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Giving Voice in Court: Cushioning Adversarialism for Witnesses with Intellectual Disabilities

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Abstract

Recent amendments to ss 29(2) (the narrative evidence power) and 41 (the improper questions power) of the *Evidence Act 1995 (NSW)* have the potential to alleviate the abrasiveness of the adversarial court process for witnesses with intellectual disabilities. However, the application of these provisions is problematic. Curial recognition of vulnerability is necessary before the provisions are employed in court but without appropriate training it is questionable whether judges and magistrates can appreciate the complex difficulties facing witnesses with intellectual disabilities. The provisions also fly in the face of the principles underpinning the adversarial trial, in allowing for a disruption of legal narrative and overturning traditional views about the secondary role of the witness in court. This paper considers the importance of these provisions in assisting vulnerable witnesses in court, while acknowledging the difficulties in application that arise within the adversarial court system.

Introduction

Kasim,[1] a client at a metropolitan Intellectual Disability Rights Service, invites me to play soccer with him on Saturdays. Abby, his solictor, tells me that he is the best goalkeeper that they have ever had. She also tells me that he has problems with anger management, a consequence of his intellectual disability. Kasim is in court for assault occasioning actual bodily harm. I ask her tentatively whether she will put him in the witness box and she looks a little horrified. He would never stand up to cross-examination, she tells me. He gets angry and confused when he is asked too many questions because he thinks that he is being taunted. The last time someone let him say something in court, he swore at the magistrate.

Perhaps the most significant thing about Kasim's case is the paradox that it presents. On the one hand Abby thinks it would be beneficial for Kasim to be able to tell his story, to show the court the internal logic — indeed the provocation — that drove him to assault someone. However, she cannot let him do so, because Kasim's intellectual disability means that he is an unpredictable witness. He would not be able to respond convincingly to cross-examination. He may incriminate himself in relation to this offence, and others for which he has not been charged.

It was perhaps in an attempt to address the pressures facing vulnerable witnesses like Kasim that specific amendments were made to the *Evidence Act 1995 (NSW)*.[2] First, the new s 29(2), or the 'narrative evidence power': this provision allows the court to *order* that a witness give their evidence by narrating their account, without a lawyer's questions,

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1 Kasim is a client of the Intellectual Disability Rights Service, situated in the suburb of Redfern in Sydney. Abby is one of the solicitors from the service. The names have been changed to protect the privacy of these parties.

2 The *Evidence Act 1995 (NSW)* closely conforms to the *Evidence Act 1995 (Cth)* that applies federally and in the ACT. The *Evidence Act 2001 (Tas)* is in similar terms. The Victorian legislation excludes these amendments.

interruptions or directions. Previously, a court could only exercise this power upon application from the party calling the witness. In addition, s 41, or the 'improper questions power', has been transformed. It now establishes a curial obligation to intervene in questioning that is misleading, unduly annoying, harassing, intimidating, offensive, oppressive or repetitive, after taking into account any relevent characteristic of the witness, including mental, intellectual or physical disability.[3]

These amendments have the potential to alleviate the abrasiveness of the adversarial court process for witnesses such as Kasim whose intellectual disabilities mean that they cannot read the court processes the way people who are better equipped intellectually and emotionally can. The court's duty to intervene and scrutinise the way in which the witness is treated is extremely important but it is not without problems. First, the powers require curial recognition of vulnerability. Sometimes, Abby tells me, magistrates simply do not appreciate the severity of problems that affect those like Kasim. Second, it is arguable that these provisions fly in the face of core principles underpinning the adversarial common law trial. How does a provision that allows narrative evidence sit within a legal system that has complex rules of evidence? How does a trial accommodate statutory brakes being applied to test a witness' account in court? These are significant challenges for judicial officers. It is for them to apply these provisions yet all their professional experience reinforces the tradition of carefully controlled evidence-in-chief and robust cross-examination within the previously discretionary bounds of propriety contextualised by light, or even invisible, enforcement. Finally, there is the issue of whether the court will be willing to make use of these provisions at all, given entrenched judicial views about the role of the witness.

Kasim is not the typical vulnerable witness. He is a legally-represented defendant, and thus has advantages that would not be shared by the typical unrepresented non-defendant witness.[4] Abby's presence alleviates the problem of curial recognition that Kasim has a disability — she can inform the court that he does. She can also intervene on his behalf. Second, as a defendant, there is no onus on him to prove his case, and so the pressure on him in the witness stand is not as great. Indeed, he need not take the stand at all. Abby's reluctance to make use of these powers despite Kasim's position, however, indicates the inherent contradictions and problems that handicap the narrative evidence and improper questions power, rendering them relatively ineffectual in protecting Kasim's dignity and humanity in the witness box and giving him his voice in court.

Telling one's own story: the narrative evidence power

Witnesses give evidence in court by the way of question and answer. It has been argued by psychologists, however, that the testimony of some witnesses would be more accurate if they were allowed to provide their evidence in narrative form. Cashmore (2007:285), for instance, has noted with regard to children, that the testimony they provide using the question/answer format may be 'evidentially unsafe' even though it is obtained using techniques generally accepted as part of the adversarial process. Agnew and Powell's study (2004) of children with intellectual disabilities found that a decline in accuracy of recall

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3 *Evidence Act 1995 (NSW)* s 41(2)(b).

4 Or the unrepresented defendant.

correlated with situations where children were asked close-ended questions. The traditional cross-examination format allowed for increased suggestibility:

> The more cues the interviewer provides, and /or the greater the demand for highly specific details, the more compelled the child is to provide a (potentially inaccurate) response (Agnew and Powell 2004:290).

Conversely, there was a high level of accuracy regarding general details among all children, whether they were with or without intellectual disabilities, when the opportunity was given to provide a free narrative recall of the situation they were being examined on (Agnew and Powell 2004:290).

In a criminal trial, accuracy of general details will not be enough to present a narrative in examination-in-chief for a prosecution witness. It is usually necessary to 'particularise the offence' (Guadagno et al 2007:64). To draw out these particular details, it has been found that precise and direct questions are required (Powell, 2004:139–40). Therefore, narrative evidence is of limited use in this context, and recourse must eventually be had to more specific questioning. As a defendant, Kasim has no legal obligations to provide coherent particulars. However, a prosecution witness would be under an obligation to carry the prosecution case on his/her shoulders and it would be more important for the witness to be able provide a clear coherent statement.

Moreover, it seems that the narrative evidence power is antithetical to the traditions that have moulded the Australian criminal legal system. It is built on the view that truth is created by the adversarial trial (Goodpastor 1987:133). Central to the criminal legal system is the ethos of *legal* narrative — the partisan interpretation of facts — so that what *is* of central importance are not the facts themselves, but the interpretation that those facts are given. Giving free rein to the witness would be counter-intuitive. Vulnerable witnesses, in particular, may not be capable of appreciating the need to comply with the imperatives of legal narrative. This is a fear voiced by the NSW Public Defender's Office, which has opposed the legislative changes allowing the court to order narrative evidence on this very ground — that the witness will give 'irrelevant or prejudicial' evidence leading to the abortion of the trial (ALRC 2006:5.26).

Despite the power of the arguments outlined above, the law reforms acknowledge that the traditional view of truth being a product of the adversarial trial must be reconsidered. It may no longer be able to emphasise the ethos of the legal narrative at the expense of human dignity and accuracy of the witness.

Protecting dignity and humanity: The improper questions power

Sometimes the language employed in cross-examination is beyond the comprehension of the witness being questioned. In a study carried out by Ericson and Perlman (2001) on a group of people with intellectual disabilities, it was noted that several parties could not comprehend terms as fundamental as 'guilty' and 'innocent'. The researchers concluded that, 'understanding of the complexity of the legal system requires a degree of cognitive

sophistication beyond the capacity of most developmentally disabled individuals' (Ericson and Perlman 2001:541–2).

Similarly, studies carried out by the Brennans indicate that child witnesses have specific difficulty with the vocabulary used by lawyers, for instance, with words like 'taunt' and 'fabrication' and forms of legal address like 'His Worship' and 'my friend' (Brennan and Brennan 1995:135). These difficulties are exacerbated by the use of double negatives, leading and rhetorical questions (Brennan and Brennan 1995:310–11). Sometimes, as Eades notes, it results in witnesses mistakenly agreeing to statements which they do not in fact understand (Eades 2007:11).

The effect is confusion and intimidation and it is this that makes the process of cross-examination so abrasive, potentially 'a secondary trauma' where child sexual abuse victims are concerned (Briggs 2007:5). And yet, as Kebbell et al observe, while traditional approaches to questioning require modification to suit the shortcomings of the witness involved, witnesses with intellectual disabilities are questioned in largely the same way as other witnesses, regardless of their memory and comprehension problems (cited in Hunter 2007:271).

The appeal of the new improper questions power — which requires a judge to intervene and prevent this traumatisation — is obvious. As Spigelman J commented in *R v TA* (2003) 57 NSWLR 444, [8]: 'Judges play an important role in protecting complainants from unnecessary, inappropriate and irrelevant questioning by or on behalf of an accused.'

It is necessary to place some kind of limit on corrosive cross-examination so that it is proportionate to the capabilities of the individual witness involved. The improper questions power makes explicit the common law position that while there is some leeway in the way questioning is carried out, counsel cannot ignore the burden upon the witness (*Mechanical & General Inventions Co v Austin & Austin Motor Co Ltd* [1935] AC 346, 359).

Powell notes, however, that closed and leading questions are intrinsic to the process and purpose of cross-examination, questioning whether cross-examination can really be carried out without their use (Powell 2004:139). Limiting the use of these questions through the improper questions power would be to fundamentally alter the nature and effect of cross-examination and this leads to questions about the role that the improper questions power would play. Rather than intervening in the process of cross-examination, Powell advocates a different tack, the use of re-examination 'to call attention to the inconsistency extracted by the different questioning procedures used' (Powell 2004:139).

Another issue is recognition of vulnerability in a witness. As Briggs (2007:4) asks: 'how can they [judges] be expected to know what is developmentally appropriate for a young or disabled child when their expertise is restricted to law?' This difficulty has been noted by the NSW Law Reform Commission, which, in its report on the *Evidence Act*, cites a recommendation by the New South Wales Adult Sexual Assault Interagency Action Committee to issue 'practice directions to assist judges in utilising the improper questions power of the *Evidence Act 1995 (NSW)* to regulate the conduct of cross-examination of the complainant' (ALRC Report 2006:5.81).

But practice directions may only be useful *once vulnerability has been recognised.* The *Equality before the Law Bench Book* (the Bench Book), released by the Judicial Commission of New South Wales to educate judicial officers as to how they can maximise participation in court proceedings by vulnerable witnesses, provides definitions of what intellectual disability is (Bench Book 2006:5.2.2.4), acknowledging that there may be situations where judicial officers will only be able to assess the needs of the person when they appear in court, without having been forewarned (Bench Book 2006:5.4.1). There is therefore a very great onus on judicial officers, who have to be sensitive to the possibility that the witness before them may have an intellectual disability. The Bench Book merely advocates that the court and judicial officers generally be flexible, so that such a possibility can be accommodated (Bench Book 2006:5.4.1).

Practice directions may be useful, however, in assisting with the second issue facing judges — namely, the identification of what it is that constitutes an improper question. The Bench Book, for instance, provides some guidance in this respect, clarifying that questions posed to a witness with an intellectual disability may be improper where 'the language used is too complex, fast or abstract' (Bench Book 2006:5.2.4). Double negatives and the use of legal jargon and Latin phrases are discouraged (Bench Book 2006:5.4.3.5). Ultimately, practice directions and publications like the Bench Book may be most useful in encouraging a general caution by the court regarding questions put in cross-examination to any witness, whether or not that witness is particularly vulnerable. They may help to re-educate the legal profession from the view that there is nothing abnormal or unexpected about the use of yes/no questions, or double negative questions (Hunter 2007:271) within the legal system.

Even if there is recognition that a witness is vulnerable, judicial officers may still be unwilling to intervene in the trial process. It has been noted that a predominant view among judges and magistrates is that ultimately the accused is at the centre of the trial (Cashmore and Bussey 1996:323). One judge commented: 'Sure, I can think of a number of ways of helping kids, but when you realise that the predominant philosophy behind the court trial is the protection of the accused, you have a problem' (Cashmore and Bussey 1996:323). Ten years ago, at the time when Cashmore and Bussey carried out this particular study, judges even were hesitant about allowing CCTV examination of child witnesses, believing that this deprived counsel of the opportunity to test the child's credibility in the witness box itself (Cashmore and Bussey 1996:324).

But traditional assumptions are slowly changing. In *Whisprun Pty Ltd v Dixon* (2003) 200 ALR 447, Kirby J noted the imbalance in cross-examination between the lawyer and the plaintiff. The latter was a:

> soft target: a former abbatoir worker, of limited education, inarticulate, living in a country town, with an alleged medical condition one feature of which was its possible impact on her powers of concentration and memory ((2003) 200 ALR 447, [121]).

Dixon's failure to cope with cross-examination was not unexpected given all these extrinsic factors. Too much emphasis should not be laid on her inability to stand up to the cross examining tactics of experienced counsel. Rather, the court has a duty to take into 'full account the objective and consistent evidence in the case' ((2003) 200 ALR 447, [122]).

Moreover, there is recognition that witnesses with intellectual disabilities can provide useful, reliable evidence. The Bench Book explicitly dispels misconceptions about witnesses with intellectual disabilities, stating that they 'are no different from the general population in their ability to give reliable evidence so long as communication techniques are used that are appropriate for that person' (Bench Book 2006:5.3.1). The growing understanding that the problem may lie with the manner of communication carried out in court rather than the witness per se, coupled with the whittling down by the High Court of the 'natural biases of judges' (Cashmore and Bussey 1996:332) through the encouragement of preference for incontrovertibly established facts over an adverse appraisal of a witness' credibility (*Fox v Percy* (2003) 214 CLR 118) may mean that judges will be more willing to apply the improper questions power, so that real protection is provided to a vulnerable witness.

Conclusion

The traditional suspicion for witnesses borne by the adversarial system is perhaps exemplified in the practice of cross-examination (Hunter 2007:261). This mistrust, coupled with the primacy of the duty to one's own client, has meant that notions of dignity and humanity have been sidelined to the 'interstitial spaces' (Hunter 2007:265). Hunter notes, more explicitly, that the poor treatment of witnesses has stemmed more from the 'culture of advocacy' (2007:271) rather than any strict letter of the law.

The greatest justification for these amendments may lie in the fact that they add substance to the rather ambiguous duty that counsel has to treat all participants with dignity and humanity. By addressing the culture of advocacy — the manner of communication in the courtroom, the way information is elicited through the question/answer format, and the corrosive culture of cross-examination on particular witnesses — these provisions have the potential to enhance the voices of witnesses with vulnerabilities and allow them to participate more fully in the court process.

The question must be asked, however, about the reality that these provisions must engage with. If Kasim is ordered to give narrative evidence, Abby believes he will incriminate himself. Ironically, it may be to his advantage to avoid the operation of this power. As a defendant, Kasim's situation does not raise the tricky issue of balancing defendant's rights with the obligation to accord dignity and humanity to a prosecution witness. The reality, however, is that his legal representative cannot be sure that the extent of his vulnerability will be recognised by the judge before serious damage to his defence, and to his dignity, is done by the cross examining prosecutor. She will not put him on the stand, and in doing so, makes redundant the question of whether these powers can be of use to Kasim.

Kasim likes to get spiffed up for court, Abby tells me. He has on a new suit and his hair is slicked back. However, his role in court is limited. He is under strict instructions to remain silent. While Abby speaks we sit on the sidelines and Kasim holds his papers.

When she finishes, he gets up, bows, and leaves the courtroom with her.

After a while, so do I.

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