded video-taped statements

The intermediary model (section 170A of *Criminal Procedure Act*) does not provide a solution to the problem of children that are too young to testify in any event and it also does not address problems created by the fact that the trial often takes place a long time after the alleged incident. Young children (a three year old child for instance) may be able to give an accurate account of the incident within a few days of it happening, but unable to give coherent testimony several months later. Furthermore, the child is likely

⁵⁶ If the witness is traumatised by the mere sight of the accused, at least it will not affect her/his testimony if identification is only done at the end of his/her testimony. Müller 1999 *THRHR* 257.

⁵⁷ See Müller 1999 *THRHR* 254.

to be subjected to a multiplicity of interviews and will have to re-live the unpleasant experience.⁵⁸

It has therefore been suggested that in addition to the procedure in section 170A of the *Criminal Procedure Act* pre-recorded video-taped interviews with the child soon after the offence has taken place should be allowed into evidence.⁵⁹ Such statements would be of assistance to truth-finding as the court will get a more accurate version of the events as the child could give its version while the memory of the experience is still fresh in his or her mind and the child's recall is at its best. Research has indicated that an earlier version is likely to be the more accurate version of any witnessed event. Another advantage of such statements is that it may reduce the number of times a child must repeat its story, thereby reducing the emotional trauma. Recording the child's evidence at such an early stage allows the child to put the incident behind her/him and to recover from the incident.⁶⁰

The admissibility of such statements in South Africa may be challenged on the basis that it infringes the right to a fair trial in that it prevents face-to-face confrontation between the accused and the witness and it hampers the right to cross-examination.⁶¹ In

⁵⁸ Schwikkard 1991 *SACJ* 48; Schwikkard 1996 *Acta Juridica* 148 at 160. Schwikkard refers to research done by Spencer 1987 *Criminal Law Review* 76 at 81-82 and McEwan 1988 *Criminal Law Review* 813.

⁵⁹ Schwikkard 1991 *SACJ* 48-49. The South African Law Commission in its 1989 report (note 50) on the protection of child witnesses acknowledged that video-taped statements made soon after the offence would be of assistance to truth-finding but they did not make any recommendations in this regard.

⁶⁰ Schwikkard 1991 *SACJ* 49; Cassim 2003 *CILSA* 76. Schwikkard refers to Spencer 1987 *New Law Journal* 1031; Spencer 1988 *New Law Journal* 497 and McEwan 1988 *Criminal Law Review* 813 for a more detailed discussion regarding the advantages and prejudicial effects of this method.

⁶¹ The right to a fair trial includes the right to challenge evidence and the right to confrontation. Section 715.1 of the *Canadian Criminal Code* which provided for the admission of videotaped statements by

*Klink v Regional Court Magistrate*⁶² section 170A of the *Criminal Procedure Act 51* of 1977 was attacked on the same grounds but it had been decided that the section is not unconstitutional. It is submitted that, provided the child is available at the trial to be cross-examined, the admission of pre-recorded interviews would also not be unconstitutional because such statements, among other things, enhances fair decision-making which is to the advantage of the accused.⁶³

Such statements can also be objected to on the ground that it constitutes hearsay evidence. In South Africa, however, hearsay evidence may be admitted in terms of section 3(1) (b) of the *Law of Evidence Amendment Act 45* of 1988 if the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings. A pre-recorded statement may thus be admitted if the child is called as a witness. Another objection to such statements is that delayed cross-examination will harm the accused but Schwikkard correctly points out that it is questionable whether cross-examination is less effective after the passage of time.⁶⁴

In any way, admission at all cost is not advocated. It is submitted that section 32A of the English *Criminal Justice Act* of 1988, which applies to sexual offences and offences of violence and cruelty, provides a useful guide in this regard. It may be useful for it provides safeguards whilst at the same time leaving room for judicial discretion in the

children was found to be unconstitutional in *R v Laramée* (1992) 73 MAN R 283; (1991) 65 CCC (3d) 465 (Man CA). See Schwikkard 1996 *Acta Juridica* 161.

⁶² *Klink v Regional Court Magistrate* 1996 3 BCLR 402 (SE).

⁶³ Schwikkard 1996 *Acta Juridica* 161.

⁶⁴ Schwikkard 1996 *Acta Juridica* 161-162. She argues that if early videotaping provides a more reliable testimonial record, it is difficult to see how delayed cross-examination will harm the accused.

best interest of justice.⁶⁵ In terms of that section a video recorded interview with the child⁶⁶ may be admitted into evidence with leave of the court. Leave should only be granted if the child is available for cross-examination on the contents of the statement. For this purpose it may still be necessary to appoint an intermediary.⁶⁷ Leave should be refused if the court is of opinion that it would not be in the interest of justice to admit the recording, for example because admission would infringe the accused's rights in the circumstances of the case. As the child is required to testify at the trial the only advantage of this method would be that the court is presented with a more accurate account of the incident.

4 Children's competence to testify

No age limit is imposed on the competency of children in South African law but children should pass a test before their evidence will be admitted.⁶⁸ The presiding officer should be satisfied that the child can communicate intelligibly and that he/she is able to distinguish between what is true and what is false. If the child is considered by the court to be competent, he or she need not be sworn in, but is admonished to tell the truth.

The competency test has been questioned on various grounds, *inter alia* because many children who do not understand the duty to speak the truth or who cannot verbalise their understanding of such concepts may have the ability to give a reliable account of

⁶⁵ See Schwikkard 1996 *Acta Juridica* 161-162 and Murdach Watney 1998 *THRHR* 428-429 for a discussion on this section.

⁶⁶ Under the age of 17 where the offence is sexual in nature and 14 where it is violent or cruel.

⁶⁷ If leave is granted the child will be called as a witness, but cannot be examined in chief on any matter which has been dealt with in her recorded testimony. The recorded statement constitutes evidence.

⁶⁸ A "presumption of incompetency" applies to children. Schwikkard 1996 *Acta Juridica* 149. She refers to Birch DJ "Children's Evidence (1992) *The Criminal LR* 262 at 265.

events and may thus be of assistance to the court. This approach may therefore result in the exclusion of relevant and understandable evidence and may inhibit successful prosecutions.⁶⁹

It has therefore been suggested that the “competency test” be abandoned, that children be allowed to testify without a preliminary testing of competency, but that a court should assess the child’s credibility only after it has given evidence by weighing matters such as the demeanour of the witness, his or her maturity and understanding, and the coherence and consistency of the testimony in deciding whether it should be relied upon.⁷⁰ This suggestion is supported as it will probably increase the potential for successful prosecutions and it accords with the position in the United Kingdom⁷¹ and the United States where children is allowed to testify without a preliminary testing of competency.⁷²

If an intermediary is appointed it should in any way not be necessary for the court to ascertain whether or not the child can distinguish between truth and lies. The intermediary is appointed in order to guide the child and to ensure that only reliable evidence is admitted. If it appears that the child cannot distinguish between what is true and what is false the intermediary should advise the court accordingly.⁷³

⁶⁹ See Schwikkard 1996 *Acta Juridica* 149, 151 for further grounds of criticism.

⁷⁰ Schwikkard 1996 *Acta Juridica* 150. She refers to The Pigot Committee in England *Report of the Advisory Group on Video Recorded Evidence* 1989 and Melton (1981) *Law and Human Behaviour* 73 at 79.

⁷¹ Sec. 33A of the *Criminal Justice Act*; Birch 1992 *The Criminal LR* 262 at 268.

⁷² Schwikkard 1996 *Acta Juridica* 150; McCough *Child Witnesses* (1994) 98.

⁷³ But see Murdoch Watney 1998 *THRHR* 431 who refers to the report by The Law Commission where it was stated that the use of an intermediary does not interfere with the courts duty to ascertain whether or not the child is a competent witness.

5 Credibility of the child witness – the cautionary rules

Evidence tendered by children is subjected to a cautionary rule which directs the trial court to remind itself of the dangers inherent in the testimony of children and to seek some or other safeguard excluding the risk of a wrong decision. In other words, the evidence should be scrutinised with great care in order to decide whether the witness is credible and can be relied upon. In cases where the complainant was alone with the accused at the time of the alleged offence (which is very often the case in child abuse matters) the courts also tend to apply caution with regard to the evidence of a single witness. It is possible therefore, that both cautionary rules may apply to the evidence of a child witness.⁷⁴

There is no closed category of pointers to the truth. Corroboration may be sufficient indication of trustworthiness, but there may be other forms of confirmation, for example the age of the witness, the nature of the evidence given, the character and intelligence of the child, the likelihood of a false identification, and the presence or absence of a motive to conceal the truth.

This rule of practice is based upon the belief that, because of the following reasons, children are inherently more unreliable than adults as witnesses: (1) children's memories are unreliable; (2) children are egocentric; (3) children are highly suggestible; (4) children have difficulty distinguishing fact from fantasy (they are imaginative); (5) children make false allegations, particularly of sexual assault; and (6) children do not understand the duty to tell the truth.⁷⁵

⁷⁴ The cautionary rule which was until recently applied in sexual matters and which requires that there should be corroboration of the evidence led by the complainant is no longer part of our law.

⁷⁵ *S v S* 1995 (1) SACR 50 (ZS); *R v Manda* 1951 (3) SA 158 (A) at 163C-D; *Woji v Santam Insurance Co Ltd* 1981 (1) SA 1020 (A) at 1028A-E; Schwikkard 1996 *Acta Juridica* 151.

The application of the cautionary rule to the evidence of child witnesses has been criticised because it is based upon a misunderstanding of the testimonial value of children's evidence. The rule was developed when the development of children was less understood,⁷⁶ and at a stage when they were subjected to harsh cross-examination and not protected by the judicial system at all. The rationale of the rule is outdated, fallacious and discredited by research which has shown that the evidence of children is not particularly less reliable than that of adults, and that children are less inclined to lie about events than adults.⁷⁷ It may also be argued that the rule is unnecessary in the light of the fact that intermediary's are nowadays used. Furthermore, the rule cannot be justified as necessary for the legitimate rights of the accused.

The cautionary rule has also been criticised on constitutional grounds in that it conflicts with the equality clause because it only refers to children (mostly females). It is discriminatory in that certain categories of witnesses are disadvantaged on the basis of their age. Schwikkard submits that this infringement constitutes an unreasonable limitation on the rights of the child witness and it cannot be justified in terms of the limitations provision contained in section 36 of the Constitution.⁷⁸

Having regard to the above criticism it has been suggested that the application of a cautionary rule to the evidence of child witnesses needs to be re-examined.

⁷⁶ The belief that children are inherently more unreliable than adults as witnesses accords with views that was prevalent up until the 1960's.

⁷⁷ Recent research has resulted in a reappraisal of earlier beliefs and a realisation that children's ability to give reliable evidence has been greatly underestimated. See Schwikkard 1996 *Acta Juridica* 151 for a reference to some of the research which has been done in this field. Also see *S v S* 1995 (1) SACR 50 (ZS) where the judge commented on the validity of the traditional objections. The court relied on Spencer and Flin *The evidence of children* 1993.

⁷⁸ Schwikkard 1996 *Acta Juridica* 154.

Unfortunately the new research which impacts on the child witness and the cautionary rules has not yet been acknowledged by South African courts. However, Ebrahim JA the Zimbabwean court in *S v S*⁷⁹ called for a new approach in assessing children's evidence. He has also led the way in indicating how the research can be used to create a new approach to the evidence of a child witnesses:

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 in the manner suggested by *Spencer and Flin*. ... 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.⁸⁰

Notwithstanding the criticism of the rule Schwikkard cautions that abandonment of the cautionary rule on its own is unlikely to improve the quality of fact-finding.⁸¹ Children are not miniature adults, and, given that their cognitive skills are different to those of adults (although not necessarily qualitatively different), presiding officers should be required to show that they are aware of these differences when assessing the evidence of children. Reform measures would be ineffective and possibly dangerous if not accompanied by an intensive education campaign. A working knowledge of the stages and issues of child development is essential to any person who interacts with children in the legal system.

6 Conclusion

There is no question that the intermediary model alleviates the plight of the child witness. However, it is still open to criticism in various respects as it could be more sensitive to the needs of the child victim and witness. Reform measures of courtroom

⁷⁹ *S v S* 1995 (1) SACR 50 (ZS).

⁸⁰ *S v S* 1995 (1) SACR 50 (ZS) at 60b.

⁸¹ It is more likely that the prejudices represented by these rules will become an unarticulated factor influencing judicial assessment of credibility.

procedures should not only protect the child witness, it should also take account of the accused's rights. This means that the interests of the child to be protected against procedural abuse, the interests of the accused to have a fair trial, and the interest of the community that justice should be done, should be balanced. It is suggested that the following changes should be introduced into our criminal justice system precisely because it strikes a balance between the competing rights:

1. Section 170A *Criminal Procedure Act* 51 of 1988 should be amended as follows:
 - (a) all child witnesses under 18 years of age should be allowed to testify in a separate room via electronic means;
 - (b) it should be mandatory to appoint an intermediary in all cases in which the witness is under the age of 13 years without the need to show undue mental stress or suffering;
 - (c) if the child is 13 years or older, the court should retain its discretion to appoint an intermediary if it appears to be in the interest of justice.
2. In order for the intermediary to be effective in assisting the child, her function and role needs to be redefined and her powers should be extended. However, this can only be done if the qualifications and practical training of intermediaries are attended to.
3. The intermediary model does not provide a solution to problems created by the fact that the trial often takes place a long time after the alleged incident. The procedure in section 170A of the *Criminal Procedure Act* should therefore be supplemented by pre-recorded video-taped interviews with the child soon after the offence has taken place. Such statements should only be admitted with leave of the court.
4. The "competency test" which is applied to children should be abandoned. Children should be allowed to testify without a preliminary testing of competency and the court should assess the child's credibility after it has given evidence.

5. The application of a cautionary rule to the evidence of child witnesses needs to be re-examined, but any reform measures should be accompanied by an intensive education campaign.

Unfortunately, these suggestions are also open to criticism because it does not address the hardships imposed on the child witness by the adversarial nature of our system. The procedure in section 170A *Criminal Procedure Act* 51 of 1977 retains the theoretical structure of the adversarial trial which was not designed with the needs of children in mind.⁸² Closed-circuit television does 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. It is generally accepted that children are more accurate witnesses when their memories are skilfully elicited in a non-adversarial mode.⁸³ The anomaly of course is that the possibilities for reform are in fact limited by the adversarial nature of our criminal proceedings.

Be that as it may be. The starting point for true reform lies with professional training, changing attitudes and access to resources.

⁸² The presiding officer plays the role of arbitrator or passive umpire who remains aloof from the proceedings.

⁸³ Schwikkard 1996 *Acta Juridica* 148. Schwikkard *inter alia* refers to Saywitz and Snyder "Improving children's testimony with preparation" in Goodman and Bottoms.

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