

LEADING THE EVIDENCE OF A CHILD WITNESS IN COURT

Submitted by the Child Witness Institute

KEY CONCEPTS	
Leading evidence	Child Witness
Prosecution of child abuse cases	Examination-in-chief of child

Introduction

Leading evidence, or examination-in-chief as it is also known, is the process of placing the evidence of a witness before the court. The placing of evidence before court is achieved by adopting the oral question-and-answer method. This method enables the party calling the witness, in this instance the prosecutor, to control what the witness says, and thereby to ensure that the evidence is ordered and remains relevant. It does, however, place the burden of presenting complete evidence upon the prosecutor. The prosecutor must ensure that all the evidence relevant to the elements of the offence is placed before the court.

Although this is the primary purpose of leading evidence, there is a further subsidiary purpose, which is rarely acknowledged and which relates to the emotional impact of the witness's evidence. Not only must the facts of the case be placed before the court, but the facts themselves should be presented in a manner that is also persuasive. According to Palmer and McQuoid-Mason,¹ it is a futile exercise to lead the witness "through a dry, stark rendition of his version". It is necessary to get the witness to paint a vivid, dramatic picture in the mind of the presiding officer, so that the latter has a clear understanding of the facts, as well as the context within which they take place.

Preparing for trial

In preparing for trial, the prosecutor will have made a list of the witnesses they plan to call. They will have analysed the statements of the witnesses and will, hopefully, have consulted with the witnesses. They should, therefore, have a clear idea of what each witness's contribution to the trial will be. It is essential that an examiner knows exactly what information they require from a specific witness before they begin to lead that witness's evidence. This will enable them to focus on the relevant issues and better control the witness.

For each witness that is to be called, the prosecutor should have a list of the elements that need to be covered with that particular witness, so that they ensure the evidence is placed before the court. This preparation should merely include a list of the points that the witness needs to cover, such as identification, location, time etc. It is not suggested that the prosecutor write out all the proposed questions, as this is not only time-consuming, but also tends to blinker the prosecutor to alternative directions of questioning, should the witness's answers create new possibilities. If a prosecutor has a list of proposed questions, they will

¹Palmer, R. and McQuoid-Mason, D. 2000. Basic Advocacy Skills. Butterworths. 54.

not focus primarily on the witness and the replies that the latter offers. The focus will be on the questions and not on listening to what the witness has to say. This is especially relevant where the witness is a child, because children tend to respond in an ambiguous and free-associative manner, which can give rise to confusion and contradictions. The prosecutor's attention should, therefore, be upon what the child is saying, so that they can clarify any ambiguities. In addition, the child may, in the course of a reply, introduce another line of evidence, and if the prosecutor is too focussed on particular questions, they may miss this important opening.

Leading evidence

The essence of examination-in-chief is to lead a witness through the sequence of events, from a given point in time until the culmination of the event. The witness must be given an opportunity to place their version of events before the court in a chronological sequence in their own words. Once they have done this, the prosecutor can return to specific events to clarify or highlight particular points.

The quality and reliability of a child's evidence will be influenced to a great extent by the skills of the examiner. To enable the child to give a coherent and unbiased account of the events experienced by themselves, the examiner will have to conduct the examination with expertise and sensitivity. When leading the evidence of children, a simple interview structure should be adopted.

The first phase of any interview involves the building of rapport. Where a child is a witness, rapport-building is vital. The child is not only intimidated by the court and all that it encompasses, but is also afraid of what is about to happen and whether they will be able to answer the questions put to them. It is, therefore, essential that the prosecutor spend a few minutes putting the child at ease. Since one of the primary fears which children have, is that they may not be able to answer questions, the prosecutor should allay these fears by asking the child simple, rapport-building questions that will be easy for the child to answer. In this way, some measure of confidence is instilled.

Ironically, this form of rapport-building is very often used by the defence at the beginning of cross-examination, whereas it is completely ignored by most prosecutors. The latter, after a cursory comment or two, usually go straight into the facts of the case by asking the child to tell what happened without any attention paid to rapport building. Defence attorneys, on the other hand, spend more time on rapport-building with the witness.

Chatting to the child in a friendly manner without referring to the incident will contribute to the child's overall well-being in the courtroom. On the face of it, these questions seem to amount to nothing more than small talk. However, as far as the child is concerned, they accomplish a number of positives. The child, who has up until this moment been afraid that they will not be able to answer the questions, begins to realise that the questions are not so difficult. It offers the child an opportunity to practise the question-answer format of examination-in-chief in a non-threatening manner. And it also provides the child with an

opportunity to relax and become slightly more comfortable. The first few questions are always the worst, and once the child has responded to these successfully, they will be better able to deal with the rest.

Once the prosecutor has developed some form of rapport with the child, they can then move to the actual facts of the case. It is important that they inform the child at every stage what is happening. The more context that is provided for the child, the more effective a witness they will be. This can be done in the form of a simple statement or two: "Are you feeling okay, X? Do you mind if we move on to what happened to you? I have to ask you some questions now." Any transition statement that informs the child of what is going to take place would be suitable here.

Before proceeding to detailed questions, the prosecutor should allow the witness an opportunity to provide a free-narrative account of what happened. The need for control, especially where the witness is a child, is so great that prosecutors very rarely allow the witness to tell their story in their own words. They simply go straight into the questioning phase (as illustrated in the Lombardt case supra) and decide upon the line the evidence will take. It is important to allow the witness an opportunity to tell their story in their own words. Firstly, the child may offer a lot more detail than specific questioning would elicit and, secondly, the child will explain in their own idiosyncratic way what happened, thus contributing to their own credibility in the eyes of the court. Often this spontaneity is more effective than stilted replies to questions posed.

It is accepted that children are not skilled at providing detail and will, in all likelihood, simply offer an over-summarised version of events. When the child has had an opportunity to tell their story in their own words, the prosecutor can then move on to the questioning stage of the examination. Again, it is essential that the child is informed about what is happening: "Now, X, I was not there when all these things happened, so it is a bit difficult for me to understand everything. Okay? I am going to go back to the beginning and ask you some questions so that I can understand better. Is that okay? If I ask you something you don't understand, please tell me. Then I'll ask it in another way." If the context of the questions is not constantly reinforced, it is very easy for the child to become confused.

The prosecutor can then proceed to ask the child more detailed questions. Only one particular topic should be dealt with at a time. For instance, if a child has been abused on more than one occasion, the prosecutor should deal with each occasion separately, introducing each occasion to the child so that the latter is aware of what the prosecutor is talking about. Again, transition statements would be used to move from one topic to another: "Now that you've told me about what happened in the car, I need to ask you some questions about what happened in the bedroom. Can we talk about what happened in the bedroom?" It is necessary, from a developmental point of view, to reinforce a change in topic as the child will often have difficulty in doing this on their own.

Questions should always progress from open to closed, as this eliminates the danger of using leading questions. Questions would progress from “Can you tell me what happened in the bedroom?” to “And where was the bed?”. Because young children do not yet have the ability to evaluate the needs of their listeners, they will very often only provide some of the details. The prosecutor will, therefore, have to make use of prompts throughout the examination to assist the child to focus on what is important.

It is essential at this stage to focus on communicating with the child. The prosecutor must be vigilant about the manner in which they phrase questions, and must constantly be evaluating the child’s replies to see whether the child has not misunderstood the question. This is an incredibly difficult, but vital, role that they must play.

Prosecutors should be very aware of the manner in which they phrase commands. A particular difficulty experienced with child witnesses is the fact that they speak very softly and that their responses can often not be heard. Commands like “please speak louder” and “don’t nod your head” are intimidating and tend to frighten and confuse children. As mentioned previously, it is simply necessary to contextualise these requests so that the child understands. Explain that their voice is being recorded on a tape and cannot be heard, or that the tape cannot see them nodding: “X, remember that what you say is being taped. If you speak softly, the tape can’t hear your voice. Do you think you can speak a little louder for us?”

When the prosecutor is satisfied that they have covered all the necessary elements of the offence, the prosecutor can bring the examination to an end. This, again, can loosely be based on the closing phase of interviewing. Thank the child for their participation, and explain what is going to happen to them next. The defence will proceed to cross-examine the child and ask them the same questions all over again. The prosecutor should use this opportunity to prepare the child for cross-examination: “X, I have finished all my questions now. Thank you for answering them. The accused/lawyer for the accused is now going to ask you some questions just to make sure he understands everything. Okay?”

Conclusion

In conclusion, it cannot be emphasised enough how important the development of rapport is when leading the evidence of a child witness, as well as the contextualising of information. Children are especially fearful and stressed by a court appearance, and it is essential that they be put at ease before they even begin to attempt the questions. This will simply contribute to their effectiveness as a witness as well as to their credibility.