The Use of a Watching Brief as a Legal Tool for the Protection of Child Victims in the Criminal Justice Process

Patmalar Ambikapathy
Barrister and Solicitor
Supreme Court of Victoria and Malaysia

ny lawyer who is asked to act for a child victim very quickly discovers that their client is at a disadvantage in the criminal justice process. The experience can challenge all the assumptions held with respect to the common law system. Lawyers trained in this system realise that from a child victim's perspective the situation appears unsatisfactory and problematic. It is necessary to search therefore for some answers that could lead to legal intervention to protect the interests of a child victim.

Firstly, the principles that have guided lawyers in the criminal justice system for several hundred years should be mentioned. One of the greatest traditions of this system is that every accused person is presumed to be innocent until proven guilty in a properly constituted court of law. Also, any crime a person is accused of must be proved beyond reasonable doubt before any conviction can be made. Indeed, an essential prerequisite of a democracy is that all accused persons should have a fair trial. The common law rules of evidence clearly embody these principles. Lawyers have, by their very training in this system, developed a strong resistance to any perceived erosion or compromise of these basic values. It has long been accepted that these fundamental rules should be paramount and no-one can doubt the validity of this point of view.

However, having stated the above, there are instances when these rules have been modified by statute, so precedents have been established for careful re-examination of other situations that may warrant a fresh approach - such as the problems faced by child victims.

There are other principles in the law that have been, unquestioningly, held in good faith over the years but have now been reviewed as public attitudes have changed. It was not long ago in Victoria that married women, lunatics and children, were considered as classes of persons who were not competent to act for themselves. The first two categories of persons have achieved remarkable progress in the recognition of their rights in the law, but there are still difficulties with society's attitudes to child victims. Society has failed to recognise or acknowledge that children are in need of special protection in the criminal justice process.

Lawyers need to ask if common law principles are incompatible with protecting the interests of child victims in the criminal justice system. Initial cases seem to indicate that it is possible to remedy some of the disadvantages faced by child victims without compromising the above common law principles. The challenge then facing any child victim's lawyer is to develop ways of protecting their client without failing in their duty to accused persons.
Legal Representation of Child Victims

In Victoria, which has inherited a modified version of the English common law, the same difficulties are faced as by American states when confronting the problem of legal representation of child victims in the criminal justice process. The role of lawyers in the criminal justice process has been limited to that of guardians of liberty of accused persons. Indeed, Sir Harry Gibbs said recently:

It is obvious enough that the fundamental aim of the criminal justice system is to keep down crime. But public order and the suppression of crime, may sometimes be secured only by too great a sacrifice of the freedom and a democracy must seek to maintain a proper balance between order and liberty (Gibbs, speaking in Canberra, February 1987).

This reflects the current state of play in Australia. The state, largely the police and the prosecutors, protects society (and by implication the victim) and lawyers assist the accused persons in the preservation of their liberty. However, there is a description of the function of the criminal law that would appeal much more to lawyers interested in assisting child victims. In 1957 in England, the Wolfenden Law Report defined the function of the criminal law as being
to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in state of special physical, official or economic dependence (Wolfenden 1957, pp 9-10).

It does not take long to realise that the criminal justice process falls short of the ideals expressed in the above definition when the current Victorian law with respect to child victims is examined.

The Family Court of Australia and the Children's Court of Victoria (as well as provisions under welfare and family law) do afford some safeguards to abused children who appear before them. In fact, there is a procedure for separate legal representation of children in the Family Court when the court determines and orders that it is 'in the interests of the child' to be separately legally represented. Cases of abuse surface in this jurisdiction in relation to such questions as access and the Legal Aid Commission of Victoria funds a lawyer for the child in these circumstances. Although the objectives of these courts are different to those of the criminal justice process, they all seek to protect the rights and interests of children in situations where there are other competing rights to be considered before the court. Additionally, courts have lately used their inherent powers to protect the interests of children against that of competing care givers (Re: Baby 'X' Supreme Court of Victoria, 3 July 1986).

In disturbing contrast, the criminal justice process in Victoria does not protect children with special rules when they are compelled to be witnesses in a trial. Often the children are victims, with the accused person being charged with committing a sexual or physical assault on them. In the prosecution of such cases, the background against which a child victim's lawyer has to operate is discouraging. There is no mandatory reporting of child abuse nor any significant intervention in the criminal justice process to protect child victims, as exists in several states in America. There are no Guardian ad litem programs or proposals for them as yet in the criminal justice process in any Australian state. However, the victims' rights movements have made several attempts to protect and assist child victims, but these take the form of 'support' from professionals who cannot function in the criminal justice process.
The result is a situation where it is impossible to prosecute successfully accused persons where very young child victims are involved, and such crimes then continue by and large, without redress in the criminal justice process. Yet, lawyers still do not see this situation as a miscarriage of justice.

**The Overseas Alternatives**

As the Australian approach has been limited by tradition, one can look at other courts and other countries that have a shared tradition of the common law to see how they have developed methods to overcome the problem. In Malaysia, America and Australia, the needs of victims have been addressed in different ways, but there are some similarities.

**The watching brief**

The watching brief is a method of representing clients who are not strictly parties to the proceedings. It was developed early in England in the Coronial Courts as a device to put forward and protect the rights of persons who had an interest in the proceedings and its outcome. It was used by counsel retained for potential defendants, the estate of deceased persons, and other witnesses or victims who had a stake in the findings of the Coroner's Court. It has been described thus: 'any person who, in the opinion of the coroners is a properly interested person is entitled to examine any witness at inquest either in person or through his counsel' (*Halsbury's Laws of England*, vol. 3, p. 621). It is arguable that child victims have an interest in the prosecution of an accused person and this has been ably argued elsewhere (Hardim 1986).

Interestingly, the watching brief has not been confined to Coroner's Courts. It has been used in criminal trials, in civil litigation and before administrative tribunals in Australia and elsewhere. It is stated in *Halsbury's Laws of England* that 'counsel may accept a watching or noting brief, but if this is on behalf of a person who is not a party on the record or who is not allowed to take part in the proceedings, he ought not to take part whatsoever in them'.

In 1835 an English judge said to a barrister who 'had a brief in the cause', 'I am aware that there are many precedents to bear out the learned counsel in consenting to stand in his present position', but the judge continued to exercise his discretion and refuse the barrister the right to participate in the hearing (*Moscatti v. Lawson* [1835] Mood and R at 454). It is submitted that this authority of the court is an effective safeguard to the rights of the accused person. Thus, participation by the use of a watching brief in the proceedings is not a right but is at the discretion of the court. The lawyer holding the watching brief is free to act for the child victim before and after the trial. This is a valuable role that can be undertaken by any lawyer as the due process of prosecution begins long before the hearing. The child victim's lawyer is in a position to coordinate the whole system to protect the interests of the child victim client. The following are some of the duties that have been undertaken by a child victim's lawyer upon instructions from an adult in charge of the child victim:

- interview the adult in charge of the child and discuss the options available;
- put the child victim in touch with health and welfare agencies;
- make a legal aid application;
- obtain/tender reports from a psychologist/counsellors/doctors regarding:
  - the effect of proceedings on the child; the child's development and whether the child is able to understand the nature of an oath or duty to tell the truth; and a victim-effect report;
- advise on appropriate action in the interests of the child and of the immediate steps to be taken to protect the child - for example welfare proceedings;
- prevent repetitive medical examinations or questioning that would distress the child;
- obtain a statement and if possible a list of charges against the accused person;
- investigate matters not covered by police;
- negotiate with police to lay charges against the accused persons;
- assess the appropriateness of charges against the accused person and decide whether other charges need to be laid;
- maintain contact with police to tender any new evidence;
- review evidence with respect to matters which may be damaging to the child;
- negotiate on the exclusion of matters damaging to the child with police or defendant's lawyer;
- give input into any charge bargaining;
- contact police with respect to input on bail/conditions of release/custody;
- monitor the welfare of the child prior to the trial and advise of any further action that needs to be taken to protect the child victim;
- make pre-trial applications on behalf of the child victim;
- ensure police are advised on any breaches of bail/conditions;
- advise the adult in charge of procedures in court;
- attend to pre-court formalities for the child victim;
- tender the victim-effect report to the prosecution;
- have input into early release options;
- ensure protection of the child victim upon release of the offender from gaol;
- coordinate civil and criminal proceedings.

In Malaysia, the strategy of a watching brief was used when a victim suffered an assault from a politician. The watching brief there took the form of a 'talking brief' as the victim's lawyer was allowed to participate in the proceedings and the victim's lawyer worked very closely with the police on a watching brief (R v. Seow Hun Khim [1985] Penang Magistrates Court, Malaysia).

In Australia, the watching brief has been used in two ways - to negotiate with the police to lay charges, and to protect the interests of child victims when they were prosecution witnesses in a trial. In both cases the Legal Aid Commission of Victoria assisted in funding, which represented a breakthrough, as such funding had never been granted previously. However, since those cases, there appears to be resistance to assisting child victims in this manner and in a time of scarce resources, there appears to be a policy to fund accused persons more readily than child victims. The Law Institute of Victoria, through its Child Welfare Committee, is seeking to redress this situation now that a precedent appears to have been established. A child victim's lawyer is on that Committee to promote the idea of a watching brief.

In the case where the Legal Aid Commission of Victoria (Re: Baby 'X', Supreme Court of Victoria, 3 July 1986) funded a child victim's lawyer, most of the above duties were performed on behalf of the client. The child victim's lawyer sat at the bar table and his presence was not objected to by the prosecution or the defence. The court has not seen this as a potential threat to the accused person's right to a fair trial (State v. Walsh 1985 A2d 1256 New Hampshire Supreme Court).

Again in the case (Re: Baby 'X' Supreme Court of Victoria, 3 July 1986), an application was made in pre-trial proceedings and the child victim's lawyer was able to obtain the approval of the court, the defence and the prosecution to adopting an approach that was the least traumatic for the children involved. A good rapport with the prosecutors was of great assistance. Early cooperation and input into the criminal justice process can result in a more efficient, well-run case for the child victim, and reduce the need for their participation in the actual trial.

Separate and independent representation has proved its worth in other ways as well. Given the finite resources of the police and the prosecution, there is often no ongoing relationship between the prosecutors, the investigators and the child victim. As a result, information that would assist the prosecution may not be communicated to them. In one case recently, an investigatory role was played by the victim's lawyer and details of an alleged voluntary confession was passed on to the prosecution. In another case, the police
were unaware that the suspect had a gun which the child victim's family believed could be used against the victim. Information that the licence for the gun could have expired, gave the police material that they could act on before trial to protect the child victim from a potentially tragic situation.

It sometimes happens that an accused person or their family may seek to intimidate the victim or their family. In such situations, the child victim's lawyer can address the situation by either informing the police or taking other appropriate action. Civil remedies can also be used.

In all of these cases, a relationship is established between lawyer and client which without this relationship may have prevented the client communicating matters of importance. In many intangible ways, the child victim's lawyer is made to realise that they are helping their client. One child said in wonder in the courthouse before the trial 'All these people believe me!' This unquantifiable support may have given the child victim more confidence to deliver their evidence - and in that case a conviction was obtained. In one case recently, a psychologist indicated that children feel 'empowered' with such assistance and begin not to see themselves as only helpless participants in a system.

There will be other ways in which lawyers acting for child victims can assist their clients, depending on the client's needs. For instance, appropriate Family Law injunctions can be used to remove an accused person from the victim's family rather than removing the child victim through welfare law and the Children's Court. Holding a watching brief for a child victim and attending court at sentencing can result in an acquisition of knowledge of the accused person that was previously not available. For instance, information can be obtained about the accused person's psychiatric condition, which would have been material for a plea of mitigation and would have been communicated to the court at sentencing. This same information could be a basis for restricted access or contact with the child victim once the accused person is released from custody.

In Victoria, a claim can be made to the Crimes Compensation Tribunal for damages for pain and suffering. It is also proposed to develop common law torts to seek compensation for child victims. Child victims are also put in touch with health and welfare professionals for appropriate emergency and ongoing assistance.

The bulk of the duties undertaken by a child victim's lawyer using a watching brief can also be undertaken by a Guardian ad litem for the child victim. As can be seen so far, none of the duties undertaken pose a real threat to the rights of the accused person. However, duties in court during the trial could prove more problematic. Nevertheless, in using a watching brief, the court retains the discretion to refuse to allow the child victim's lawyer to participate in the proceedings. Arguably then, given the court's discretionary powers, the accused person's rights are safeguarded. In one case where legal assistance was granted to the child victim for their own representative, the child victim's lawyer was unable to address the court on a point of law. Despite this, a conviction was obtained. It is clear that the chances of conviction may increase with the presence of a child victim's lawyer but this, it is submitted, does not jeopardise the accused person's rights to a fair trial (State v. Walsh 1985 A2d 1256 New Hampshire Supreme Court). Rather it can be argued that the services of a child victim's lawyer lends support to a child victim and thereby helps in the prevention of an injustice, when accused persons are protected by the criminal justice process to the detriment of a child victim.

A detailed examination of the disadvantages faced by child victims reveals a crucial role for any lawyer. This role is to develop the proper use of professionals outside the legal field to balance the interests of child victims and the community against the rights of accused persons. Psychologists have developed tests to assess the ability of children to verbalise and thus to give evidence on oath. This ability plays a vital role in the criminal justice process in Victoria. If a child victim cannot understand the nature of an oath, that child cannot give any sworn evidence, which means that there can be no conviction without corroboration. Thus in such situations the child victim will not even be able to participate in the criminal justice process. Corroboration is typically absent in many such cases and this
rule, whilst quite properly safeguarding the right of an accused person, does not safeguard the rights of a child victim.

Whilst there are difficulties in the use of expert opinion, the criminal justice process must be open to intervention by professionals who are specially trained to assess verbal communications of children. Their professional evidence need not be unchallenged, but arguably should be received to prevent an injustice occurring in a situation where the system clearly needs assistance in ascertaining properly presented evidence. Expert opinion has long been accepted in common law systems. Judge Saunders, in England in 1554, said

If matters arise in our law which concern other sciences or faculties, we commonly apply for the aid of that science or faculty which it concerns. This is a commendable thing in our law. For it thereby appears that we do not dismiss all other sciences but our own, but we approve of them and encourage them as things worthy of commendation (Buckley v. Rice-Thomas [1554] 1 Plows 118 at 124).

Given that this philosophy underlies our system, the child victim's lawyer should seek out and coordinate all the expert opinion available - from doctors, psychologists and counsellors. In Victoria, the use of a psychologist's report on the question of the child's ability to understand the oath is being developed. At present this fact is ascertained by the court on a voir dire, and not by professionals trained to discover this fact. This is an unsatisfactory situation as the court has to decide on this difficult issue without assistance. It is a situation that need not continue as there are common law precedents where the court has sought assistance on this very matter.

Conclusion

Earlier, reference was made to three common law principles that had shaped the criminal justice process. Exposure to other disciplines have indicated that there is perhaps a need to examine more closely some of the premises upon which these principles are based. It is submitted that the criminal justice process has assumed that any contest in their courts is between two equals. Rules in the criminal justice process have been framed for adult offenders and victims who come before a court for a trial, but no special rules have been developed for contestants who are not 'equal' to the offender. The concept of 'equality before the law' is a principle that we have readily accepted, but usually only with reference to accused persons and not child victims. The criminal justice process incorporates rules to protect accused persons who are deemed not 'competent'. These same persons, however, are clearly at a disadvantage in the criminal justice process when they are victims.

In civil litigation children act through a Guardian ad litem, yet no-one acts for them when they are in the much more vulnerable position as victim in the criminal justice process. To expect the same standards and burdens of proof from children and adults is somewhat illogical and unrealistic. There cannot be a fair trial for a child victim in such circumstances. Does the criminal justice process recognise that child victims are not 'equal' to adults before the law? In Victoria, we continue to believe that child victims' interests are adequately addressed by the mere fact of prosecution and by bringing the accused person to justice. By this process accused persons continue to remain in a situation where they can avoid the community's disapproval and can continue to function in that society like any other law-abiding citizen without confronting their responsibility for such offences.

An alternative approach to this problem is to re-examine once again basic common law principles which appear to reflect current public policy and appear to have their origins in the rules known as 'presumptions'. Such presumptions are more or less a reflection of our attitudes and perceptions, rather than sacrosanct and inviolable principles of law. Indeed it has been stated that 'the classification of many presumptions is uncertain. In some cases the
same rule has, at different periods in history, been treated as a presumption of fact, a rebuttable presumption of law, an irrebuttable presumption, or a rule of substantive law' (Halsbury, vol. 17, p. 83).

In Victoria, there is an irrebuttable presumption of law that children under the age of 10 are incapable of committing a crime (Crimes Act 1958 (Vic.)). This is a presumption based on public policy as this age varies from state to state in Australia. What this means in effect is that children are deemed to be innocent and no facts are admissible to show that this cannot be so. Does this presumption sit comfortably beside the presumption that children are not competent to act for themselves? It appears that in the criminal justice process the presumption of innocence of an accused person takes precedence over other presumptions about the innocence and vulnerability of children. There is some conflict here. It has been suggested that where there is conflict of presumptions, we should examine the social policy behind the presumptions, to enable the policy which seems more vital to prevail (Professor Morgan, Harvard Law Review, vol. 44, p. 906).

If this criterion is used to examine all rules, principles or presumptions in the criminal justice process then such debate may result in a change of public policy. Perhaps a reappraisal of the arguments that have been accepted for so long is necessary if we are to increase the legal profession's awareness and sensitivity to the problems faced by child victims. If the watching brief is used in every case where child victims are involved, their lawyers will inevitably continue to challenge a system that automatically disadvantages their clients.

A modification of some of the common law rules without compromising the accused person's rights may be warranted. An examination of the position of both the child victim and the accused person is necessary rather than traditionally confining the debate to just the rights of one party in the criminal justice process.

Ultimately, it must be acknowledged that the strength of the common law lies in its ability to change and adapt to the community's needs. The use of a watching brief to assist child victims can be a very useful tool to promote and protect child victims now, without the need for law reform or a court order.

The lawyer's role in this process of law reform is crucial. A French lawyer and writer, Denis Langlois, who is said to be one of today's most outstanding fighters against injustice, stated in an interview (The Guardian, 31 August 1986) that:

I feel the lawyer's role is clearly evolving. For a long time he was someone who defended an accused person, or accused a person, before a judge. Today, he has become more of a helper, a support for someone who feels somewhat crushed, someone completely intimidated by the legal apparatus, someone who cannot understand anything simply because he is not expected to understand anything. This is more than simply defending a client.

This is the kind of challenge that faces lawyers acting for child victims today. The road ahead for the field of pioneering endeavour will be marked with controversy and obstacles, as we will have to confront the criminal justice process with the needs of child victims. Their needs are immediate and substantial. The watching brief has been devised to offer them some assistance now without waiting for law reform.

Imaginative use of discretionary powers vested by statutes or the common law in the courts, continues to be used to extend the frontiers in the criminal justice process, to assist child victims. It is hoped that lawyers will be able to overcome their conditioning, which has quite properly made them zealous in protecting the rights of the accused, and rise up to the challenge posed by the plight of the child victim.
References

