

## CHAPTER FOUR

### COMMUNICATING WITH THE CHILD WITNESS

#### 4.1 INTRODUCTION

As discussed in chapter three, knowledge of the developmental aspects regarding cognition, language, memory, communication, morality, and attention of the child witness is important. Fear and trauma can influence the child's ability to testify meaningfully. Children are frequently direct victims of crime and violence or witnesses of these crimes. Civilized society attempts to resolve such crime, conflicts, disputes, or criminal conduct in courts of law. Children are unrealistically expected to behave and respond on an adult level in court. This is something most children are not always capable of doing as a result of restraints in their cognitive and language development. Criminal court hearings are a challenging, demanding, confusing, and difficult environment for the child (Copen, 2000:2).

The child who testifies in court continues to experience unrealistic, adult like expectations about his performance as witness. His testimony is usually found to be less reliable when he fails to satisfy the expectations of the adults who have little understanding for his developmental limitations and the impact of the trauma of his victimization.

This chapter will discuss trauma and all facets of trauma as well as the child's memory and problems that can arise during the court case. Further, the dynamics of child abuse with specific emphasis on sexual abuse, as most children who testify in court have been physically and sexually abused, will be discussed. The effect of the court, the advantages for the child, and the difficulties the child experiences will also be discussed. The child's language skills and problems the child experiences in court with relation to his skills, as well as cognitive shortcomings affecting the child's ability to testify, will be discussed.

## 4.2 TRAUMA

Having to testify in court after a traumatic abuse incident can be upsetting and the child suffers fear and anxiety before he has to testify in court. The child experiences emotional trauma as a result of repeated questioning about the abuse by police and attorneys and of repeated court appearances (Perry & Wrightsman, 1991:135).

In a comprehensive study of the emotional reactions of the child sexual abuse victim, Perry and Wrightsman (1991:136) found that the emotional trauma experienced by the child who is involved in giving legal evidence takes many forms. Fear is a common symptom.

Berliner and Barbieri (1984:128) note:

“One major barrier to prosecution of child sexual-assault cases is the fear that the child will be further traumatized by involvement in the legal process.... [T]he victims and their families may be reluctant to report the crime to authorities because of the fear that the child will be subjected to further trauma by the criminal-justice process. It can be lengthy and requires the child to repeatedly face traumatic memories: the victims and their families can have no guarantee that the child will not encounter untrained or insensitive personnel.”

Testifying in court is difficult for children who have been sexually abused and can lead to traumatization. The trauma the child experiences when having to testify in court is also known as secondary traumatization.

From the above it can be seen that the accusatorial judicial system that we have in South Africa is an unfamiliar and unfriendly world for both the child as well as the adult. The child finds it very frightening and embarrassing to testify in a sexual abuse case. The courtroom is also a somber place that makes the testifying of the child a frightening experience (Don Wauchope, 2000:46).

#### **4.2.1 Definition of trauma**

According to Lewis (1999:6) a traumatic experience differs from stress or a crisis. Trauma is “an experience that is sudden, horrifying and unexpected. The person feels fear and is helpless and out of control.” Lewis further states that trauma is not part of a child’s normal experience. The event is so extreme and frightening that it overwhelms the child’s ability to cope. A trauma is always negative and damaging to the mental health of the child.

Brohl (1996:12) describes trauma as “a disordered physic or behavioral state resulting from mental or physical stress or physical injury.... an agent, force or mechanism that causes trauma.”

Thus, trauma for the child is an event or experience of an event that is more than merely stressful, it is shocking, terrifying and overwhelming to the child who experiences it. This results in feelings of helplessness and usually causes a range of reactions.

#### **4.2.2 Characteristics of child trauma**

Because of developmental immaturity and age- and stage-specific abilities to integrate the information of traumatic events, children understand and respond to trauma in a different way than adults. The child processes the information and reacts according to his developmental level and capacity.

Terr (1991:40) documented four characteristics that affect almost all children subjected to trauma, namely:

- Repeated visualization or perceptions, even in children who were infants or toddlers at the time of the traumatization.
- Repeated behavior or physical responses, even in children with no verbal memory and who where exposed to a traumatic event before the age of 12 months.
- Trauma-specific fears above and beyond the normal fears of childhood.

- Revised ideas about people, life and the future. Traumatized children have limited sense of the future and are aware of negative life events.

The research on the biological responses to traumatization has been extended to children and indicates developmental and maturational aspects to the response. The presence of trauma during childhood can lead to changes in brain and hormonal functioning in ways that appear to affect all aspects of normative developmental processes (Alpert, Brown & Courtois, 1998:54).

#### **4.2.3 Impact of childhood trauma on the brain**

Post (2004:1) found that early exposure of a child to traumatic experience exposes the developing neurophysiological system of the child to “arrested emotional development”. An environment of normal, calm interaction between the primary caregiver and the child is necessary for successful development of the brain so that emotional regulation can develop. When this is absent, Post (2004:1) found that normal and healthy developmental experiences do not take place. The absence of this calm interaction causes a chronic stress when a child should be experiencing calm interaction. The result will be a child who is poorly equipped to tolerate and manage a stressful situation.

Bremner (1995:1) calls the trauma caused by psychological trauma the “invisible epidemic” of childhood abuse. He further postulates that childhood abuse and other extreme stressors can have lasting effects on brain areas involved in memory and emotions. The hippocampus is a brain area involved in learning and memory that is particularly sensitive to stress. The hippocampus and the medial prefrontal cortex play an important role in memory and emotional regulation. Dysfunctions in this area can cause memory deficits (Bremner, 1995:4).

High levels of the cortisol hormone are secreted during trauma and stress. This is associated with the damage of neurons in the hippocampus of the brain. Symptoms of increased heart rate and blood flow, increased agitation, narrowed attention, and poor organizational skills are experienced. A further result is that new learning is negatively influenced by damage to the hippocampus that was caused by trauma.

From research done it was found that the hippocampus is involved in verbal declarative memory and is very sensitive to stress. The abused child has shown to have a smaller hippocampus volume and that there are deficits in the hippocampal-based verbal declaration memory functions (Bremner, 2005:6; Naude, Du Preez & Pretorius, 2003:16).

Taking the aforementioned in account, the researcher is of the opinion that the traumatized child will show similar symptoms as the attention deficit hyperactive disorder child (see 5.7). The same skills used when those children testify should also be applied when the traumatized child testifies.

#### 4.2.4 Symptoms in children who are traumatized by abuse

The following are symptoms that the child who has been abused can experience:

- **Re-experiencing the event:** The children can engage in post-traumatic play or re-enact their trauma in play. Repetition of the traumatic themes in children's play is an indication that they are re-experiencing thoughts about disturbing events (Van Niekerk *et al.*, 2000b:C3-3; Terr, 2004:43).
- **Numbing of responsiveness:** The child avoids both conscious and unconscious thoughts, activities and symbols of the traumatic event. This avoids the child from being overwhelmed with powerful feelings and thoughts of the trauma. This is a powerful survival strategy, but can lead to a general numbing of the feelings and adversely affect the child's social, emotional, and cognitive development (Terr, 2004:43; Van Niekerk, 2000b:C3-4).
- **Symptoms of hyper arousal:** According to Lewis (1999:14) research has shown that if a child is traumatized, the chemical function within the brain becomes impaired. This creates a heightened sensitivity and can cause hyper arousal or hyperactivity. The child will experience sleep problems, irritability, inability to concentrate, anger outbursts, hyper vigilance, and exaggerated startle responses. The child will also have trouble concentrating or remembering information. This can cause

problems for the child when having to testify, as he must be able to concentrate for some length of time (Terr, 2004:43; Van Niekerk, 2000b:C3-4; Lewis, 1999:14).

- **Developmental changes:** Pynoos and Eth (1984:105) noted developmental differences in children's behavior after experiencing severe trauma.
- **Generalized fears:** Victims of trauma have difficulty regulating anxiety as well as aggression. When the traumatized child is confronted with reminders of the event, for example, when having to testify, he exhibits increased anxiety and generalized fears (Terr, 2004:43).
- **Spiritual/Psychological consequences:** Danger replaces the feeling of safety for the child in the community. The trauma indicates a loss in the belief that there is order in life. The child will experience a loss of people, freedom, protection, and control (Terr, 2004:43).
- **Blurring of distinction between friend and enemy:** For children living in a safe environment it is difficult to distinguish between friend and enemy. If a friend or family member committed the abuse, the child who should feel loved and protected now is scared of the person (Terr, 2004:43).
- **Emotional regression:** Many children who are called upon to testify have been traumatized to some degree. Such children have usually experienced personal harm – physically, psychologically, and/or sexually. Severely or chronically traumatized pre-school children are likely to regress emotionally and therefore function at a less mature psychosocial level than is normally expected of a child of that specific age. The child will show anxious attachment behavior, which indicates a regression to Erikson's first psychosocial stage, trust vs. mistrust (see 3.9.11) (Pynoos & Eth, 1984:107).

School-age children are more aware of internal body sensation but can find it hard to control their behavior, suggestive of the difficult-to-control autonomy versus shame-and-doubt stage as described by Erikson (see 3.9.11) (Myers and Perry, 1987:512).

- **Co-morbidity:** There are a number of psychiatric disorders that are also commonly found in traumatized children and adolescents, for example, major depression, substance abuse, attention deficit/hyperactivity disorder, oppositional defiant disorder, and conduct disorder (Terr, 2004:44; Van Niekerk, 2000b:C3-6).

#### 4.2.5 Traumagenic model of child sexual abuse symptoms

Finkelhor and Brown (1985:530) proposed the need for the symptoms of sexual abuse to be arranged in a model and subsequently developed the four-factor traumagenic model. They conceptualized the impact of sexual abuse on the child in terms of four trauma causing factors, namely, sexualization, stigmatization, betrayal, and powerlessness. They further postulated that the combination of these four factors make sexual abuse unique and distinguish it from other trauma. These dynamics are, however, generalized and can occur in other kinds of trauma. These symptoms are therefore not unique to sexual abuse.

Finkelhor and Brown (1985:531) categorized the characteristics and perceptions associated with sexual abuse. This model shows how the child’s cognitive and emotional orientation towards the world changes because of distortion in the child’s self concept, outlook on life, and affective capabilities.

Table 4.1 provides an overview of Finkelhor and Brown’s key factors and impact of traumagenics.

**Table 4.1: Key features and impact of Traumagenics**

<b>Trauma causing factors</b>	<b>Characteristics</b>	<b>Psychological Impact</b>
Sexualization	<ul style="list-style-type: none"> <li>• Associates sexual activity with gaining affection</li> <li>• Associates sexual activity with negative emotions and memories</li> </ul>	<ul style="list-style-type: none"> <li>• Confusion about sexual identity</li> <li>• Negative towards sexual activities and intimacy</li> </ul>
Stigmatization	<ul style="list-style-type: none"> <li>• Blame and belittling of</li> </ul>	<ul style="list-style-type: none"> <li>• Guilt and shame</li> </ul>

	<ul style="list-style-type: none"> <li>• victim</li> <li>• Pressure on child to maintain secrecy</li> <li>• Other people’s reaction to the discovery of abuse</li> <li>• Labeling the child responsible for abuse</li> </ul>	<ul style="list-style-type: none"> <li>• Lowered self esteem</li> <li>• Sense of being different</li> </ul>
Betrayal	<ul style="list-style-type: none"> <li>▪ Trust and vulnerability is manipulated</li> <li>▪ Pressure/force to involve child</li> <li>▪ Child cannot control situation</li> <li>▪ Lack of support/protection from caregiver</li> </ul>	<ul style="list-style-type: none"> <li>▪ Grief and depression</li> <li>▪ Cannot judge trustworthiness of other</li> <li>▪ Anger, hostility</li> </ul>
Powerlessness	<ul style="list-style-type: none"> <li>• Invasion of the child’s body territory</li> <li>• Pressure/force on child to be involved</li> <li>• Child cannot control situation</li> <li>• Repeated experience of fear by child</li> <li>• Others will not believe child</li> </ul>	<ul style="list-style-type: none"> <li>• Anxiety, fear</li> <li>• Lowered sense of efficiency</li> <li>• Sees himself as victim</li> </ul>

Adapted from Finkelhor et al., (1986:187).

#### 4.2.6 Impact of sexual abuse on the child

Literature on childhood trauma is very extensive. As the majority of children that testify with an intermediary are sexually abused, the researcher decided to focus primarily on trauma caused by sexual abuse and trauma experienced by the child witness when having to testify. Sexual abuse is the trauma that is most complex and all encompassing in terms of the impact it has on a child’s life (Lewis, 1999:98).

Muller (2002b:99) postulates that the very core of the child is damaged when an adult enters into a sexual relationship with a child. Current research has shown that the child is likely to suffer more intensely when the trauma was caused by a person the child knows and/or trusts. Trauma also results from the nature of the incident (Hendricks, Black and Kaplan, 1993:20:20). According to Lewis (1999:98) sexual abuse of a child is an expression of power and authority, so the abuser chooses a vulnerable victim.



#### 4.2.6.1 Loss the sexually abused, traumatized child can experience

- **Loss:** The most intense loss the sexual abused child will experience is that of loss of childhood itself. The normal process of developing trust and secure attachments with adults as described by Erikson in 3.9.11, is damaged and leaves the child with fear and distrust (Walker, 1999:41).

- **Symptoms of Loss:** The child who has experienced the trauma of sexual abuse goes through a phase of bereavement with regards to the loss of his childhood and innocence. Doing so gives closure to the traumatic event in his life. The child experiencing loss will move through the following phases described by Kubler-Ross (1981:58) and Myers and Perry (1987:514):

- Denial and isolation – disbelief that the incident happened.
- Anger, rage and resentment - usually evident in relationships with others.
- Bargaining – child will promise good behavior to restore the status quo.
- Depression – the apathetic phase, the feeling of loss is now overwhelming.
- Acceptance – acceptance of the abuse and the ability to resume a normal life. The child detaches him from the incidents.

Thus, the child's recovery may be a long, painful and difficult process. The parents and other caregivers should be made aware of this and support the child were necessary.

#### 4.2.7 Impact of the trauma on the child's memory

Research by Ovens, Lambrechts & Prinsloo (2001:30) shows that trauma has an impact on a child's memory process and eyewitness testimony. Important information like the experience of the actual sexual abuse is remembered more readily than other peripheral details. Developmentally appropriate, open-ended questions elicit the most accurate reports from the child. Repeating questions can improve children's memories while misleading questions can increase mistakes in recall (compare Williams and Banyard (1999:57). The researcher is of the opinion that it must be kept

in mind that there are individual differences in how the child's memory is affected by trauma and stress.

Ovens et al. (2001:30) postulate that it is possible for the victim to trauma to further develop symptoms of Post Traumatic Stress Disorder. Characteristics like intrusive thoughts about the event, nightmares and flashbacks, as well as dissociate amnesia may influence the recall process.

When a child experiences trauma, the memory that is stored has less sensory detail and is less consistent than memories about positive events. According to Fivush (2002:234; Hyman, Thomas, & Fitzgerald, 2003:234) this could be because the child pays more attention to the negative internal state than to what is actually happening. Another possibility is that the child is dissociating from the incident and is pretending that the incident is not happening or concentrating on something other than what is happening to him.

Koss, Tromp & Tharon (1995:119) states that the child's memory of trauma has less sensory detail. This is as a result of inadequate retrieval processes or cognitive avoidance strategies that are employed to decrease the anxiety that is associated with disturbing emotional memories. The child does not think about his experiences and over time this coping strategy may lead to less vivid memories (compare Dent, 1977:339).

Research by Williams and Banyards (1999:56) led to the formulation of a model that explains the impact of trauma on the child's memory process and eyewitness testimony. The literature indicates that the information that is central to the incident is remembered more readily than the peripheral information.

Ovens, Lambrechts, & Prinsloo (2001:30) found that children as well as adults are able to remember traumatic events. However, it was found that there is a possibility that the event or incident was misunderstood or inaccurately recalled. The child may have processed the incident differently, misunderstand it or store it less clearly.

Given young children's ability to provide accounts in response to open-ended questions, many experts argue that focusing on the questioning strategy is a more useful indicator of the reliability of the child's memory recall than brief tests which require the child to prove his competency to accurately recall (Powell, 2004:5).

Although children have less sophisticated techniques than adults for recalling information, on some tasks children perform as well as adults or older children. Child witnesses may be able to show adequate memories if they are questioned about something of which they have a reasonably extensive knowledge base. Age related changes influence the ability to use memory strategies, as described in 3.4.1, 3.5.5 and 3.6.

#### **4.2.8 The child witness and the court experience**

During the court case, the child re-experiences intrusion, helplessness, aggression, threats, feelings of guilt, being bad, and lack of faith in his testimony as well as feelings that he has no protection. The child is further put under aggressive cross-examination regarding the effect of the internalization of love/want and hate/fear resulting in more feelings of chaos (Potgieter, 2000:39).

The trauma experienced by the child who has to testify in court is often described as secondary trauma or reabuse of the child. Most children will re-experience the trauma incident repeatedly in their minds, even after the event has ended. The thoughts, emotions, and feelings of being out of control and threatened will be re-experienced, as will the fear, anxiety, and pain associated with the event. The emotional and affective memory of the incident has to be called to mind when the child testifies in court (childtraumaacademy, 2005:1).

In a study undertaken by Saywitz and Nathanson (1993:619) it was found that certain characteristics did interfere with the child's optimal testimony and increased the child's perception of stress of testifying. Children being questioned in simulated courtroom environments produced less complete descriptions of past events in free recall, made errors in response to direct questions and often agreed to misleading questions. The physical and social setting of the courtroom is complex and can

therefore distract the child and draw his attention away from the memory task. It was also found that stress influenced the completeness of the child's free recall. This demonstrates a need to take into account the influence stress will have on the context and emotions of testifying (Saywitz & Nathanson, 1993:620-621).

The researcher is of the opinion that with the necessary empathy from the intermediary, a lot of the above can be eliminated and thereby preventing as much secondary trauma as possible. A safe atmosphere can be created by the intermediary who lets the child understand that she is there for the child, will listen to the child, will understand the child's stress and cares for the child.

#### **4.2.9 The child's perceptions of stress**

At a given moment of deliberate remembering, a child is involved in a variety of tasks at multiple levels of processing. The child appraises the task metacognitively and analyses consequences of error and the amount of effort required. Together with this the memory is searched for answers, retrieval strategies are generated and the results are evaluated. Simultaneously, the child experiences certain emotions that have the potential to influence his attention, effort, motivation and efficiency of his cognitive activity. Fast changing emotions, such as anxiety or fear, can be triggered by the child's perception of the situation as frightening or threatening in contrast to his perception of his own ability to succeed in the task and to overcome his fears.

It becomes clear that the above factors suggest that self-image plays a powerful role in causing anxiety that interferes with information processing by minimizing motivation, ability, and effort needed to generate and use retrieval strategies (Saywitz & Nathanson, 1993:620).

The victim often feels lost in the impersonal legal system and the trauma of the court case and the cross-examination can sometimes be worse than the sexual abuse itself (Swanepoel, 1991:59). The researcher is of the opinion that it is the intermediary's task to help the child experience as little stress as possible within the difficult circumstances of having to testify.

#### 4.2.10 Fears and stressors experienced by the child witness

##### 4 2.10.1 Causes of child witness's anxiety

Katz-Levin (2000:C3-22), Dezwirek-Sas, Wolfe & Gowdey, (1996:350) and Saywitz, (1989:150) identified the following possible sources of the child witness's anxiety and stress that he has to cope with during the criminal justice process:

- The child may experience fear about the unknown aspects of the court environment and the processes that occur in the court;
- The child may experience anxiety about having to testify in front of the public or community in court;
- The child's fear can be intensified by the fact that he has to face the accused in an unfamiliar environment;
- The child may associate the court with punishment and may feel that he has to prove his innocence;
- The child fears that he may give the wrong answer and be sent to jail;
- The child experiences fear, ambivalence and guilt regarding possible negative repercussions the trial may have for the perpetrator;
- The child may experience additional anxiety because of threats by the perpetrator to harm him if he discloses the abuse;
- Lengthy delays of cases that are postponed;
- The child is afraid that he will not understand the complex court procedure;
- The child fears that the perpetrator might hurt his family members because he disclosed the abuse;
- The child has a fear for difficult cross-examination by the defence lawyer; and
- The child may be concerned about the social stigma and long term consequences he and his family may suffer because of the abuse.

The court appearance is usually an accumulation of repeated interviews with the child by various people (Blumrick, 2004:40; Oates, 2001:245). Ghetti, Alexander and Goodman (2002:2) cite that testifying is associated with several potential stressors for the child involved in the legal system. The child may need to go multiple times to testify. According to the above authors, the most salient fears for the sexually abused child that has to testify are:

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- The accused may lie in court;
- Seeing the accused in court or waiting area;
- Accused being found not guilty;
- That the court will not believe him;
- Describing embarrassing incidents that happened in front of strangers;
- Being in the witness stand; and
- Fear of retaliation.
- Facing and accusing the defendant.
- Cross-examination by the defense attorney.
- Answering questions in front of a lot of people.
- Having the accused lie in court.
- The accused not being found guilty.
- Having people scream at him in court.

Stressors identified by Don Wauchope (2000:44); Oates (2001:245); Swanepoel, (1991:5) and Perry & Wrightsman, 1991:136) include:

- Lack of legal knowledge of court processes;
- Insensitive interviewing techniques;
- Inadequate protection during cross-examination;
- Lack of social support for the child giving evidence;
- Crying whilst giving testimony;
- Fear of having to go to the toilet;
- Being punished or being sent to jail;
- Delays in the court case;
- Being removed from his home;
- Breaking up the family and depriving the family of a bread winner; and
- Alienating his family.

Fears that the child experiences when incriminating his own parent, occurs in cases of intra-family abuse. Nearer to the trial, the child may experience nightmares and sleep problems, he may experience mood swings, anxiety attacks, and feel angry and depressed (Sas, 1992:184).

Table 4.2 provides an overview of the stressors that the child experiences when involved in the criminal justice system

**Table 4.2: Criminal Justice System Stressors the child witness can experience**

Delays	Numerous unforeseen adjournments, lengthy delays.
Public exposure	Having to tell embarrassing and frightening incidents in a public courtroom
Facing the accused	Despite fear for personal safety still having to face the accused
Understanding complex procedures	Being exposed to court procedures that are foreign and easily misunderstood by children who do not know legal terminology.
Cross-examination	Being cross-examined by a defense attorney who can be very aggressive and who exploits the child's sensitivity and vulnerability.
Exclusion of witnesses	Being alone in court because other witnesses are removed.
Apprehension and placement outside the home	Children are often removed from home and the accused can stay. The child is stripped of his family support.
Lack of preparation for the role of witness	Not being aware of what is expected of him because he is a child witness.

Adapted from Dent & Flin, (1992:184)

Trauma impacts on the thoughts, feelings and behaviors of victims and therefore influences how they respond to the process of investigation and prosecution of a court case. Children who have been traumatized will most likely experience heightened traumatic reactions before, during, and after testifying in court. This is a real dilemma for the child. The fear and trauma associated with testifying in front of the defendant may traumatize the child and undermine the truth finding function of the trial by inhibiting effective testimony. The completeness and accuracy of the child's testimony can be seriously hampered by intimidation and heightened emotions. When confronted by the accused, the child may show signs of anxiety, refuse to testify, be unable to verbalize answers, and have difficulty identifying the perpetrator. However, it must be kept in mind that not all children are traumatized by what they have experienced or seen. Some children are more resilient than others or have a stronger support system (Blumrick, 2004:40; Goodman, Jones, Pyle, Prado-Estradea, Port, England, Mason & Rudy, 1998:167).

The researcher is of the opinion that this discussion would not be complete if no mention is made of the opposite effect of testifying on the child witness. Don-Wauchope (2000:44) states that there are child witnesses who perceive the court process as empowering and therapeutic. These children draw from their own resilience. It is very important that the child should have support from significant other people in his life as well as the court personnel. This is especially important regarding the child in his middle childhood years as these children are very aware of fairness during this developmental phase.

#### 4.2.11 Diminishing the impact of stressors before the child testifies

To reduce those aspects of the judicial procedures that could place negative stress on the child's testimony, the following can be done:

- **Eliminating multiple interviewing:** Because repeated interviewing may cause distress in children who has to repeat the abuse over and over, decreasing the number of interviews may lessen negative psychological outcomes of legal involvement (Ghetti, Alexander & Goodman, 2002:9).

The researcher is of the opinion that the availability of a one-stop center where professionals are available to assist the child from when the abuse is reported until after the trial, will alleviate the child's trauma and limit secondary abuse.

- **Court Preparation:** Some courts have implemented programs to help the child whilst participating in sexual abuse court proceedings. One of the goals of a preparation program is to help the child to gain confidence and to familiarize him with the legal aspects of testifying (Ghetti *et al*, 2002:9). There are various ways of doing the above, as described in 4.6.

- **Lessening shame and stigma:** Reducing the shame and stigma that is attached to being a victim of sexual abuse and being involved in legal proceedings is a complex task. The question: "When does the child start perceiving himself as a victim, and when does he start thinking that others may blame him and hold him responsible for what happened" must be asked. It is important that the child is made to understand



that he is not on trial. Asserting himself and acquiring self-confidence and emotional strength will help him reverse negative feelings. Teaching the child relaxation techniques to reduce stress will also help him deal with anxiety (Ghetti *et al*, 2002:11).

#### **4.2.12 Minimizing stress, fears, and trauma of the child witness in the courtroom**

The child victim is likely to suffer moderate to severe anxiety when testifying in the presence of the perpetrator. Providing a supportive system for the child witness within the legal context is a way of minimizing anxiety and trauma experienced. This reduced trauma increases the witness's credibility and assists the process of psychological adjustment (Don-Wauchope, 2000:47).

Taking the stand is a very difficult step for most children so it is important to minimize the negative impact of this experience so that the child will experience less stress when testifying (Ghetti *et al.*, 2002:10).

To alleviate the child's fears and feeling of helplessness when having to testify in court, special courtroom facilities have been erected and courtroom preparation programs have been developed (See 6.4). A support person, for example, a family member or caregiver can be asked to accompany the child when he testifies to reduce his anxiety and increase the accuracy of his testimony. An application can also be brought for the use of an intermediary to assist the child witness. The child will then testify via a closed circuit television in a separate room where the intermediary will assist him (Don Wauchope, 2000:47; Muller & Hollely, 2000:45; Ghetti *et al.*, 2002:10).

### **4.3 THE CHILD WITNESS TESTIFYING IN COURT**

#### **4.3.1 Advantages of testifying in Court**

Giles (1989:5) summarized the advantages for the child testifying in court as follows:

- The child is seen as the complainant, the person who has been wronged;
- The child is given skilled assistance of a legal or psychological nature;
- The child has an opportunity to explain to the court how he feels about what has happened to him;
- The child can see that a powerful and competent adult is responsible for dealing with the accused;
- The court appearance provides a ritual whereby the child ceases to be a victim and a pseudo-adult and returns once more to childhood;
- The family has an opportunity to show their disapproval of what the offender has done.
- The child experiences satisfaction if the accused is found guilty and is punished.

From the above it can be seen that for the child to testify can have positive results.

#### **4.3.2 Disadvantages of testifying in Court**

An array of disadvantages can face the child that has to testify in court. These disadvantages include:

- **Oral evidence**

Oral evidence in the adversarial system has to be given in the presence of the accused as described in 2.3.1. The implications of this are:

- The child must personally give evidence in the courtroom itself; and
- There are often long delays between the incident of abuse or the witnessing thereof and giving testimony at the trial.

- **Court delays**

Because the witness has to give oral evidence in court it can lead to long delays between the event and the trial, for example, the case *Woji v Santam Insurance Co Ltd 1980(2) SA 971 (SE)*, where two boys gave evidence five years after the incident

happened. The researcher, in her experience as intermediary, has found that the average lapse of time between the incident and the child's testimony is one to two years. Some trials were even held up to six years later.

As a result of the long delays of trials, the question arises whether the child should receive therapy in the intervening period, and whether the child's memory can be affected by such a long period between the incident and the trial.

The danger associated with the court delays is the effect that it may have on the child's memory. When working with a child, it must be kept in mind that his memory is not static and can be influenced by thinking about the past. This means that the child can become more susceptible to suggestions being planted in his memory by coaching, either deliberately or unknowingly (Muller, 2002b:12).

▪ **Multiple interviews**

The child witness has to undergo multiple interviews before finally testifying in court. According to Muller (2005), the child undergoes between ten and 15 interviews before testifying. Saywitz (1995:134) postulated that undergoing multiple interviews has the following effects:

- Increased stress is experienced because embarrassing detail has to be repeated several times;
- Multiple interviewing has an effect on the child's memory, which is not static;
- Suggestion (unwitting incorporation of information in memory) can take place through subtle suggestions, expectations, bribes, threats, stereotyping and leading questions (Ceci & Bruck, 1995:45).
- After repeating what has happened several times, the child's story starts sounding as if it has been rehearsed. He may also adopt the interviewer's terminology. The court will get the impression that the child was told what to say; and
- After having repeated his story in multiple interviews, the child may not want to repeat his story again when testifying (Spencer & Flin, 1993:365). Keeping the child's egocentricity in mind, he will believe that the magistrate already

knows all the detail, especially as he has repeated the details so many times before.

- **Confronting the accused**

Hill and Hill (1987:820) through empirical research showed that physical confrontation with the accused damages the existence, reliability, and quality of the child's evidence. Unfortunately, the adversarial process, which is part of the South African legal system, requires that evidence be given in the presence of the accused. To prevent this, the courtroom can be rearranged by using a screen so that the child does not see the accused. The accused can however see the child. The child can alternatively be allowed to testify in another room via closed circuit television, with or without an intermediary.

#### **4.4 LANGUAGE SKILLS OF THE CHILD WITNESS**

Conversational speech involves a give and take of questions and answers. The question and answer format that is used in court is not how a young child usually communicates. The child likes to speak about his own topics, ask his own questions and express how he feels which is inappropriate in court. The child has difficulty just answering the questions put to him, and he does not like to wait for his turn to speak. This is unacceptable behavior for a witness in court and thus the child is often cut off in mid-sentence when he testifies. A particular kind of language is fundamental to the legal process and the court appearance is seen as a verbal contest between parties (Viljoen, 1992:65-66; Dezwirek-Sas, 2004:1).

It is this specialized language that causes difficulties for the child during the course of giving evidence in court. Words are used which don't fall within the child's normal language use. In the legal profession vocabulary and technical terms, known as legalese, are used. The child who is relatively inexperienced will find this language difficult to understand (Muller, 2002b:21).

Although children show an increase in the vocabulary they can produce by the time they go to school, they still need to have simple sentences put to them. Dezwirek-Sas (2004:1) claims that the number of words used in a question should match that of the age of the child. Unfortunately the length and complexity of questions put to the child by legal professionals in court have more words. These questions can confuse the child.

Language used in the courtroom is not normal everyday language. The exchange of information follows unique and unfamiliar rules of socio-linguistic interaction, unique to the legal system in an unfamiliar and formal setting. The child is usually expected to respond to age-inappropriate-questions in a language that is difficult to understand and contains multiple parts, which even adults often find difficult to grasp (Dezwirek-Sas, 2004:2).

#### **4.4.1 Role of language and the lawyers and public prosecutors**

The language of the law sounds foreign to the child. Lawyers and public prosecutors commonly make two mistakes with young witnesses:

- They use words and more specific, legal terms that the child cannot understand; and
- They use linguistic complex sentences that are too complex for the child to understand (Myers, Goodman & Saywitz, 1996:2).

According to Perry, McAuliff, Tam, Laycomb, Dostal & Flanagan (1995:609):

“Lawyers are students of language by profession, and they exercise their power in court by manipulating the thoughts and opinions of others through the skillful use of language.”

According to Perry *et al.* (1995:625) research has shown that developmentally inappropriate questioning reduces both the child witness' comprehension and the accuracy of his responses. When questions are difficult and/or complex, the child's, adolescent's, and young adult's comprehension suffers. Difficulties between the

language capacity of the child witness and the courtroom language used by legal professionals, does impede communication. Some form of legal terminology seems to be more harmful than others. Perry *et al.* (1995:627) recommends that presiding officers should therefore insist that legal professionals ask witnesses questions that are phrased simply and that are developmentally appropriate to the child witness' age.

#### **4.5 CROSS EXAMINATION OF THE CHILD WITNESS**

Cross-examination was partly discussed from a legal view in chapter 2. In this chapter the effect of cross-examination on the child witness will be discussed.

The child witness can experiences difficulty in dealing with the adversarial procedures used in court. One of the main attributes of the adversarial process is the accused's right to cross-examine any witness who gives evidence against him. Children, however, are not prepared for interaction on an adversarial basis and they do not understand the purpose of these questions being asked in court. The child finds leading questions particularly difficult to understand as well as the language that is used in court (Muller, 1997:595).

##### **4.5.1 Objectives of cross-examination:**

The following are objectives of cross-examination of the child witness:

- The primary objective of the attorney's method in cross-examination within an adversarial system of justice is to maintain control of the communication. The child is at a greater disadvantage than the adult in resisting such control. This is as a result of the child's cognitive and social development stage and his inherent belief that the adult knows better (Westcott & Page, 2002:142).
- The content of cross-examination in sexual abuse cases frequently relies on the restating of myths surrounding sexual abuse and the accusations that the child is lying.
- Cross-examination comprises of a mixture of intimidation and legal language. The characteristics of this legal language, or legalese as it is known, includes complex,

multipart questions, use of double negatives, rhetoric questions, repetition and difficult vocabulary (Westcott & Page, 2002:143; Muller, 2002b:21).

- Accusations of lying against the child witness are one of the main features of cross-examination of sexual abuse victims. This emphasizes that it is frequently the accused's word against that of the child. This is a very important aspect in the courtroom as the young child is often accused under cross-examination of remembering only the things he wants to remember (Mitnick, 1998:4). This is reported as being the most distressing feature experienced by the child witness with negative outcomes for the child's well being (Westcott & Page, 2002:148).

In view of the above, the researcher is of the opinion that the child's thinking involves centration, during which the child focuses on certain aspects during an incident and ignores the others. This then leads to the child not being aware of peripheral information and can therefore not answer the question.

#### **4.5.2 The effect of cross-examination on the child**

Language use in court is a particular form of language, so rich in legal tradition that it falls outside the normal language used by adults and children. Added to this is the emotional stress and fears which the child experiences when being questioned about a traumatic event in an adversarial environment (Muller & Tait, 1997:521).

#### **4.5.3 Difficulties the child witness experiences when being cross-examined**

Language used by the defence is sometimes very compact and a lot of information is asked in one question. Consequently legal language contains a large number of embeddings. This occurs when a question contains a series of qualifying clauses (Muller, 2002b:21).

During normal conversation, language forms such as questions, description, and narratives take place. In the courtroom only one form, namely people asking the child questions and making statements and the child answering questions, occurs. The

child cannot negotiate over what he wants to answer and what not (Muller & Tait, 1997:522).

#### **4.6 THE CHILD WITNESS IN COURT**

Although the child's memory abilities influences his ability to provide accurate testimony, the child must also be able to monitor his ability to understand what is being asked and to ask questions when he is confused. There is considerable evidence that the child often experiences confusion in the courtroom environment, even if he has previous courtroom experience (Saywitz, 1989:155; Saywitz, 1995:135; Peters & Nunez, 1999:662). The child's communication of the abuse may be affected by the child's emotional state, attention and attending abilities, language abilities, and the abilities of other court players to understand what the child is saying. If a child is upset or distressed by the courtroom setting and/or the conduct or mere presence of other legal professionals, the child may become confused, and in extreme cases, unable to testify. Depending on a child's age and developmental level, he may have a limited attention span and become confused or distressed after a prolonged time on the witness stand or after repeated questioning (Scudds, 1988:81).

The researcher is of the opinion that the intermediary has an important role to play when the aforementioned happens. This can be conveyed to the magistrate in court and an adjournment can be requested.

##### **4.6.1 Purpose of asking the witness questions.**

Children are used to being asked questions because people are interested in their replies and not for questions being aimed at manipulating their replies (Brennan & Brennan, 1988:60). Cross-examination tests the child witness' credibility and finds further detail, which will assist the defence's own case. Often these questions antagonize the child witness causing him to become angry or distressed. Once distressed, the witness becomes confused and may even contradict himself. The two



purposes of cross-examination conflict with each other because, whilst testing the child's credibility, he becomes angry and confused and he will not be able to provide further accurate details (Muller & Tait, 1997:523).

#### **4.6.2 Miscommunication and the child witness**

Many young children have difficulty monitoring their comprehension of questions in the unfamiliar courtroom context (Saywitz, 1995:150). The child's ability to monitor his comprehension and identify misunderstandings is important in the courtroom. The child will try to answer a question he does not fully understand. In lengthy sentences the child will respond to the part of the question that he understands, usually the beginning or the end. This difficulty may be particularly problematic because legal professionals often use complex language in framing their questions and statements (Peters & Nunez, 1999:662; Myers et al., 2003:358).

Miscommunication may occur at any age, but is more likely to occur with pre-school and young school-aged children. Children will sometimes not inform an interviewer when there is a misunderstanding because they may not realize that they misunderstood the question (Walker, 1993:66). This can happen because of the difference in power between child and adult and the child's ability to monitor his language. Comprehension develops in late childhood and early adulthood (Bourg *et al.*, 1999:108).

##### **4.6.2.1 Common miscommunications of the child witness**

The following are of the most frequent miscommunications that can take place when the child testifies in court:

- **Children may interpret questions literally:** The child may think that the word "touch" does not include "washing, poking, or rubbing"; "clothes" are different from "pajamas, dress or pants"; "apartments, flats and caravans" are not houses. The interviewer can ask separate questions regarding different kinds of touch/locations/objects and/or can pay attention to the words the child used initially (Bourg et al., 1999:108).

- **Children do not move well from general to particular:** The reason for this is:
  - The child's ability to search his memory is limited; and
  - The child does not categorize objects in the same way as adults do, for example: "Did someone touch you in a way you did not like?"
  - Touch is a higher order word. The child might think it means some type of contact with the hand and not realize that the word can include poking and rubbing.
  - "Way you like it" is a prompt for a global memory search. The child may not be able to search the memory for all the touches that he doesn't like.
  
- **Distortions may occur:** If a distortion occurs, it is usually due to an unconscious error rather than deliberately lying from the part of the child. This does not necessarily mean that the rest of the testimony is unreliable. The defence, the prosecutor and the magistrate should be aware of the tendency of a young child to be prone to distortions and should avoid statements and conclusions being put to the child that are beyond his cognitive abilities (Myers & Perry, 1987:499; Muller, 2002b:180).
  
- **Question may have been too complex or poorly phrased:** Many types of grammatical constructions are common in the courtroom but have not yet been mastered by young children. Studies show that children misunderstand many common courtroom question types. Lengthy compound sentences containing independent and embedded clauses, grammatical constructions and other linguistic complexities are beyond the comprehension and memory of many children under the age of eight years. Such lengthy questions need to be broken up into shorter questions requiring short answers to make the child's response credible (Myers, Goodman & Saywitz, 1996:1; Muller, 2002b:91; Myers & Perry, 1987:508).

For example: A multiple clause like "Can you tell me (1) where you were (2) the first time (3) you got touched (4)?"

The child may respond "no" to a complex question due to lack of comprehension. He may respond, "yes" to please the interviewer but be unable to elaborate. The child

may also only remember the last part of the question (4) and not take the first part into consideration when answering (Saywitz et al., 1990:523).

- **The child may describe what something felt like and not what actually happened:** Penetration by an erect penis may be described as: “he stabbed me with a knife.” This metaphorical communication can happen when the tactile senses were not prominent during the incident and/or the child did not see what happened. Follow-up questions about the actual experience are crucial in a case like the one above (Bourg et al., 1999:109).
- **Definitions of abstract concepts are asked:** Most five-year-olds can correctly identify truthful statements and lies when given examples, but may not be able to provide definitions of “truth” and “lies”. Most seven-year-old children can give a definition of at least one of these concepts but do not perform well when asked to articulate the difference between truth and lies. Concrete examples should be used when asking the child to distinguish between truth and lies. The oath can also be made child friendly, as the child may not know what it means to swear (Bourg et al., 1999:110; Myers et al., 2003:357).
- **Negative questions are asked:** The child under six years of age has limited comprehension of negatives, and even for adults, a negative question is more difficult to understand than a positive one. Perry *et al.* (1995:613) reported that the child can use both negative and positive sentences, but negative questions are much more difficult to understand. Negative questions are only fully comprehended by the age of eight years. Questions with more than one negative are more confusing than single negatives. Many common legal terms are unfamiliar to, or misunderstood by children under the age of ten years. Lengthy or complex compound sentences with embedded clauses typically are beyond the comprehension of the child younger than eight years of age (Perry *et al.*, 1995:613).
- **Lack of communicative competence:** Communicative competence can be defined as “a speaker’s knowledge of how to use language appropriately in a given culture.” This knowledge includes the ability to use different types of speech acts, such as commands, complaints, requests, and promises in their direct as well as

indirect forms. The child's communicative competence is influenced by the intelligibility of his speech, as well as his level of comprehension, cognition, memory and emotional functioning. The child's potential to successfully communicate in a court depends on his comprehension, logic, memory, fantasy-reality distinction and knowledge of the legal system development (Brennan & Brennan, 1988:60; Perry *et al.*, 1995:252; Walker, 1993:66).

Direct speech acts are clear-cut and the intention of the speaker is revealed grammatically. It is through the spoken word that the child is expected to express his memories (Walker, 1993:64).

The adult's communicative competence depends on his ability to communicate in a non-biased manner at the child's level of understanding. The child's age, vocabulary, and linguistic skills must be taken into account. Sexual knowledge, suggestibility, temperament and emotional adjustment also play a role. There is also evidence that opposing attorneys frequently use developmentally inappropriate and often confusing language in court (Brennan & Brennan, 1988:60; Perry *et al.*, 1995:252; Walker, 1993:66). Even when a child's memory is accurate and strong, developmental and communication limitations can upset the testimony. The five most frequently used confusing questions that cause confusion are found to include negatives, double negatives, multipart, complex syntaxes and difficult vocabulary.

#### **4.6.3 Communicative competence of the child witness:**

The child's communicative competence depends on skills that include the ability to:

- Translate memories into language;
- Deal with non-comprehension;
- Reason; and
- Distinguish fact from fantasy.

Giving evidence in court is about communicating one's perception of a past event to create an image in another person's mind about that event. For children, this ability is

limited by age-related factors such as vocabulary, their ability to use words, and their understanding of the word's symbolic meanings (Scudds, 1988:81).

Also relevant is the child's knowledge of the legal system and his ability to cope with the stress of testifying. To communicate successfully involves all the above skills. All these difficulties that the child experiences in court can be as a result of the child's misunderstanding of the adult's adult questions and/or the adult's misinterpretation of the child's answer (Butler, 1993:60; Myers, Berliner, Brier, Hendrix, Jenny & Reid, 2003:356).

Young children are capable of recognizing difficulties in comprehension and how to solve them. This is done in a naturalistic setting when task and stimuli are simple and familiar. As soon as the task becomes complex and verbal, for example, in a court situation, the young child has difficulty detecting the message adequately (Butler 1993:66). A recent study by Saywitz and Snyder (1996:135) showed that even if children do not understand the lengthy complex sentences, they still try to answer the question. The children's responses varied from repetition of the question to answering a part of the question (usually the beginning or the end of the question).

#### **4.6.4 The role of emotions on the child's communicative competence**

A child's communicative competence can be affected by various aspects of emotional functioning. The child under stress frequently regresses to more immature levels of behavior, which may compromise his ability to testify. The child may have difficulty using advanced grammatical constructions that he has already mastered and used in familiar non-stressful situations. He may also have difficulty in comprehending constructions that he has already mastered in other contexts (Butler, 1993:72).

#### **4.6.5 The role of the child's temperament on his communicative competence**

The child's temperament determines how he will react in the court. A shy, insecure and withdrawn five-year-old may refuse to testify or may burst into tears whilst an outgoing, confident, five-year-old may have little difficulties. This will in turn affect

the competence with which he tells his story and the adult's perception of his credibility (Butler, 1993:73).

The researcher is of the opinion that the communication demands of the legal system are problematic to the child's stage of language development. Even older children may not communicate at their optimal level of communication under such stressful conditions.

#### 4.6.6 Form of Questions

Research has shown that the quality of information received from the child as a result of option-posing and suggestive questions, is likely to be less accurate than information that is obtained from open-ended prompts. Eliciting poor quality information from the child in court makes it harder to prove that the abuse took place, especially because witnesses and corroborative evidence is usually absent (Cederborg, Orbach, Sternberg, & Lamb, 2000:1340).

Aspects of the different forms of questions asked in court that can influence a child's testimony are:

- **Vocabulary:** Many common terms used in court are unfamiliar to or misinterpreted by children under the age of ten years. In a study by Saywitz, Jaenicke and Camparo (1990:35) it was found that young children tended to make auditory discriminating errors, mistaking the unfamiliar legal terms for a similar sounding familiar word, for example, "a court is were we play ball games" (Zaragoza, Graham, Hall, Hirschman & Ben-Porath, 1995:116).
- **Leading questions:** A leading question indicates to a witness how he should answer the question or it puts words into the witness's mouth (Greenstock & Pipe, 1996:77). This most common tactic is used by the defense to attempt to show that the previous interviewer "led, coached, or played upon the suggestibility of the child", contaminated the child's evidence and gave rise to a false disclosure of abuse (McFarlane, 1989:154).

- **Linguistic complexity:** Another problem is questions that allow multiple interpretations and options but restrict the answers to “yes” or “no” without qualification (Butler, 1993:61; Myers *et al.*, 2003:356).
  
- **Homonyms:** The young child can make homonym errors by assuming that a familiar, non-legal definition is the only definition, even in a courtroom; for example, a hearing is what you do with your ears. The young child will insist that the term does not have a different meaning in a court of law. An older child, who has moved out of the concrete developmental phase, would recognize that the word could mean something else in a court situation (Saywitz *et al.*, 1990:529). Young children’s tendency to make the same types of mistakes demonstrates that children think they understand the meaning, when they have a different meaning in mind (Peters & Nunez, 1999:662; Myers *et al.*, 2003:357). Such miscommunication damages children’s credibility. Age appropriate word choice is an important factor in eliciting reliable, credible testimony from children (Butler, 1993:61; Poole & Lamb, 1998: 160).
  
- **Yes/No Questions:** The yes/no question is introduced in order to obtain a affirmation or negation to the information put to the child. Often the child will simply answer “yes” or “no” just to move the conversation along to another area of investigation (Muller, 2001:13). Studies of children’s perspective-taking and listening skills suggest that children may only respond to a part of the question and not realize that their response may be interpreted as applying to other parts of the question as well. Because of egocentric thinking, children less than seven or eight years of age may have difficulty putting themselves in the role of the listener. Young children rely heavily on context to gather meaning. They do not usually ask for clarification when adults’ questions confuse them. Word choice and grammatical construction are critical factors in eliciting accurate, credible testimony from children (Butler, 1993:62).
  
- **Pragmatics of questions:** The child’s pragmatic skill, for example, his functional use of language in social interaction, is another important factor in his ability to testify. Language and procedures in the courtroom resemble a foreign language or culture. The rules of interaction are governed by rules of evidence, case precedent,

and judicial discretion. Children under the age of nine years may expect a degree of sincerity from an adult who is not present in the adversarial process. Not understanding the speaker's intent will influence how readily children succumb to misleading questions (Butler, 1993:62; Zaragoza *et al.*, 1995:118).

- **“Why” questions:** When the “why” question asked is about the child's motivations or intentions, the question is likely to be perceived as critically. The child could feel defensive when asked this type of question. These defensive feelings may interfere with the child's ability to answer the question, or the child may become focused on justifying his actions. “Why” questions require a number of advanced cognitive skills, including self-reflection, recapturing past causal reasoning processes and using language to describe these processes (Bourg *et al.*, 1999:104).
  
- **Comments that link a discussion:** Comments that link a discussion with a next topic of conversation are common in ordinary conversations, but are often omitted in the formal courtroom questioning (Brennan & Brennan, 1988:99). The cumulative effect of rapid switching from one topic to another without proper introduction leaves the child disorientated with little understanding of how and why questions are being asked (Butler, 1993:63). When this happens, the intermediary can draw the child's attention to the fact that another topic has been raised.
  
- **Content of question:** It is crucial that the questioner should have knowledge of the cognitive development of children. Questions must be related to the child's knowledge base and reasoning ability, and answers should be interpreted according to the child's cognitive development stage, for example, if the child has not learnt to count, he should not be asked how many times something has happened (Saywitz & Camparo, 1998:5). Questions become problematic when they require skills the child has not yet developed. The child may try to answer a question when he does not have the necessary skills, and the adults may misinterpret his answers as a sign of incompetence (Butler, 1993:63; Zaragoza *et al.*, 1995:120). The intermediary can draw the prosecutor's attention to the above before the child testifies but during testimony no input from the intermediary regarding the above is allowed.



- **Measurement:** Until the age of eight or nine years of age, children can still be confused by a question asking whether something happened before or after something else. When asked what time something occurred, a child may try to answer even though he has not yet mastered telling the time. Children under the age of ten may often have difficulty telling events in exact chronological order, as described in 3.3.2 (Butler *et al.*, 1993:64; Myers *et al.*, 1996:4). When testifying, the child should rather report the event in relation to some routine aspect of his daily life, for example, “Just before I go to bed” or “During the Telly Tubby Show on television.” These concrete anchors help the child so that his testimony is not overstated, lessened or distorted (Myers & Perry, 1987:469).

The young child learns conventional systems of measuring time, distance or weight over the course of his early school years. These are abstract concepts with which the child has difficulty. Before the age of ten the child has difficulty with weight, height, length, and speed. To a young child all adults are big or old and all distances are far. Time like 7.00 pm. will mean nothing to a child unless linked with something like: “it happened when Scooby Doo was on television,” or “it was dark” (Massengale, 2001b: 4). This skill is not fully mastered until preadolescence. It is important that, should the child be questioned about above aspects, it be done in a developmentally sensitive manner.

- **Kinship:** Inquiries about kinship with children younger than ten years of age must be carefully monitored to avoid creating unnecessary confusion that threatens credibility. The younger child does not yet have mental operations of reversibility and can therefore not change direction of thought, for example, the child will know she has a sister but will not necessarily realize that she is a sister to her sister (Butler, 1993:65).

- **Abstract reasoning:** Questions that require complex or abstract reasoning often hamper the fact-finding process. The child is not aware of his own limitations and may try to use trial and error to reason out something that can only be solved with more complex reasoning skills. The child under six years of age reasons on the basis of what he sees. Hypothetical reasoning leads the child to try to answer questions they are incapable of answering (Butler, 1993:66).

- **Mental concepts:** The attorney must be very careful when asking a child a mental concept question, for example, “Is your father kind to you?” The child must give an opinion on the concepts “kind” and “unkind”. Children are inclined to generalize from one or two incidents. Some children will experience this as unkind whilst other children will overlook these incidents and experience their father as a “kind” father. The child has no frame of reference of what is normal in a family (Myers & Perry, 1987:476). He should rather be asked to describe a specific incident and the presiding officer should be left to categorize the father’s actions. Alternatively, the attorney must determine how elaborated the child’s categorical representations are, as the child may see somebody as good or bad or right or wrong and not see the nuances of real life. This can be done by either asking a child psychologist or social worker to assess or skilfully question the child about unrelated matters (Myers & Perry, 1987:477).
- **Logic:** Forensic questions often require advanced hypothetical deductive thinking of the child. The child’s response can be because of limited logical thinking rather than dishonesty. Inconsistencies and misunderstandings result when the child is obliged to answer questions requiring skills beyond his stage of cognitive development (Zaragoza *et al.*, 1995:123). When the child testifies, it is a better approach to ask the child to tell what happened from his own perspective (Myers & Perry, 1987:480).

The intermediary, whilst build a rapport and assessing the child before he testifies, can indicate the above to the prosecutor. She must however refrain from conveying any knowledge or opinion to the court whilst the child is testifying.

#### 4.6.7 Questioning strategies

When questioning the child witness he should be asked questions in the following ways so that he can understand the questions and be in a position to answer them:

- **Short sentences with easy words improve comprehension:** No matter how old the child is, questions should contain only one idea. Longer questions should be broken down into shorter questions with a single focus. Even high school and college students are less accurate with complex sentences and difficult vocabulary (Walker,

1993:68). With the pre-school and young schoolchild, the interviewer should strive for three-five word sentences, for example, “Tell me what George did”, “Show me where George has touched you.” Children cannot process multipart and lengthy questions (Bourg *et al.*, 1999:100).

▪ **Avoid asking the child witness unnecessary clauses that complicate the question:** Examples of unnecessary clauses are: “Do you remember?” or “Can you tell me” at the beginning of a question and tags such as “Didn’t he?” or “Don’t you?” One of the problems with these types of questions is that they require a “yes” or “no” answer from the child. If the child fails to elaborate on his answer, the interviewer will not know whether the child understood him (Bourg *et al.*, 1999:102).

▪ **Avoid repeating a question or part of a question to the child witness:** When a question or part of a question is repeated to a child within the same interview, the child may interpret the repeated question as an indication that his initial response was not correct and that new information needs to be given (Powell & Thomson, 1994:204).

▪ **Provide context for questions:** Children depend on adults for providing context when asking questions. For young children, context reminders are always important. They are particularly important with the older child when there are multiple incidents and/or multiple perpetrators. The child will literally have to be told when the interviewer changes from one topic to another. The child must then shift mentally from one incident to another. By providing this type of context, the questioner (intermediary) enables the child to understand what is being asked of him and to focus his attention to that incident (Massengale, 2001b: 4; Bourg *et al.*, 1999:103).

#### **4.6.8 Common errors made in child communication in court**

Questions asked in court are often in a language too advanced for children to understand. Interviewers and legal professionals must be able to communicate effectively with children. Those who question children must be knowledgeable about the stages of language development and about common errors made by children in their language usage.

The following are mistakes most frequently made when questioning children in court, followed by the correct way of asking the child witness the question in court (Saywitz *et al.*, 1993:61-70; Saywitz *et al.*, 1998:827-839; Saywitz, 2002:355-370; DeVoe & Faller, 2002:5; Schoeman, 2005:38-41).

Most common errors followed by correct procedure:

- Long, three to four syllable words, for example: identify.  
**Use one-to-two syllable words, for example: point to.**
- Multi-word verbs, for example: “might have been”, “ might it have been the case that...?”  
**Use simple tenses, for example; -ed, was, did, and has, “What happened?”**
- Hierarchical, categorical terms, for example: Weapon, anything, clothes.  
**Use more concrete, visual terms, for example: gun, shirt.**
- Use of uncommon vocabulary found in legalese, when words can have two meanings, for example: parties, minor.  
Use the nonlegal meaning of the word, for example: “hearing” which means “to hear” not “a meeting”.
- Using pronouns such as him, her, she or unclear references, for example: those things, this, it, that, for example: “Did you talk to him about it?”  
**Use proper names: repeat antecedents, for example: “Did you talk to Peter about what you saw?”**
- Use of passive voice, for example: “Was Mary taken to the room by her uncle?”  
**Avoid passive voice and use active voice, for example: “Did Mary’s uncle take her to the room?”**
- Use of words whose meaning varies with time, or place, for example, here, there, yesterday.  
**Use of relational terms, for example: more or less, approximately.**  
Use stable and definite terms, for example, in front of the house, next to the bed.
- Multipart questions where one single long question lists several facts and can have different answers (yes and no), for example: “Did you not see a man and did he not have black hair?”

Use several short questions to replace one overloaded question, for example: “Did you see the man?” and “Did he have black hair?” It is unclear to which question the child will answer yes/no: Follow the question up with clarification, for example, “Can you tell me more about it?” and ask “what, who, where” type of questions.

- Asking how many times something happened before the child has learnt the concept of numbers.

**Many young children can “count” but do not understand the underlying number concept. They will be able to count but it will be like reciting the word of a song.**

- Words that are not in the child’s vocabulary, for example: “Did Peter abuse you?”

**Rather use a word the child will understand, for example: “Did Peter hurt you?”**

- Asking measurements, for example, “How old was Uncle Sam?”

**Children only learn conventional systems for measuring of time, distance, weight, i.e. minutes, hours, months, years, centimetres, meters, gradually over a period of time. This is only mastered by adolescence. If time is asked, link it to mealtimes or a television program. If age is asked, after the child has answered ask the child, “What makes you think he was old?”**

- Complex terminology and sentence forms, for example:

- Negatives: These are questions involving “not”, for example, “Did Sam not hurt you?”

**Rather ask: “Did Sam hurt you?”**

- Double Negatives: These are questions using the word “not” two times, for example: “Did Sam not say that he was not going to take you to the park?”

**Rather ask: “Did Sam say that he was going to take you to the park?”**

- Complex syntax: Sentence structure that is difficult to process, for example: “At any time before or after Sam pushed you onto the bed, did he show any sign of affection towards you?”

**Rather ask: “Did Sam ever hug you?”**

- Asking questions where the child has to make a deduction and viewing the world from someone else’s perspective and inferring what somebody else saw, for example: “Did the police man see blue marks on your buttocks?”

**Young children are still in the pre-operational development phase and their thinking is concrete. They will base their judgement on what they saw at that moment. If the child cannot see the blue marks on his buttocks, he presumes that they were not there and nobody else would have seen the marks.**

- Asking evaluative questions, for example: “Did you and your stepfather get on well?”

**The specific memory of the stepfather at that moment (pleasant or unpleasant) will determine the child’s answer.**

- Repeating a question.

The child will think that the previous answer was wrong and will give another answer in the hope that the new answer will satisfy the person questioning him.

- Asking “why” questions, for example, “Why did you not call for help?”

Children will often find the “Why” question judgemental and evaluative and will probably not answer it.

- Asking “tag” questions, for example, “He touched you, didn’t he?” or “So you weren’t afraid then, were you?”

**Make the question less leading, for example, “Did he touch you?” or “Were you afraid?”**

- Making statements.

Because it is an adult making the statement, the child will be afraid to disagree with him. The child could perceive it as being disrespectful.

- Saying to the child, “Let’s pretend”.

Children pretend when they play and also know when they are pretending. This can lead to the child using fantasy when testifying.

- Abrupt topic changes.

This will only confuse the child.

**Cues can be given, for example, “We spoke about the incident in the garden; we are now going to speak about the incident in the car.”**

- Overextension.

Children sometimes extend the meaning of a word in their small vocabularies to include actions or objects for which they have no word. Overextension occurs in between one fifth and one third of the communication of young children. Although overextension violates adult language rules, from the child’s

perspective it makes good sense to apply just one word to objects that resemble each other, for example, all four legged furry animals may be “kitties”. The courts must be very careful to decipher the specific meanings of words used by young children (Perry & Wrightsman, 1991:126).

- Underextensions.

Children also tend to underextend the meanings of words. They attribute part of the meaning to a word that it has for an adult. Underextension occurs when children come upon a term that is far removed from the central meaning they have for the word, for example, the young child may not categorize pants, dresses, and shoes as “clothes”. This type of error might have serious implications in litigation as misunderstanding can take place (Perry and Wrightsman, 1991:127).

- Syntactical error.

In the English language sentences, the order of the words partially determines their meaning. The sentence follows a subject-verb-object sequence. Legal language makes use of syntactical structures, which include complex linguistic features that create difficulties for children. Legal language is challenged with the use of negative expressions. The grammatical structures of these negatives, and their position in a question, conform to a set of rules to which children have no access (Muller, 2002b:21).

**To avoid syntactical miscommunication the child should be asked to show the adults what he means instead of asking him to explain himself** (Perry and Wrightsman, 1991:127).

- Abstract concepts.

Children have difficulty with abstract concepts and these should be avoided as much as possible. Legal terminology should be avoided completely. Terms like “defendant”, “perpetrator”, “allegations”, “penetration”, and “intent”, have little or no meaning to even older children (Massengale, 2001b:3).

Because words do not always mean the same thing to the child as they do to an adult, it is necessary for the adult to explain or define the term to the child. It would be useless for an adult to use words like abuse, negligence, verdict, magistrate, presumption, or compensate. The word has to be translated to the child, for example,

the word “abuse” could be defined as “someone hitting/hurting/burning or touching you where it does not feel good” (Perry and Wrightsman, 1991:128).

#### **4.7 MEMORY OF THE CHILD WITNESS**

The increasing number of children who testify in legal proceedings has led to research into the dynamics of the child’s memory and the accuracy of their testimony, as described in 3.4.1, 3.5.5, 3.6 and 4.2.7.

##### **4.7.1 Metacognitive development**

Perry, McAuliff, Tam, Laycomb, Dostal and Flanagan (2001:309) state that the ability to monitor one’s mental processes, for example, memory and knowledge, is known as metacognition. Even pre-school children display some sensitivity in memory-monitoring activities. Their skills only improve, as they grow older.

Young children do not usually ask for clarification of a question because they do not recognize a confusing adult question (Saywitz, 2002:309). When children do not understand questions about past events, they are likely to try and answer them. Even if they are told to ask if they do not understand a question, they seldom do so. This skill to know when one does not understand a question and how to cope with it develops gradually. Recent research suggests that the child’s ability to detect and cope with not understanding a question may be improved through teaching and preparing the child for court, as described in 5.2 (Saywitz & Nathanson, 1993:621).

The legal implications of metacognitive and language development and the influence on the child’s testimony is clear. The young child is likely to have communication and metacognitive difficulties when he is a witness during legal proceedings because the typical language and questioning of attorneys is not on the same level as the child’s abilities (Perry *et al.*, 2001:310).



#### **4.8 PSYCHO-SOCIAL NEEDS**

Every human needs love, nurturance, and stimulation. These are all known as psychosocial needs. Children who are deprived of love, nurturance and stimulation may suffer brain damage, failure to thrive, emotional disturbances, or even death (Myers & Perry, 1987:509). Even though the child's psychosocial needs are met, they may suffer problematic effects if they experience traumatizing events.

##### **4.8.1 Effects of unsuccessful resolution of psycho-social needs of the child witness**

During the first phase of psychosocial development of trust versus mistrust, infants who are securely attached to their primary caregiver show signs of anxiety and fear if they are separated from them. If the child has not successfully resolved this issue, he may have difficulty in trusting anyone – prosecutors, magistrates, social workers, and intermediaries. They may therefore be reluctant witnesses (Myers and Perry, 1987:510).

In the second phase of psychosocial development the issue of autonomy versus shame and doubt is resolved. Children who are unsuccessful in resolving this issue may not be very good witnesses because they may be uncertain and experience doubt (Myers & Perry, 1987:510).

During third phase of psychosocial development the issue of initiative versus guilt is resolved. An older child who is stuck at this psychosocial level may be difficult to work within the legal system because he may have an overactive sense of guilt that may make them reluctant to talk. Some children may feel responsible for the incident/s, many of which they could not possibly have influenced (Myers & Perry, 1987:510-511).

The fourth phase of psychosocial development deals with the issue of industry versus inferiority. The child with a strong feeling of inadequacy may make a poor witnesses. They may be unwilling to take a public stance. If such a child is to testify, care must be taken to build his confidence before he testifies (Myers & Perry, 1987:511).

During adolescence, the solving of a previous crisis is questioned as the adolescent attempts to create a unique personal identity. In his search for his new identity, the adolescent will question his parents' ideas and values. This search can sometimes end in role confusion. Adolescents who experience this confusion may be reluctant to testify because they feel inferior or exceptionally anxious (Myers & Perry, 1987:511).

#### **4.9 SUMMARY**

Having to testify in court after a traumatic incident can be upsetting and the child will suffer fear and anxiety before he testifies in court. Sexual abuse itself is the trauma has the most complex and all-encompassing impact on the child's life. The impact on the brain of the child is far reaching. The child can experience loss or symptoms of loss, as well as symptoms of trauma in relation to the event as well as additional trauma of having to appear in court. The intermediary must be aware of techniques to alleviate these symptoms at court and also be aware of the effect trauma has on the child's memory.

When a child has to testify in court he is subjected to unrealistic, adult like expectations on his performance in court. Unfortunately, the child's testimony is found to be less reliable when he fails to satisfy the court's and other adults' expectations. The adults show little understanding of the child's developmental limitations and what the impact of the trauma is on the child.

There are advantages and disadvantages for a child to testify in court. These must be taken into consideration and should be explained to the child and his/her parents/caregivers. Aspects such as giving evidence in a court, court delays, multiple interviews, and confronting the accused are aspects that need to be discussed.

Other factors that have to be taken into consideration when the child testifies in court are his level of language and speech development. Language that is used during cross-examination, the effect of cross-examination on the child, and the difficulties the child will experience when being cross-examined will have a definite influence on

his understanding and handling of the trial. These factors will all add to the emotional stress and fears the child will experience when having to go to court.

One of the main difficulties a child can experience when testifying is his communication competence as well as miscommunication. Communication includes translating memory into language, dealing with non-comprehension, reasoning and distinguishing fact from fantasy. The most frequently used questions that confuse children are negatives, double negatives, multifaceted questions, complex syntax and difficult vocabulary. Emotions, temperament, the form of questions, and question strategies will play a role when the child testifies.

The psycho-social needs of the child and the successful resolution thereof is important, otherwise the child will show signs of mistrust, uncertainty, doubt, guilt, feeling responsible for the incident, inadequacy and inferiority.

When communicating and speaking with a child, it is of extreme importance that the court as well as the intermediary understands that the child's language and cognitive abilities have to be taken into account so that the child will be able to participate and understand the court process meaningfully.