jottings on the bar

Evidence of children in criminal matters - removing the mythical assumptions

By David Lewis*

Having spent the larger part of my career in the Family Court, and only recently (within the last five years or so) turning exclusively to a life of crime, I have occasionally been disturbed by the unsubstantiated assumptions which filter into and underline the processes by which our courts reach their conclusions – particularly where the evidence of children is concerned.

We all make assumptions, and for better or worse we are all subject to minor prejudices and bias - we are only human after all; however there are many unsubstantiated "urban myths" which have found their way into our cultural ethos as undisputed fact or at least as an underlying assumption which can be relied upon to be correct.

There are many examples of this which most of us have heard in Northern Territory courts from time to time – the man from Ngukurr who carries a knife to cut his meat has a potential weapon; the 14 year old Aboriginal boy who drives the car unlicensed when told to by intoxicated adults has an option to refuse; the Aboriginal woman who might conceivably consent to sexual intercourse by having all of her clothes removed in broad daylight, in a public place, in full view of any passer by, while she is subjected to rough sex on a bed of sticks and stones with a rock for a pillow.

In terms of Aboriginal juveniles driving a car when ordered to do so by a drunken adult, I was once asked by a Magistrate:

> *" ...and what's the difference between him and a white youth in the western suburbs of Sydney wearing a flannelette shirt, being told to drive a motor vehicle by his flannelette shirted uncles because they were too drunk to drive"*[1]

See how it creeps in? – the urban myth.

The most worrying assumptions of myth are those relating to the evidence of children.

Amendments to the Evidence Acts in each State and Territory have removed the possibility that courts might treat such evidence as dangerous in terms of children being an unreliable class of witness in sexual offence matters[2].

Nevertheless, comments continue to be made from the bench and by counsel in both the superior and lower courts relating to the potential for children to imagine facts which have taken place and be prone to fantasy.

"We all know that children can imagine things" is a comment the writer has heard recently from the bench. This is an assumption which has no basis in fact, and is an assumed myth hailing from the mores and attitudes of Edwardian England. More importantly, there is a body of research which would indicate that the evidence of children in reporting observed facts is arguably more reliable than the evidence of an adult.

The Family Law Act came into being in 1975. Since then significant research has been undertaken concerning children's evidence. The requirement for some children to be separately represented has given rise to a large body of psychological and psychiatric literature in this area.

If it was suggested to a Judge of the Family Court in 2004 that a child's evidence on observed facts was generally subject to imagining and fantasy, the person making the submission would be met with stony incredulity or at least a mirthful dismissal. Children do engage in fantasy and imagination when at play or in some circumstances when it is required of them, but as a rule they do not do so when reporting important events they have observed to adults.

The Full Court of the Family Court (Baker, Kay, Fogarty JJ) made the following observation, adopting the comments of an expert witness, in the matter of *H & W 1995 FLC 92-598:*

> *"As to the reliability of children's views and wishes, Dr Collings believes that under the right circumstances, children can express valid and reliable views and wishes. There is a good body of research which indicates that children's memories with respect to issues of fact are quite reliable, that their observation and registration of fact is quite reliable and indeed that the likelihood of children telling the truth is quite high.*
>
> *There is, in fact, good evidence which suggests that children between the ages of four and nine years are more likely to feel a desire to tell the truth and indeed to respond truthfully than older children and adults."*

It seems that the expertise and experience developed over nearly 30 years in the Family Court jurisdiction

continued page 15...

* David Lewis is a Barrister and Crown Prosecutor with the ODPP in the Northern Territory. The views and opinions expressed in this article are not necessarily those of the Director of Public Prosecutions or his office.

Evidence of children in criminal matters - removing the mythical assumptions cont...

has been slow to filter into the criminal jurisdiction. There have, however been some movements in that regard.

The High Court of Australia in *The Queen v Robinson*[3] has cited with approval the Canadian decision in The *Queen -v- Ewanchuk*[4] which dealt with mythical assumptions and stereotypes in court proceedings.

In *Ewanchuk* the appellate court was concerned with the issue of implied consent, where a woman had submitted to sexual advances through fear. L'Heureux-Dubé and Gonthier JJ made the following observations:

> *"This case is not about consent, since none was given. It is about myths and stereotypes. The trial judge believed the complainant and accepted her testimony that she was afraid and he acknowledged her unwillingness to engage in any sexual activity. However, he gave no legal effect to his conclusion that the complainant submitted to sexual activity out of fear that the accused would apply force to her. The application of s. 265(3) requires an entirely subjective test. As irrational as a complainant's motive might be, if she subjectively felt fear, it must lead to a legal finding of absence of consent.*
>
> *The question of implied consent should not have arisen. The trial judge's conclusion that the complainant implicitly consented and that the Crown failed to prove lack of consent was a fundamental error given that he found the complainant credible, and accepted her evidence that she said "no" on three occasions and was afraid. This error does not derive from the findings of fact but from mythical assumptions. It denies women's sexual autonomy and implies that women are in a state of constant consent to sexual activity.*
>
> *The majority of the Court of Appeal also relied on inappropriate myths and stereotypes. Complainants should be able to rely on a system free from such myths and stereotypes, and on a judiciary whose impartiality is not compromised by these biased assumptions."*

Ewanchuk was also cited with approval by the Queensland Court of Appeal in *R -v- Crooks*[5] where it was footnoted that:

> *"The emphasis on corroboration in a rape case may be misguided since the amendment of s.632 of the Criminal Code by Act No. 3 of 1997 which removed any requirement that a judge must warn a jury that it is unsafe to convict the accused on the uncorroborated testimony of a witness. Subsection (3) specifically provides that a judge must not warn or suggest in any way to the jury that the law regards any class of complainants as unreliable witnesses: as to which see R v. Ewanchuk (Supreme Court of Canada, 25 February 1999)."*

These assertions apply equally to the mythological assumption that children have a general propensity to imagining and fantasy when reporting observed facts.

In any event, we should all be vigilant to ensure that mythological assumptions, urban myths, and stereotypes do not enter the realm of the courtroom.

Footnotes

1 Timber Creek sittings NT CSJ 15/4/03
2 s4(5) - Sexual Offences (Evidence & Procedure) Act NT
3 [1999] HCA 42
4 [1999] 1 SCR 330
5 R v Crooks [1999] QCA 194

Congratulations to NT's new silks

Congratulations to Mr Peter Barr, Ms Suzan Cox and Ms Raelene Webb who were recently sworn-in as the Territory's newest Queen's Counsel.

The successful candidates were required to apply to the Chief Justice, who made his recommendations to the Attorney-General.

The nominees were approved by Cabinet before being sworn-in by the Administrator.

Law Society NT President Merran Short said congratulated the new appointees on their achievement.

Attorney-General Dr Peter Toyne congratulated the three new Queen's Counsel for reaching a major milestone in their legal careers.

continued page 22...