

## GUIDELINES FOR JUDICIAL MANAGEMENT OF CHILD WITNESSES

Submitted by the Child Witness Institute

KEY CONCEPTS	
Judicial discretion	Judicial management
Court accommodations	Child witness

### Introduction

It is the normal procedure for a judicial officer to allow attorneys or advocates fairly wide latitude in shaping their cases. When child witnesses are involved, however, there is a greater need for judicial involvement.

Researchers argue that enhanced judicial involvement is a necessity for the following reasons. These factors affect the performance of the child on the stand:

- children's relative lack of knowledge regarding the legal system
- their embarrassment and fear of public speaking
- stress and anxiety.

Adults are to a certain extent able to manage their stress through their general understanding of what happens in court. Some children may believe that they will go to jail if they give the wrong answer. A stressful courtroom situation may cause a young child to be unable or unwilling to testify. Judicial officers are not trained to identify cognitive and language difficulties that the child witness may experience in court. The lack of knowledge on the part of the presiding officer prevents them from interfering with developmentally inappropriate cross-examination by the defence, thereby exposing the child witness to further trauma.

Many courts internationally have accepted that rules of evidence were not developed to handle problems presented by child witnesses. Courts must, therefore, be free to adapt these rules to accommodate these circumstances. This approach is succinctly summarised in the following comment from the Alaskan Supreme Court:

"Despite the adoption of procedures making the process of testifying less intimidating for a young child, the fact remains that many children are not able to discuss incidents of abuse even in a modified courtroom setting..... Generally speaking the rules of evidence were not developed to handle the problems presented by the child witness. Therefore our courts must be free to adapt these rules, where appropriate, to accommodate these unique (circumstances). However, this increased flexibility places a proportionately greater burden on the trial judge" (In re T. P., 838 P. 2nd 1236, 1240-41 Alaska 1992).

The increased burden on the judicial officer was also highlighted in the Zimbabwean case, *S v S* 1995 (1) SACR 50 (ZS), where Judge Ebrahim had the following to say:

“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 (op cit). 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. This will undoubtedly mean an increase in the workload of judicial officers and the machinery of justice generally, but ways must be sought of accommodating this, as it is the price to be paid for professionally administering justice in an increasingly complex society.”

### **Judicial discretion**

The judicial officer has inherent judicial authority, unless otherwise specifically excluded, to control the conduct of the proceedings and interrogations before it, in an attempt to accommodate children. In addition, there are several specific accommodations authorised by legislation and case law. The authority of the judicial officer in this regard was emphasised in *S v S* supra, and is elucidated in many judgments. In *S v Stefaans* 1999 (1) SACR 182 (CPD) the court at 187-188 found that “the presiding judicial officer should require that appropriate evidence be adduced to enable him to exercise a proper discretion.”

In accusatorial systems, the need for accommodation, though more difficult, is more important than elsewhere in order to ensure that children are empowered to testify. Research has shown, however, that judicial officers in some jurisdictions seldom implement accommodations that are available to them under existing laws. The reason for this would appear to lie firstly in the presumption of innocence, which requires judicial officers to protect the rights of the accused. It is the fear of compromising judicial neutrality and undermining the rights of the accused that may withhold judicial officers from playing an active role in managing the testimony of the child witness. A further reason is that they do not have knowledge of all the possible methods of reducing trauma nor the confidence to take control of the courtroom proceedings.

### **Guidelines for possible accommodations**

The following are guidelines that can be used by judicial officers to manage their courts when children testify.

#### ***Ground rules for attorneys***

At the outset of the trial, ground rules for attorneys regarding the questioning of the child witness can be set down by the presiding officer to facilitate the child’s testimony. The result of pre-determined ground rules is that the court’s control is underscored and counsel is educated. Based on child development research, the following ground rules are suggested:

- Questions aimed at children should be asked in a form that is developmentally appropriate. A simple guideline for children under the age of eight is to use short

sentences, one or two syllable words, simple grammar, and concrete visualized words.

- Postponements and delays, if granted, should be as brief as possible to preserve memory for details and minimize legal intervention into children's lives. A pending case can cause a lot of stress.
- Questioning of children should occur at an age-appropriate time of day: during school hours, before or after nap time, or at times that do not interfere with cherished activities.
- Attorneys should not raise their voices when questioning a child witness and should argue objections out of the child's hearing. Young children over-personalize courtroom procedures, assuming that arguments occur because they have done or said something wrong.
- Attorneys should generally question children from a single, neutral location. Walking around the room creates a changing visual backdrop that distracts children. Standing near the accused creates emotional factors that could hamper the child's ability to testify to the best of their ability. Although this refers more to other jurisdictions, it is nevertheless a valuable point to take note of.
- Children need regularly scheduled, frequent breaks (e.g. every twenty minutes). Children have difficulty focusing attention on verbal questioning for long periods of time. It is unrealistic to rely on children to monitor their own behaviour and notify the court when they need a break.
- It is cautioned that assumptions should not be made based on the child's age or physical appearance.
- Information should rather be obtained about the child's needs, developmental stage, learning or other difficulties and home circumstances, as well as the child's updated emotional status and adjustment.
- Awareness by all parties of the child's concentration span is also very important.

### ***Introduction and welcome***

It goes without saying that testifying in court is a stressful experience for a witness. They are required to give evidence in the presence of strangers, often about embarrassing and intimate details. The setting of the courtroom is alien to anything they have previously encountered. The procedure is foreign and the language formalistic. Where the witness is a child, these factors are even further exacerbated by ignorance. Ignorance of the procedures followed in court and the inability to understand the language employed prevent the child from being an effective witness and from taking part effectively in the judicial process.

It is, therefore, vital that the judicial officer assists the child by dispelling some of the myths and misconceptions that may clutter the child's understanding of the procedures. When the child gets into the witness box, it goes without saying that they are scared, anxious, and uncertain about what is going to happen. It is the role of the judicial officer to welcome the child and make them feel a little less anxious. Children see the judicial officer as the boss of the court, and should this person develop some rapport with them at the initial stages of

the trial, this will contribute greatly to the child's subsequent performance in the witness box.

The presiding officer should welcome the child and spend a minute or two making the child feel a little more relaxed. Language usage and tone are very important. Speak to the child in a manner that they will understand, and use a tone that is respectful of and sensitive to the child. There are many ways in which to develop rapport with a child, and this will depend very much on the individual child concerned. The aim is simply to get the child to relax and feel a little more confident about testifying. It is, therefore, suggested that the judicial officer chat to the child about inconsequentials unrelated to the case. Although rapport-building may take a few minutes, this is not time wasted. It will contribute greatly to the effectiveness of the child as a witness subsequently in the trial.

The judicial officer should provide the child with a brief introduction to the role-players involved in the trial. A simple description of who is present and what their functions involve will suffice, which must be offered in a developmentally appropriate manner.

Finally, it is important to provide the child with a few ground rules that will assist them to testify to the best of their ability. These would include, for instance, the fact that the child must say when they do not understand or cannot remember. These must be explained in a manner that the child will understand, and, where possible, the child should be given an opportunity to practise what they have just been told.

It is important to be sensitive to the child's age and development and to use appropriate language. Asking the child to demonstrate their understanding of a concept by role-playing it, is a useful technique to ensure that the child does, in fact, understand what has been said.

### ***Examination, cross-examination and re-examination***

Children are ignorant of court procedures, so do not have an understanding of who will ask them questions, nor do they understand the order in which the questioning takes place. Once the judicial officer has sworn the child in or warned them to tell the truth, the judicial officer can take a minute to explain to the child that the prosecutor will now ask them some questions so that the court can find out what happened.

The judicial officer should reinforce the need to tell the truth as well as the fact that they do not know anything about the case and were not present when it happened, so the child must tell them everything. There are no standard instructions, so judicial officers should simply talk to the child in an appropriate manner. The following is an example of an explanation given by the presiding officer:

"Ben, the prosecutor is now going to ask you a few questions to help you tell us your story. Remember that we weren't there, so you must tell us everything, otherwise we won't understand. All you must do, is tell us what really happened".

At each stage of proceedings, the judicial officer should explain to the child what will happen next. For instance, when the prosecutor has completed their questioning and the defence is about to begin cross-examination, the presiding officer should intervene to explain to the child what is happening. The judicial officer should explain that the prosecutor has finished asking questions and that the defence now has a turn to ask questions. Children are often confused by the fact that the prosecutor asks them questions and immediately thereafter somebody else asks them the same questions.

### ***Interventions from the bench***

The magistrate is the 'boss of the court' and should, therefore, manage their court to the best of their ability in the interests of justice. One aspect of managing a court involves the protection of witnesses. A presiding officer should ensure that witnesses are not bullied or harassed in court, and there is a duty upon them to intervene when it is obvious that a witness does not understand a question and is being confused. There are a number of instances when it is incumbent upon the judicial officer to intervene, and the purpose here is not to address fully all the possibilities. Rather, the idea is to highlight a few instances where the interventions are particularly applicable to child witnesses.

- *Introducing a child's statement into court*

A major difficulty experienced by children is the introduction in court of the statement they made to the police. These would include:

- time delay between the making of the statement and the trial
- progression in stages of cognitive development
- lack of appreciation of the legal weight attached to a police statement
- incomplete disclosure process
- inability to read or understand the contents of the statement.

The mere fact that the police have got a seven year old child to sign a statement does not mean that child had the ability to read the statement and agree or disagree with the contents thereof. The judicial officer should intervene to assist the child witness in this situation, where, for instance, it is obvious that the child was too young to understand the contents of the statement at the time it was made.

- *Language development*

The difficulties children experience with court language have already been highlighted in previous sections. It suffices to say that judicial officers need to be acutely aware of the manner in which questions are framed, especially where they are addressed to children, who have very little language ability. Judicial officers should insist that questions be simple, one-topic questions, that they be phrased in the active-voice, that unnecessary negatives be eliminated and that specialised vocabulary is excluded.

- *Cross-examination*

Cross-examination does not grant an examiner the right to harass and bully. It is the role of the judicial officer to protect witnesses from unnecessary attack. Where child witnesses

are concerned, this role becomes even more important as it is so much easier to intimidate children.

### ***Special techniques***

- *Recesses*

The judicial officer has the discretion and responsibility to decide upon recesses in the course of court proceedings during a child's testimony, and should do so when the child shows signs of fatigue, loss of attention or unmanageable stress. The response of some children to testifying can easily be misinterpreted. Breaks can be allowed either as a matter of routine or when the child witness is emotionally upset. In the latter instance, it is in the discretion of the judicial officer to allow it or not. When the need arises during cross-examination, special care should be taken to ensure that no coaching takes place. The purpose must be to allow the witness to calm down. To avoid the complaint that recesses interfere with cross-examination, the court may inform counsel ahead of time that recesses will occur at regular intervals.

- *Rearranging the courtroom*

A child witness may testify from a location other than the witness chair, allowing the accused and judicial officer to have frontal or profile view of the child. A child may not be required to look at the accused, except for official in-court identification. A pre-school witness may be allowed to sit at a child-sized table and a child-sized chair. The judicial officer, prosecutor and the attorney can sit there too. It is important to note that no supporting finding of trauma is required for accommodation of the child in rearranging the court room. The judicial officer may also remove their robe. It is suggested that the child is given the option to choose whether robes should be worn or not, and that the consent of everyone is obtained.

- *Support person*

Researchers highlight the obvious need for the assistance of a parent when a child goes to hospital, but how this assistance is not available when the child has to go to court. The tradition is that the child must go to court alone. Fortunately, this tradition is giving way to a more enlightened approach. Many countries now have laws that allow support for children testifying in court, including Zimbabwe. A trusted adult may accompany the child. If the adult is also a witness, the court may require the adult to testify prior to the child. The court will normally instruct the individual not to coach or prompt the child. The needs of the child should dictate the location of the support person. It may vary between sitting near the child, holding the child's hand or the child sitting on the adult's lap. The child should, however, not sit on the prosecutor's or judicial officer's lap while testifying. The support person should not speak to or interfere with the witness while still under oath or giving evidence.

- *Comfort item*

The court has the discretion to allow a child witness to keep a comfort item during their testimony. It may vary and can include a blanket, doll or teddy bear. A child witness should be permitted to bring their favourite toy or stuffed animal.

- *Speedy disposition of cases*

Delays in the processing of sexual offence cases may delay the healing process of the victim, prolong the trauma and anxiety associated with court appearances and may erode the memory of the victim and other significant witnesses. Cognitive and language development may also occur in this space of time, and child victims may mature physically, emotionally and psychologically. That in turn may further contribute to the development of inconsistencies in the child's evidence as compared to the initial statement, and this can have a detrimental effect on the case.

Time delays are inherent in the present criminal justice system. The role the judicial officer can play at present is to exercise their discretion in granting or denying a request for postponement for further investigation or to acquire the evidence of expert witnesses. Other reasons leading to postponements include witnesses not showing up, the accused requesting legal representation, the accused's attorney not showing up or requesting a postponement due to inadequate time for preparation. It is suggested that the judicial officer should take a firm stance against unjustified or flimsy reasons for postponement.

- *Thanks*

It would be fair to the child witness to thank them after giving evidence. Recognition is given of the time spent in court as well as the effort. Their dignity is also enhanced in this way.

## **Conclusion**

Judicial officers have a responsibility to protect vulnerable witnesses, including children, from unnecessary stress and trauma. They can accommodate child witnesses in the courtroom without compromising judicial neutrality and without undermining the rights of the accused. Judicial officers should take an active management role in accommodating child witnesses to reduce trauma and increase the accuracy and completeness of their testimony.