The Use of Video Technology for Child Witnesses

JUDY CASHMORE*

Two main forms of video technology, the videotaping of evidence and the use of closed circuit television, have been proposed to alleviate some of the problems facing child witnesses. The problems directly related to their court appearance include having to see the accused, fear of retaliation from the accused, the intimidating formality of the courtroom, and having to repeat their story and answer numerous questions about often embarrassing events in the presence of a number of strangers whose role is unclear to the child.[1] Numerous task force and law reform bodies around Australia and in other countries have proposed that one solution to some of these problems lies in the use of video-technology by allowing the child to be removed from the environment of the courtroom and from the immediate presence of the accused. The benefits are seen to be twofold — to reduce the trauma of testifying for the child witness and to improve the quality of the evidence. There are, however, opposing arguments and there are differences between closed circuit television and videotaped evidence in the way in which they approach these two goals and in their specific aims. Furthermore, what appear to be two forms of video technology encompass a variety of forms in practice, and which particular form is used reflects the acceptance or rejection of arguments for and against their use.

The paper is in five sections. The first three consider three uses of video technology: closed circuit television, and two forms of videotaped evidence (videotaped testimony and the videotaping of interviews). Each of these sections offers a description of use in several countries and states, and a discussion of the expected advantages and disadvantages in terms of the child: effects upon the child's state (eg level of anxiety or trauma) and effects upon the quality of the evidence. The fourth section looks beyond the child to the impact upon the other participants: the accused, the judge or jury, and the lawyers. The final section turns to ethical issues and suggests some ways in which they may be resolved.

* Judy Cashmore BA Hons, MEd, PhD is a Research Associate in the School of Behavioural Sciences at Macquarie University and the consultant to the Australian Law Reform Commission for the evaluation of the use of closed circuit television in the Australian Capital Territory. The constructive comments of Justice Elizabeth Evatt, President of the Australian Law Reform Commission and colleagues at Macquarie University (in alphabetical order, Jenny Bowes, Jackie Crisp, Jacqueline Goodnow, Jenny Gray, Rosemary Leonard and Pamela Warton), the University of New South Wales Law School (Richard Chisholm), and Sydney University Law School (Patrick Parkinson) are gratefully acknowledged.

[1] D Whitcomb, ER Shapiro, and LD Stellwagen, *When the Victim is a Child: Issues for Judges and Prosecutors* (1985); Goodman et al, 'The Emotional Effects of Criminal Court Testimony on child Sexual Assault Victims: A Preliminary Report' (1988) in G Davies and J Drinkwater eds, *The Child Witness: Do the Courts Abuse Children?* (Issues in Criminological and Legal Psychology, vol 13).

CLOSED CIRCUIT TELEVISION

Closed circuit television (sometimes referred to as video link) allows the contemporaneous transmission of an image from one room to another. It is generally used to allow the child to give live testimony without having to be physically in the courtroom. Alternatively, it may be used to transmit events from the courtroom to the accused who is in another room.

Forms of Use

Legislation allowing the use of closed circuit television has been passed or is being considered in a number of states in Australia, USA, Canada, New Zealand, and the United Kingdom (England, Scotland, and Ireland). In Australia, pilot studies have been or are being carried out in Western Australia[2] and the Australian Capital Territory.[3] Legislation has been passed in Queensland, Victoria and New South Wales, and has been recommended or is under discussion in the other states. Similarly, closed circuit television is in use and being evaluated in England, and has been recommended by the relevant Law Commissions in both Scotland and Ireland. It is interesting to note that the Scottish Law Commission has changed its formerly adverse opinion and now recommends its use in a 1990 report following some first-hand experience of the system in England.

In the United States, closed circuit television is statutorily available in 29 states[4] but it is rarely used. Prosecutors are generally unwilling to apply for its use for several reasons. First, the provisions required to show cause for its use are restrictive. Second, its constitutionality is under challenge and prosecutors are unwilling to risk appeal. Third, some prosecutors do not believe that it is desirable for their case to do so.[5] In California, a government committee stated in its final report that closed circuit television had been used in that state only once in three years and recommended amendments to the relevant legislation to allow its greater use.[6]

The form that closed circuit television takes and the conditions governing its use vary across states and across countries. The major differences in form have to do with whether the child or the accused is removed from the courtroom, and which other court personnel accompany them. For example, in the Western Australian pilot study, the accused was removed from the courtroom and watched the proceedings via the video screen whereas in most other jurisdictions, the child is in a separate room, generally accompanied by a support

[2] WA Department of Community Services, *Closed Circuit Television in the Perth Children's Court* (1990).

[3] Australian Law Reform Commission, *Children's Evidence by Video Link* (Discussion Paper 40, 1989).

[4] As of 31 December 1988, D Whitcomb, personal communication.

[5] US National Centre for the Prosecution of Child Abuse, *Investigation and Prosecution of Child Abuse* (1987) at VI-1 [hereafter cited as US National Centre]; D Whitcomb, 'Assisting Child Victims in the Courts: The Practical Side of Legislative Reform' (1986) 9 *Response to the Victimization of Women and Children* 9.

[6] California Attorney General's Office, *California Child Victim Witness Judicial Advisory Committee* (1988) 83.

person and a court officer (ACT and England). The practice in Canada (and in Texas also) is for the prosecutor and defence lawyers to be in the separate room with the child while the judge, jury and the accused remain in the courtroom. In some American states (eg Alabama and Georgia), the defendant is also present in the room with the child, an arrangement that seems to defeat one of the major purposes of using the closed circuit television system — removing the child from the presence of the defendant. If the child is removed from the courtroom, the other difference in form lies in who the child is able to see via the video screen.[7] Again, some American states (eg California, Ohio) require the child to be able to see the defendant on screen while testifying and some allow the court the discretion to decide whether this is required (eg Minnesota and Vermont).

The class of witness for whom the use of closed circuit television may be available is defined by age and the type of offence, and in most cases, is restricted to child victims rather than witnesses to crimes against others. The age of the witness varies from under 10 (California, Indiana, the unproclaimed 1987 legislation in New South Wales) to under 18 (Australian Capital Territory) and encompasses almost every age in between. In several American states, the age is under 12 (Oklahoma, Texas, Utah and Vermont), in England, it is under 14, in Arizona, under 15; it is under 16 in some other American and Victorian states (Florida, Mississippi and New Jersey) and in New South Wales. In terms of the type of offence, there is also considerable variation with some jurisdictions restricting the use of closed circuit television to sexual offences (California, Florida and New South Wales), whereas others include physical and sexual assault (Georgia, Louisiana), or any form of (criminal) proceeding involving a 'child' witness (Australian Capital Territory, Alabama, Iowa and Scottish Law Commission recommendations).

In most jurisdictions, the use of closed circuit television is at the court's discretion and some demonstration is generally required of the risk or likelihood of 'mental or emotional harm' to the child if required to give evidence in the ordinary way.[8] This may have the unintended and undesirable effect, depending upon the way such legislation is interpreted, of subjecting children to further examinations or interviews to prove that they are sufficiently stressed to warrant the special procedure. Some American states have very restrictive conditions, requiring the child witness to be technically 'unavailable' to testify in court. A recent ruling of the Maryland Court of Appeal, for example, requires child victim-witnesses first to give evidence in court (and

[7] A difference in terminology between that used in the United States and in England and Australia may create confusion. 'One-way' in the American sense refers to a system where the defendant can see and hear the child witness but the child is unable to see or hear the defendant; in the Anglo-Australian sense, 'one-way' means that the child can hear but not see events in the courtroom (Australian Law Reform Commission Discussion Paper 40, 1989; Law Reform Commission of Western Australia Discussion Paper, 1990). The American use of 'two-way' means that the defendant's image is projected into the room in which the child is testifying. It is unlikely that this approach or the 'one-way' system in the Australian-Anglo sense will be commonly used in Australia, if at all.

[8] *Evidence (Closed Circuit Television) Ordinance* 1989 (ACT) s 6(a); Note, 'The Constitutionality of the Use of Two-way Closed Circuit Television to Take Testimony of Child Victims of Sex Crimes' (1985) 53 *Fordham L Rev* 995 at 1017.

presumably break down) before the court may decide to implement special protective measures such as closed-circuit television.[9] Other factors which may be considered under less restrictive legislation include the child's personality and maturity, the use of threats, the matters about which they are required to testify, and the likelihood of an improvement in the quality of evidence if the child is able to testify using the closed circuit television system.[10] One factor, however, that is rarely specified in legislation but should be considered is the child's wishes — whether s/he wants to use closed circuit television or would prefer to testify in open court. This issue will be discussed further in a later section of the paper.

Advantages and Disadvantages

The arguments about the likely effects on children rather than on the quality of their evidence relate to costs and benefits in terms of anxiety and attentiveness, and to possible and unintended, though not necessarily unwelcome, changes in children's participation rates in court proceedings.

The main benefit is that children's anxiety should be reduced because they are able to give evidence away from the physical presence of the accused, and, depending on the form of closed circuit television system available, also possibly outside the intimidating environment of the courtroom. The stress of testifying and its impact on children has now been confirmed by recent research, and a consistent finding from both research and clinical reports. A consistent finding from research and clinical reports is that fear of being in the courtroom and fear of seeing the accused are two of children's main concerns about going to court to testify.[11] When the accused is a family member or well-known to the child, subtle and not-so-subtle psychological techniques may have been used to coerce the child into silence, and the child may be reluctant or ambivalent about testifying, especially in the presence of the accused.[12] Fear of retaliation from the accused is also a very real fear among many child witnesses.[13] Even children not personally involved in court proceedings have expressed surprisingly high levels of fear of retaliation in response to vignettes about a child who witnesses a crime, including the fear

[9] For example, *Penal Code* 1985 (California) s 1347; also see MH Graham, 'Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions' (1985) 40 *Univ Miami L Rev* 19 at 76. GS Goodman, M Levine, GB Melton and DW Ogden, 'Child Witnesses and the Confrontation Clause: The American Psychological Association Brief in *Maryland* v *Craig*,' (1991) 15 *Law and Human Behaviour* 13–30.

[10] *Evidence (Closed Circuit Television) Ordinance* 1989 (ACT).

[11] R Flin, Y Stevenson and G Davies, 'Children's Knowledge of Court Proceedings' (1989) 80 *British Journal of Psychology* 285; D Whitcomb et al, *supra* n 1. G Goodman, *The Emotional Effects on Child Sexual Assault Victims of Testifying in Criminal Court: Final Report to the National Institute of Justice*, US Dept of Justice (1989); London Family Court Clinic *Reducing the System-induced Trauma for Child Sexual Abuse Victims through Court Preparation, Assessment and Follow-Up: Report on Child Witness Project* (London, Ontario, 1991).

[12] G Goodman and VS Hegelson, 'Child Sexual Assault: Children's Memory and the Law' (1985) 40 *Univ Miami L Rev* 181 at 190.

[13] A Yates, 'Should Young Children Testify in Cases of Sexual Abuse?' (1987) 144 *Amer J Psychiatry* 476 at 478.

that the accused may jump over the benches in the courtroom and hurt them.[14] Further intimidation results from the size and formality of courts, and the presence of a number of court officials and strangers who form the audience to the intimate details of embarrassing events the children are required to recount. It is, of course, possible that removing children to another room may increase their anxiety by making them feel isolated, and some of the children in the Western Australian pilot study in which the accused was removed from the courtroom said they preferred to be in the courtroom themselves.[15] The results of this pilot also confirmed most children's preference for the absence of the accused, and their own view that they were better able to give evidence without the accused being present. Several, however, said the presence of the accused would have triggered memories.

For most children, the effect on the quality of evidence flows directly from the likely reduction in stress which is expected to inhibit rather than facilitiate recall. Stress and intimidation may decrease both willingness and ability to retrieve information from memory.[16] A more relaxed witness is expected to be better able to process information and to answer accurately and completely than one who is frightened and intimidated. A child intimidated by the presence of the accused may be less likely to tell the truth than one who is able to testify out of the physical presence and sight of the accused. Recent evidence indicates that children are reluctant to implicate others in quite innocuous 'wrong doing', especially if that person is a parent or the wrong-doing is supposed to be a 'secret'. The presence of the 'offender' increased their reluctance and decreased the likelihood of correct identification.[17] Moreover, the sight of the accused is not unknown as an influence. Defence counsel are well versed in the tactics of standing near the accused so that the accused is directly in the child's line of sight when s/he looks at the questioner during crossexamination.[18]

Further evidence suggesting an effect on the quality of evidence comes from an American study.[19] The authors reported that children who answered questions in a small room similar to the one used for taping or closed circuit

[14] JA Cashmore and K Bussey, 'Children's Conceptions of the Witness Role' in J Spencer, G Nicholson, R Flin and R Bull (Eds) *Children's Evidence in Legal Proceedings: An International Perspective* (1989).

[15] K MacFarlane, 'Diagnostic Evaluations and the Use of Videotapes in Child Sexual Abuse Cases' (1985) 40 *Univ Miami L Rev* 135 at 147; Melton and Thompson, 'Getting out of a Rut: Detours to Less Traveled Paths in Child-Witness Research' (1987) in Ceci, Toglia and Ross (Eds), *Children's Eyewitness Memory* at 222.

[16] Goodman and Hegelson, *supra* n 12 at 186; HH Dent and GM Stephenson, 'Identification Evidence: Experimental Investigations of Factors Affecting the Reliability of Juvenile and Adult Witnesses' in Farrington, Hawkins and Lloyd-Bostock (Eds), *Psychology, Law and Legal Processes* 195.

[17] H Dent, 'Stress as a Factor Influencing Person Recognition in Identification Parades' (1977) 30 *Bulletin of the British Psychological Society* 339; ME Pipe and GS Goodman, 'Elements of Secrecy: Implications for Children's Testimony' (1991) *Behavioural Sciences and the Law.*

[18] Bowers (1983) cited in SM Romanoff, 'The Use of Closed-circuit Television Testimony in Child Sexual Abuse Cases: A Twentieth Century Solution to a Twentieth Century Problem' (1986) 23 *San Diego L Rev* 919 at 921.

[19] Hill, PE and SM Note 'Videotaping Children's Testimony: An Empirical View' (1987) 85 *Michigan L Rev* 809.

television tended to give more complete and accurate information in response to free recall and specific questions than did children in a 'normal' 'moot courtroom'. The children in the small room also reported that they were less nervous and more willing to repeat the experience than children in the 'courtroom'.

The converse view is that the isolation of the child from the courtroom and the greater sense of relaxation might be counter-productive. Two arguments have been put forward. First, children may be distracted by the equipment and may find it harder to concentrate on an image on the television screen for any length of time.[20] On the other hand, using closed circuit television may have a positive effect on attentiveness because distractions from the presence of minor court officials and from objections and other legal argument, often very confusing to children, can be 'tuned out' by a touch of a button. Allowance should be made, however, for children's shorter attention span in all court proceedings, whether closed circuit television is used or not. A second concern is that removal from the courtroom might not induce a sufficient sense of the solemnity of the occasion in the child or it may increase the likelihood that a child who has falsified evidence may persist with the lie. It is most unlikely, however, that even young children would be unaware of the specialness of the occasion, since they would still see the various court personnel on the television monitor and could hardly fail to be aware of the questions being asked by at least two of those court personnel.

Apart from the possible effects on children's anxiety and attentiveness, the use of closed circuit television may also affect children by leading to changes in their participation rate in court proceedings. For example, parents may be more likely to allow their children to testify if they are able to do so via closed circuit television, so increasing their participation rate.[21] On the other hand, their actual participation rate and the associated trauma may decrease if the use of closed circuit television encourages guilty pleas. Although this may seem an unlikely proposition, there is some indication of an unexpected increase in guilty pleas in England.[22]

The question of whether the use of closed circuit television and other video procedures result in an increased guilty plea rate may be resolved empirically by monitoring the effect. Similarly, the question of whether children are distracted or not, and whether they are more relaxed or feel isolated by the use of closed circuit television is an empirical question but one which can be answered only by asking the children involved.

In summary, then, the use of closed circuit television allows the child to be removed from the formal and awesome environment of the courtroom and from the possibly intimidating presence of the accused. The main potential

[20] MacFarlane, *supra* n 15; Scottish Law Commission, *The Evidence of Children and Other Potentially Vulnerable Witnesses* (1988) at 41.

[21] There is some support for this suggested effect in the comments of several parents in an on-going study by Cashmore and Bussey in that the parents were encouraged to allow their child to testify on the basis that they expected closed circuit television to be available by the time their child had to testify.

[22] Lord Chancellor, 'Opening Speech of the International Conference on Children's Evidence' (1989), Selwyn College, Cambridge.

benefits are a more relaxed child witness who is able to produce more effective and more reliable evidence than may be possible in the courtroom. The effect on other participants to the process, and whether this is fair to the accused, will be discussed later, jointly with the related effects of videotaped evidence.

VIDEOTAPED EVIDENCE

The essential difference between the use of closed circuit television and videotaped evidence relates to the timing of the evidence and to the creation of a record. While closed circuit television allows evidence to be transmitted contemporaneously, videotaping is used to present evidence (usually the child reporting events) recorded at an earlier time. One problem with such prerecorded materials is that they are usually inadmissible because of the hearsay rule. As Spencer and Flin point out, however, the reasons for the hearsay rule do not apply if the child witness who is the subject of the videorecording is available for testimony and cross-examination or if the defence has the opportunity to question the child at the time the tape is made.[23]

There are several actual and possible videotaping procedures. They fall into two main categories according to whether their recording is court-based (videotaped depositions or testimony) or out-of-court (videotaped interviews or statements). These two forms will be dealt with separately but once again, the general aim of both is to reduce the trauma of the investigatory and court process for the child and to improve the quality of the evidence. There are other potential advantages to both types of procedure, but as we shall see, there are also several disadvantages.

A. Videotaped Testimony

Videotaped testimony may take several forms. It may involve taping preliminary hearings for use at later proceedings or it may involve a special pre-trial deposition. The videotapes may then supplement the child's in-court testimony or they may replace either direct or cross-examination or both.

Forms of Use

Only Queensland currently has any provision for the use of pre-trial depositions or the taping of committal hearings for use at trial, although several other states have considered the question and made recommendations. The Western Australian Law Reform Commission, for example, is currently considering the proposal of taping the preliminary hearing and showing that tape at the later trial. In England, the Pigot Report[24] has recommended that the videotaped interview of disclosure replace the child's evidence-in-chief at the trial and that the video-recording of a special preliminary hearing replace

[23] J Spencer and R Flin, *The Evidence of Children: The Law and the Psychology* (1990).
[24] Report of the Advisory Group on Video Evidence (chaired by Judge Pigot) (1989).

cross-examination. The special preliminary hearing would be conducted in informal surroundings, in a room equipped with either a one-way mirror or closed circuit television to allow the defendant to view the proceedings. The majority of the Pigot Report Committee also recommended that very young or disturbed children be questioned by a child examiner, who would ask questions on behalf of the prosecution and defence lawyers. Under these proposals, children would not be required to testify at trial except in exceptional circumstances. Similar proposals have recently been introduced in New Zealand, and have been recommended by the Irish, Scottish and Tasmanian Law Reform Commissions.

Legislation in the United States, in contrast, has been operational in a number of states for several years, and a majority of states (33 as at 31 December 1986) have statutory provisions, encompassing a number of variations. The variations in terms of the age of witness, type of offence, and conditions that must be met before its use is allowed are similar to those outlined for the use of closed circuit television. Furthermore, in some states, the legislation specifies that the child should not be able to see the accused (eg Arkansas, Connecticut, Kansas) but in others (eg Minnesota, Utah, Vermont), a finding of trauma or harm is required to prevent the child from seeing or hearing the defendant during the videotaped testimony.[25] The frequency of use of the provision is also variable and there are continuing challenges to the constitutionality of the provisions.

Advantages and Disadvantages

The main advantage to the child of taping a pre-trial deposition hearing which is allowed to stand in lieu of the child's in-court testimony is to allow the child's evidence to be taken and taped in relatively informal surroundings, without the presence of the jury, press and public. In some jurisdictions, the accused is also out of the sight and hearing of the child.

The alternative procedure of taping the preliminary hearing and showing that tape at the later trial as proposed by the Western Australian Law Reform Commission (1990: p 42; 1991: p 59) has two advantages for the child. It may eliminate the need to give the same evidence twice and is likely to have a 'salutary effect upon the performance of defence counsel at the preliminary hearing, where it is said to be common for counsel to intimidate or "wear down" the child witness'.

Allowing the child to testify at an earlier time than the trial, depending on the timing of the preliminary hearing or pre-trial deposition, may also bring two other benefits to child witnesses. It allows them to put the events behind them, and importantly for the court, evidence taken relatively early after the incident is likely to be more reliable than that taken months or years later. (This issue will be dealt with in some detail in the next section in relation to videotaped interviews.) These positive effects disappear, however, or are dra-

[25] US National Centre op cit n 5 at VI-3.

matically reduced if the child is still able to be called to testify at the trial.[26] Furthermore, if the child is eventually called to testify at the trial, perhaps under exceptional circumstances, he or she is subjected to an additional procedure, with the likelihood of questions about any discrepancies between the evidence at the time of the deposition and the in-court testimony.

As with both closed circuit television and the videotaping of interviews, an important consideration is the possibility that the disclosure of facts at the earlier hearing may lead to a guilty plea, so avoiding the need for the further participation of the child.

B. Videotaped Interviews

The overall aim of videotaping interviews with the child or videotaping the child's statement is to capture and preserve the child's early report of events. Videotapes may be made by various agencies as part of the investigatory process or by counsellors in the course of therapy. No statutory authority is required to videotape interviews but the videotapes are generally inadmissible as part of the prosecution's evidence without statutory authority because of the hearsay rule. Although videotaped interviews are usually inadmissible to prove prior *consistency*, they are more commonly subpoenaed by the defence under an exception to the hearsay rule to show prior inconsistent statement. Spencer comments on this anomalous situation in the following terms: 'What justification can there be for a body of rules that permits a videotape of a previous interview with a child to be shown to attack his credibility, but not to support it?'[27] Furthermore, Spencer and Flin point out that where videotapes do not replace the child's in-court testimony, the reasons behind the hearsay rule — the ability of the defence to test the evidence and question the person making the first-hand account of the incident — do not apply.[28]

If videotaped interviews were admissible as evidence in court, apart from being used by the defence to show prior inconsistency, they may be used in several ways. First, they could be used to support the application for special in-court provisions. For example, the court's discretion to allow the use of closed circuit television or order a closed court is usually made on a case by case basis requiring the demonstration of special need. Second, they could be used to support the child's evidence in court, and perhaps replace their evidence-in-chief. Videotaped interviews are only used to replace cross-examination in rare circumstances.

Forms of Use

In Australia, only Victoria, South Australia and Queensland have any provision for videotapes to be admissible. In South Australia, they may be used in

[26] The Irish Law Reform Commission, *Consultation Paper on Child Sexual Assault* (1989) at 165.

[27] J Spencer, 'When is the Videotape of an Interview with a Child Admissible in Criminal Proceedings?' (1989) *J Child Law* 38 at 41.

[28] Spencer and Flin, supra n 22 at 147.

preliminary hearings if a written transcript is available, but children usually are not required to testify in preliminary hearings. Recently enacted legislation in Victoria (*Crimes (Sexual Offences) Act* 1991) allows the court, except in committal proceedings, to admit audio- or video-recordings of interviews with a child complainant if the child is available for cross-examination. In New South Wales, s 3 of the *Children (Care and Protection) (Personal and Family Violence) Amendment Act* 1987 provides that regulations made under the Act may regulate the recording by videotape or audiotape of any interview with a child concerning personal assault upon the child but such recordings are not yet admissible as evidence, except as subpoenaed by the defence as evidence of prior inconsistent statement. A pilot project is currently under way in New South Wales (commencing February/March 1991) but without a change in the law to allow the admissibility of the tapes, it will not provide an effective test of the possible advantages and disadvantages.

In England, the recent Report of the Advisory Group on Video Evidence has recommended that video-recorded interviews with children under 17 in relation to sexual offences should be admissible as evidence. This follows the increased use of videotaped interviews in case proceedings and by police following the Bexley experiment.[29] The Scottish Law Commission Report recommendation is considerably broader and extends to the prior statement of a witness of any age and is not restricted to sexual offences.[30] The statement may be written, audio-or videotaped, and must be adopted by the witness in the course of their evidence, either at trial or during a pre-trial deposition.

In the United States, a minority of states have provision for the admissibility of videotaped interviews under exceptions to hearsay rules,[31] but there is considerable variation in the frequency of their use in these states.[32] In contrast, videotaped interviews with the child by specially trained officers, usually police officers, are routinely admitted as evidence in several Scandinavian countries.[33]

Advantages and Disadvantages

The two main proposed advantages of taping children's early reports relate to the possible reduction in the number of investigatory interviews and the greater reliability of children's early reports of events. The first of these — the reduction in the number of interviews — holds potential benefits for children unrelated to their in-court admissibility. The issue of reliability concerns the court but has little direct benefit for children apart from the results that flow from just determinations. The other important potential advantage of videotaped interviews for children, again unrelated to their evidentiary status in

[29] Spencer and Flin, supra n 22.
[30] Scottish Law Commission, op cit n 19 at 35.
[31] US National Centre op cit n 4 at VI-1: 14 states as at 31 December 1986.
[32] P Toth, (1987), cited in K Murray, *Alternatives to In-court Testimony in Criminal Proceedings in The United States of America* (1988) at 18.
[33] J Andanaes, 'The Scandinavian Countries' in Spencer, Nicholson, Flin and Bull (Eds) *Children's Evidence in Legal Proceedings: An International Perspective* (1989); E Smith, 'How to Deal with Children's Evidence', op cit.

court, is the possibility that they may encourage a guilty plea. Visual proof of the child's allegations may be more likely to convince the defendant to plead guilty than verbal reports, with the result that the child is then not required to testify in court. Spencer and Flin suggest, however, that there is little evidence for this effect except in jurisdictions in which the tapes are admissible in evidence.[34]

Following disclosure of child sexual assault allegations, a number of agencies are usually involved for investigatory, health and welfare purposes (eg police, prosecutors, health and child welfare authorities and therapists). Children can therefore be subjected to multiple interviews by those with an interest in the case, and may become confused and stressed as a result of being asked the same sorts of questions by various people. This in turn may have harmful effects on children's in-court testimony because repetition can lead to loss of spontaneity in production and because it may lead to claims of 'contamination' by the defence, an issue that is dealt with later. These problems may be avoided by the joint use of the videotaped interview and the resultant reduction in the number of interviews. Achieving a real reduction in the number of interviews could, however, be achieved by joint interviewing without videotaping. It requires recognition of the needs of the various agencies and compromises between them.[35] The main problem is reconciling therapeutic and legal needs.

The main arguments concerning the in-court admissibility of videotaped interviews relate to the reliability of children's evidence. There are often very long delays between the reporting of the event and the preliminary hearing and trial. Children are expected to remember the details of the event months or even years after the event under stressful circumstances in which questions about seemingly irrelevant details are often used to impugn their credibility. Children have been shown to forget more rapidly than adults,[36] and indeed, when children have been abused, it is desirable that they do put the events behind them as soon as possible and continue with their lives. Protracted involvement with the criminal justice system has been shown to have detrimental effects on children's emotional health.[37]

The videotape of their earlier statement could therefore provide a record of the child's complaint in a form which preserves the child's exact verbal and facial expressions and gestures at the time of the report. This may have several significant effects given the long delays in getting to trial. First, simply in terms of appearance, a child of 9 or 10 may look very different to a jury than a more mature 12–13 year-old. Second, a videotape can provide a record of exactly what the child said at a time much closer to the event than the trial. It could be used in court to supplement the testimony of an inarticulate child but

[34] Spencer and Flin, supra n 22; S Chaney, 'Videotaped Interviews with Child Abuse Victims' in *Papers from a National Policy Conference on Legal Reforms in Child Sexual Abuse Cases* (1985), 209–18; US National Centre op cit n 5; supra n 28 at 14; Whitcomb, supra n 5 at 60.

[35] MacFarlane, supra n 15 at 137.

[36] Brainerd and Ornstein, (in press).

[37] DK Runyan, MD Everson, GA Edelsohn, WM Hunter and ML Coulter, 'Impact of Legal Intervention on Sexually Abused Children' (1988) 113 *Journal of Pediatrics* 647–53.

what effect this will have on children is unclear. It is arguable whether being spared examination-in-chief relieves some of the stress or increases it by precluding the practice that questioning by 'their own lawyer' may provide. The videotape could also be shown to the child beforehand to refresh their memory in the same way that witnesses often re-read their written statements before giving evidence. There is, of course, the danger that the defence will attack the child's credibility by implying that the child is lying or unsure because they 'had to' see their videotaped statement again. On the other hand, this line of questioning already occurs with written statements.

Third, the videotaped interview preserves the exact terminology used by the child which may counter any claims of coaching or contamination of the child's evidence. On the other hand, there is danger that lack of understanding of the developmental changes in children's vocabulary and description of events during the months and years between the videotaping of the interview and the trial may result in such discrepancies being attacked as demonstrating inconsistent rather than consistent evidence. There is also the significant practical difficulty that sexually abused children usually disclose slowly and may take some time to disclose the full story, gradually providing more detail as they gain confidence in the interviewer. A number of videotapes may therefore be required to document the history of the interviews and questions are still likely to be asked about what happened before or between the interviews. (If no tapes are available for quite legitimate reasons, what implications will be drawn? If all interviews are to be taped, what editing procedures would be acceptable to prevent an escalation in court time?) Furthermore, a recent study also indicates that children may deny the allegations during early interviews.[38] Such inconsistencies and progressive disclosures provide grist to the defence mill that the child's evidence has been 'contaminated' because they have been encouraged to tell what the interviewer wanted to hear. The concern then is that such interviews will be used more often to undermine rather than support children's credibility.

Fifth, in addition to recording the child's answers, videotaped interviews also record the exact wording and context in which questions are asked. There are obvious advantages to the court knowing how the information supporting the allegations was obtained, and as MacFarlane points out, professionals are and should be accountable for their procedures and their interviewing techniques:

> Few would disagree that interviewers should be accountable for what goes on behind closed doors in conversations with young children. Interviewers should be accountable to the children and families they serve, subject to scrutiny by their professional peers, and accountable to those whose lives will be affected by legal actions that may arise from disclosures made during interviews.[39]

The problems, however, lie in the likely unfairness of that scrutiny by

[38] C Sorenson and F Snow, *How Children Tell: The Process of Disclosure* (Paper presented at Eighth National Conference on Child Abuse and Neglect, October 23, 1989).
[39] MacFarlane, supra n 15 at 163.

defence counsel under the adversary system and in the use of interviews conducted for one purpose in an entirely different context. Leading questions may be entirely appropriate in therapeutic interviews with children who are unwilling to talk about their problems but are inappropriate for investigative purposes. It is therefore important to distinguish between these videotapes and those recorded specifically for investigative purposes. Specialised videotaped interviewing by specially trained interviewers should allow those charged with the child's welfare to go about their business without concern about claims of contamination. As Cox J pointed out (*R* v *Horsfall* (1989) 51 SASR 489), children cannot have their lives put on hold for fear of such attacks. This presumes, however, proper coordination between authorities and that the child is willing to disclose events quickly. It also requires specific training and guidelines for the professionals so that they are not vulnerable to attack on the type and form of questioning used during the interviews. Furthermore, it requires better understanding of the issue of 'contamination' and the effect of leading questions on children's evidence by those involved, including the judges, magistrates and lawyers.

While further work is still needed, the available research indicates that it is much harder to elicit false positive responses from even very young children about central issues related to events in which they were personally involved than previously believed.[40] The defence tactic of impugning the credibility of children's evidence, unfortunately, often relies on showing the unreliability of their memory for peripheral and often irrelevant aspects of the event, in the hope or expectation that the judge or jury will falsely infer that the child's memory of central facts is equally unreliable.[41]

In summary, the benefits to children of videotaping their interviews generally relate to their out-of-court use and many of the difficulties concern their use in court. The difficulties that have been outlined are not insurmountable but it is important to be aware of the possible problems and to be clear about the distinction between videotapes that are made in the course of therapy with a counsellor and videotapes that are made specifically for evidentiary purposes.

THE EFFECT OF BOTH CLOSED CIRCUIT TELEVISION AND VIDEOTAPED EVIDENCE ON OTHER PARTICIPANTS

Two major concerns about the use of the closed circuit television system and various forms of videotaping of evidence relate to the effects on the other

[40] G Goodman, L Rudy, BL Bottoms and C Aman, 'Children's Concerns and Memory: Ecological Issues in the Study of Children's Eyewitness Testimony' in R Fivush and J Hudson (Eds), *Knowing and Remembering in Young Children* (1990); K Saywitz, G Goodman, E Nicholas and S Moan, *Children's Memories of Genital Examinations: Implications for Cases of Child Sexual Assault* (Paper presented at the Biennial Meeting of the Society of Research in Child Development, Kansas City MO, April 1989).

[41] GL Wells and MR Leippe, 'How do Triers of Fact Infer the Accuracy of Eyewitness Identification?: Using Memory for Peripheral Detail Can Be Misleading' (1981) 66 *J Applied Psychology* 682.

participants to the proceedings — the accused, the trier of fact (the judge or jury) and the lawyers. First, in relation to the accused, the concern is the possible infringement of the right of the accused to confront witnesses. Second, in relation to the effect on the fact-finder, the concern is the possible effect of the medium on the perception of the child witness.

The issues generally arise out of concern about the imposition of a medium such as a television screen between the court and the witness, and are therefore not pertinent to the use of videotaped interviews in court where the witness also testifies *in court* and is cross-examined. The following discussion will therefore be restricted to the use of closed circuit television or videotaped depositions whereby the fact-finder views the witness via a television monitor, either at the time the testimony is given (live) or at some later time (taped).

The Fairness to the Accused

Whether the use of video procedures is unfair to the accused depends on three issues. First, is the procedure itself unfair? Second, is the decision to use the procedure prejudicial to the presumed innocence of the accused? Third, does the procedure inhibit the ability of defence counsel to carry out their function? The main argument against the use of video technology in its various forms is that it infringes the right of the accused to confront witnesses. This right, traditionally viewed as a prerequisite to a fair trial, is meant to serve two main purposes.[42] Whether or not this right is infringed by the use of closed circuit television or videotaped evidence should be evaluated in terms of its likely effect on each of these purposes.

The first purpose of confrontation is to permit defendants to hear the accusations against them in person and allow the defence the opportunity to cross-examine adverse witnesses. The underlying belief is that such confrontation and cross-examination increases the likelihood of truth-telling by witnesses. Where the witness is a child, however, and especially where the accused has been in a position of trust and authority in relation to the child, confrontation with the accused may decrease the likelihood of truth-telling, ie it may so intimidate children that they are unwilling or unable to testify. As several writers point out, the right to confront does not include the right to intimidate.[43]

The second purpose of the right of confrontation is to allow the fact-finder, eg the jury, to determine the witness' credibility by observing their testimony and judging their demeanour. Great store has been placed in common law tradition on the importance of demeanour and its assessment in the trial. Wigmore, for example, states:

> The witness' personal appearance is desirable because the jury may well be influenced in judging his credibility be seeing and hearing him in person, [It enables the jury] to note the readiness and promptness of a witness' answers

[42] Romanoff, supra n 17; Spencer and Flin, supra n 22 at 67–8.

[43] Romanoff, supra n 17 at 932; J Spencer, 'Child Witnesses, Video-technology and the Law of Evidence' (1987) *Crim L Rev* 76 at 83.

or the reverse; the distinctness of what he related or the lack of it; the directness or evasiveness of his answers; the frankness or equivocation; the responsiveness or reluctance to answer questions; the silences; the explanations; the contradictions; and the apparent intelligence or lack of it.[44]

The results of empirical studies, however, and even the opinion of some in the law, tend to discount both the significance of such information in decision-making about truth-telling and the effect of the video medium on the availability of demeanour evidence.

Empirical evidence supports the view that the ability to distinguish truth-telling from lying has been seriously overrated in the law.[45] In fact, the ability of observers to detect false and truthful statements by others is generally only slightly better than chance — that is, observers would do nearly as well by guessing.[46] Most research in this area has dealt with adults. A recent English study, however, investigated the ability of adult professionals to differentiate between the reports of children who had actual experience of an event from those who had seen a video of the event. Although significantly greater than chance, accuracy was not spectacular except for the detection of truthful reports for 7 to 8 year old boys (91%). Accuracy of detection was better for younger than older children, and for truthful rather than deceptive reports.[47] Poor detection of deception should not be surprising, however, given the difficulty of obtaining objective feedback to develop detection skills, the bias to judge others as truthful rather than deceptive,[48] and individual differences in the ability to control 'leakage cues' or the clues that 'give one away'.[49] This difficulty is likely to be even greater in the courtroom because indicators of anxiety may be mistaken for indicators of deception.[50]

Empirical studies provide no definitive conclusion about the effects of the video medium on the ability of observers (eg jurors) to extract information from witness' testimony. There is little evidence as yet of an effect of medium (video, audio only, transcript, or 'live' presentation) on jurors' verdicts,[51]

[44] *Wigmore on Evidence* (1970, Vol 3) at 276.

[45] Lord Devlin, *The Judge* (1979) at 63; Re and Smith, *ALRC Evidence* RP No. 8 'Manner of Giving Evidence' Pt A; Re, 'Oral v Written Evidence' (1983) 57 *ALJ* 679; Meares, 'Fact-finding — Anything but the Truth' (1989) 2 *Judicial Officers' Bulletin* 3.

[46] G Kohnken, (1989) *Psychological Approaches to the Assessment of the Credibility of Child Witness Statements* in Spencer, Nicholson, Flin and Bull (Eds) *Children's Evidence in Legal Proceedings: An International Perspective* (1989); RE Kraut, 'Humans as Lie Detectors' (1980) 30 *J Communication,* 129, M Zuckerman, BM DePaulo and R Rosenthal, 'Verbal and Nonverbal Communication of Deception' in L Berkowitz (Ed), *Advances in Experimental Social Psychology* (1981) Vol 14, 1.

[47] HL Westcott, G Davies and BR Clifford, 'Lying smiles and other stories: Adults' perceptions of children's truthful and deceptive statements'. Unpublished manuscript, 1990.

[48] RE Riggio, J Tucker and KF Widaman, 'Verbal and Nonverbal Cues as Mediators of Deception Ability' (1987) 11 *J Nonverbal Behaviour,* 126–45.

[49] Psychologists often refer to information conveyed by body language which is unintentionally contrary to the verbal message as 'leakage cues'. An example of an intentional cue is a wink which is often used to signify that the speaker is joking or not serious.

[50] Kohnken, supra n 44.

[51] LC Farmer, GR Williams, BP Cundick, RJ Howell, RE Lee and CK Rooker, 'Juror Perceptions of Trial Testimony as a Function of the Method of Presentation' in G Bermant, C Nemeth and N Vidmar (Eds), *Psychology and the Law: Research Frontiers* (1976) 209;

although there is some indication of an effect on different aspects of the presentation of some witnesses. There is little consistency in these results, however, with the effect depending on the type of presentation (black-and-white or colour; close-up or medium-distance shot), on the type of witness (strong or weak) and on the particular aspect being judged (honesty, friendliness, appearance). Furthermore, rather than being adversely affected by any reduction in information, as some have suggested,[52] it appears that jurors retained more information from videotaped testimony (especially monochromatic) and written transcripts than from live testimony, especially toward the end of the testimony.[53] As Miller and Fontes point out, the retention of information from the evidence is the best measure of 'relative merit' because the trial should be based on the evidence rather than the spurious ability of observers to detect trustworthiness in witnesses.[54] In fact, they argue that the favourable result for written and videotaped testimony may be a result of the reduction in stimulus complexity and the removal of distracting cues. It appears then that the significance of the tradition of oral testimony by the witness in person may have been overrated.[55]

It is significant that these views have been supported in American case law[56] and by several commentators[57] despite continuing challenges to the constitutionality of such measures on the basis of the Sixth Amendment right of an accused to confront his accusers.[58] It is also important to realise that the right to confrontation raises different issues in Australia and England compared with the United States because in the former countries, there is no *constitutional* right to confront the accuser as there is in the United States. There is still, however, a strong tradition of protecting the rights of the accused, especially as might be expected, among defence lawyers.[59] The challenge is to find a means of balancing the rights of the accused and the protection of vulnerable witnesses. The evidence suggests that, although the use of video

GR Miller and NE Fontes *Videotape on Trial: A View from the Jury Box* (1979). H Westcott, G Davies and B Clifford, 'The Credibility of Child Witnesses Seen on Closed-Circuit Television' (1991) 15 *Adoption and Fostering*.

52 SJ Brakel, 'Videotape in Trial Proceedings: A Technological Obsession?' (1975) 61 *Amer Bar Assoc J* 965.

53 Miller and Fontes, see note 49 at 215.

54 Several studies have reported some effect of videotaping on the credibility of witnesses but the results are not consistent and appear to be more dependent on the characteristics of the witnesses than are the verdicts or the amount of information retained. Further research is necessary to clarify the situation.

55 Re, supra n 40 at 681.

56 Romanoff, supra n 17.

57 KK Coppel, 'An Analysis of the Legal Issues Involved in the Presentation of a Child's Testimony by Two-way Closed-circuit Television in Sexual Abuse Cases' in *Papers from a National Policy Conference on Legal Reforms in Child Sexual Abuse Cases* (1985) 241; Note, supra n 18 at 809; Romanoff, supra n 17; Note, 'Video-tape Trials: A Practical Evaluation and a Legal Analysis' (1974) 26 *Stanford L Rev* 619.

58 PS Appelbaum, 'Protecting Child Witnesses in Sexual Assault Cases' (1989) 40 *Hospital and Community Psychiatry* 13; WJ Mlyniec and MM Dally, 'See No Evil? Can Insulation of Child Sexual Abuse Victims Be Accomplished Without Endangering the Defendant's Constitutional Rights?' (1985) 40 *Univ Miami L Rev* 115–34.

59 M Hill, 'Children as Witnesses' (1989) *SA Law Society Bulletin* 230.

technology may preclude direct face-to-face confrontation, its use does not, in fact, negate the essential aspects of confrontation.

Implications for fairness to the accused also arise from possible effects on defence counsel, and in particular, on their ability to establish rapport with and question the witness effectively. Concern that the video medium inhibits direct personal communication between counsel and the witness has been expressed by the criminal Bar.[60] On the other hand, it is possible, as Romanoff points out, that these criticisms reflect lack of familiarity with the techniques of cross-examination under these conditions rather than 'an inherent limitation in the procedure itself.'[61]

Another more serious concern is the possible restriction of the ability of the accused to instruct counsel if they are not together in the same room, which may occur with either closed-circuit television or videotaped depositions.[62] A recent trial of the use of closed circuit television in Western Australia found that the main problem was the technical difficulty of the communication between the accused (who was out of the courtroom) and defence counsel (in the courtroom).[63] It is possible therefore that the separation of the accused from his counsel may be disadvantageous if such problems cannot be overcome by technical improvements in the equipment or by procedural changes.

Apart from the fairness of the procedure itself, there is the issue of the possibly prejudicial effect of deciding to use such special procedures. Does the demonstrated need to prevent face-to-face confrontation between the child and the accused indicate to the jury such fear of the accused that the accused is likely to be guilty? One response to the problem lies in instructions to the jury that they should not make any inference about the guilt or innocence of the accused because any special procedure is used. The absence of the child from the courtroom via the use of closed circuit television or videotaped depositions can be explained to the jury in terms of the difficulty that children face in testifying in the intimidating environment of the courtroom rather than in the presence of the accused. For this reason, removing the child from the courtroom may be less prejudicial to the accused than removing the accused or using a partition to screen the accused from the child because these procedures can be explained only in terms of the effect of the accused on the child witness.

Another response to the potentially prejudicial effect of using such procedures is to make their use mandatory for all children in a certain class (eg child witnesses under 14 in sexual assault matters). This response is heavy-handed, however, because it denies children below the specified age the choice of testifying in the courtroom and denies children above that age the choice of using the special procedure. A mandatory rather than discretionary

[60] Id, 234.
[61] Romanoff, supra n 17 at 930.
[62] JP Grant, 'Face — to Television Screen — to Face: Testimony by Closed-circuit Television in Cases of Alleged Child Abuse and the Confrontation Right' (1987–88) 76 *Kentucky L J* 273.
[63] WA Department for Community Services (1989), supra n 2.

rule also assumes that jurors are incapable of understanding that some children are likely to be intimidated by the court process and need protective measures. Given the general lack of experience of most jurors with the court process and their own feelings of intimidation in the court environment, they are likely to understand.

In summary, it is argued that the use of closed circuit television and videotaped testimony satisfies both the intent and spirit of the accused's right to confront adverse witnesses. Furthermore, most of the traditional considerations and rationale were developed in a different technological context and there is a need to consider updating legal rules and procedures to take account of the changed context,[64] the needs of vulnerable witnesses, and the state's interest in prosecuting such cases.[65] While the rights of the accused need to be protected, those rights do not seem on current evidence to be infringed by the use of videotechnology. Even if there is some minor effect, this needs to be balanced against other important considerations.

The Effect on the Trier of Fact

Much of the preceding discussion of the fairness to the accused has concerned the effect of the use of video technology on the trier of fact, and in particular the effect on their ability to assess demeanour and detect deception by witnesses. An additional concern about the effect on the trier of fact relates to the likely impact of evidence received by video. One argument is that such evidence would have increased impact because of status conferral. Jurors are accustomed to seeing important people on television and may bestow increased status and hence greater credibility on a witness who testifies via that medium.[66] The opposing argument is of lessened impact for several reasons. First, in contrast to the argument of status conferral, the 'cultural conditioning of television as an entertainment medium' (Re, 1983) may make televised testimony, whether by closed circuit television or by videotaped evidence, seem unreal and impersonal.[67] Second, age and size cues may be distorted so that young children in particular may appear older and less vulnerable on television than they do in person. In particular, a composed child may have less emotional impact than a distressed, crying child. As Curtis points out, 'For a child to break into tears on the witness stand is, to say the least, detrimental to the defendant's case.'[68] These effects would therefore be likely to help rather than hinder the defendant's case and various commentators and prosecutors have expressed concern about the diminution of the immediacy and emotional impact of televised testimony.[69] This concern appears to be at

[64] Re, supra n 43 at 689; Note, supra n 56.
[65] Note, supra n 8 at 995.
[66] Graham, supra n 9 at 75; Grant, supra n 61 at 294–5.
[67] G Bermant, D Chappell, GT Crockett, MD Jacoubovitch and M McGuire, 'Juror Responses to Prerecorded Videotape Trial Presentations in California and Ohio' (1975) 26 *Hastings LJ* 975.
[68] VK Curtis, 'Criminal Procedure: Closed-Circuit Testimony of Child Victims' (1987) 40 *Oklahoma L Rev* 69 at 76.
[69] US National Centre, supra n 5; MacFarlane, supra n 15.

least partly responsible for the infrequent use of these procedures in the United States.[70] Whether there is any basis to the concern needs to be tested empirically, taking into account the likely benefits derived from having a less stressed witness.

ETHICAL ISSUES

Several important philosophical and ethical issues are raised by the use of such special procedures. Perhaps the central issue is the need for such procedures and the basis and means of determining when they should be allowed. One argument against the use of such procedures is that they create a special class of witness, which is seen as objectionable. Wilson, for example, surprisingly argues that this is patronising to children.[71] It may be argued, however, that children have been a special class of witness for some time, but a disadvantaged rather than advantaged class, required to testify on adults' terms.[72] What these special procedures aim to do is make the system more sympathetic to children's needs and so allow them to be heard in an adult-oriented system.

If children are to be permitted to use such special procedures, who should decide and on what basis? As already indicated, some demonstration of need or compelling state interest is generally required before alternatives to in-court testimony are allowed, and most commentators support this requirement.[73] The effect of such a requirement, however, may be counter-productive. Disagreement about the type of evidence needed to satisfy the test may lead to 'an unhelpful clash between "expert" witnesses adduced respectively by the prosecution and the defence' (Scottish Law Commission, 1988, p 101). It may also result in further testing interviews with the child, all in the name of reducing trauma for the child. It may result in the child being called to give evidence first or subjected to further testing interviews to demonstrate their distress before they are allowed to use the very measures which are designed to reduce their trauma.

Presumably, the reason for the requirement to show need is that there is some element of unfairness to the accused in the departure from the traditional manner of giving evidence. It has, however, been argued here that the essential elements of confrontation — the ability of the defence to test the evidence and cross-examine adverse witnesses and the ability of the fact-finder to test the credibility of the evidence — need not be compromised by the use of such procedures. There is therefore no inherent unfairness in the

[70] M Latham, *Evidentiary and Procedural Trends in Child Sexual Assault Litigation in USA: Report to New South Wales Law Foundation* (1981).

[71] J Wilson, 'Children's Evidence in Legal Proceedings: A Perspective on the Canadian Position' (1989) 23 *The Law Society Gazette* 281 at 291. Wilson's view is reasonable if, however, children are not consulted about their use.

[72] B Naylor, 'The Child in the Witness Box' (1989) 22 *ANZJCrim* 82.

[73] For example, J Bulkley, 'Legal Proceedings, Reforms and Emerging Issues in Child Sexual Abuse Cases' (1988) 6 *Behav Sc and the Law* 153 at 165.

attempt to balance the rights of the accused and the needs of vulnerable witnesses.

Given that the use of such special procedures is not inherently unfair, is there any reason why the child's wishes to use such alternatives should not be the most important determinant of their use? The argument for both a discretionary basis for the decision and for allowing children's wishes to determine whether they use closed circuit television, for example, focuses on the following questions. Why should children be forced to use an alternative procedure if they do not wish to, and conversely, why should children *not* use it when they wish to? There seems to be no reason to force children to use closed circuit television if they do not wish to, and indeed, to do so may reinforce any view that abused children may hold of themselves as 'powerless victims of the whims of adults'. Indeed, for some children who are prepared for the experience, testifying in court and facing the accused may have a therapeutic and cathartic effect.[74]

Several reasons may be given to argue that children should not be able to testify in this way just because they wish to. The view that the alternative procedure of testifying might not induce a sufficient sense of the solemnity of the occasion in the child has already been discussed. Another argument focuses on the competence of children to make such an informed decision. Concern about children's competence to make decisions usually relates to the possible harm they could cause themselves by making bad decisions. In this case, however, it is hard to see how a child's decision to use an alternative procedure to testify would harm him/her. Children who initially decide not to use closed circuit television should be allowed to change their mind if they are unable to testify once the trial has begun.[75]

The ability to make an informed decision also depends on the ability of others to provide children with information on which to base their decision, and this raises the question of the reliability of such communication and the possible operation of vested interests. Prosecutors, for example, may believe that children are more likely to be effective witnesses in court rather than viewed on closed circuit television and may either not ask children whether they wish to use it or encourage them not to use it. For this reason, it is desirable that the court has some means of determining the child's wishes. Probably the best means of ensuring that children understand the choice would involve showing children the two alternatives — the courtroom and the separate room with the equipment in operation.

The preceding argument mostly focuses on the use of closed circuit television but largely applies as well to videotaped evidence. There are, however, additional issues in relation to likely defence attacks on videotaped evidence,

[74] L Weithorn, 'Developmental Factors and Competence to Make Informed Treatment Decisions' (1982) 5 *Child and Youth Services* 85 at 100. D Finkelhor and A Browne, 'The Traumatic Impact of Child Sexual Abuse: A Conceptualization' (1985) *American Journal of Orthopsychiatry* 530–41; Report on Child Witness Project, London, supra n 11.

[75] The trial of closed circuit television in Canberra has seen one case in which a 15 year-old girl wanted to face the accused, her father, in court but could not continue to testify in court. In this case, application by the prosecution to use the closed circuit television system was made at that time and allowed.

and videotaped interviews in particular, which the prosecution may need to consider. The creation of a tape, a semi-permanent record, in videotaping raises the question of whether children do understand, and need to understand their rights in relation to the privacy, confidentiality, and ownership of the videotapes. What right do children have to know that they are being videotaped, to know who is to see the tape and to consent to that viewing?

It is important to distinguish again between videotapes made in the course of therapy and those specifically made as a visual record of the child's statement to the police. In both cases, children are entitled to know they are being videotaped and to know the purposes of the videorecording. The difference lies in the foreseeability of who is likely to see the tape and under what circumstances. A particular difficulty arises with therapeutic tapes if they are subpoenaed by the defence and used to discredit the child's evidence — children and parents are probably unaware of this possibility. In the case of 'statement-type' tapes, children and parents should know that the alleged offender may see the tape. The problem with both types of tapes, but with therapeutic tapes in particular, is that children are likely to be inhibited if they are told that the accused may see it. Furthermore, as MacFarlane (1985) points out, if children find out after the fact that this has happened, they may see that as a breach of trust by the interviewer, especially if the child was threatened or had promised the perpetrator not to tell what happened.

Children's right to know about the taping and its purposes raises the issue of informed consent. At what age is it reasonable to expect that children can provide informed consent and how should it be obtained? What if children and/or parents give consent to the taping and then change their mind? To what extent can their consent be informed by knowledge of the implications and of the ways such tapes can be used?

Another important ethical issue is raised by the possibility of using the tape to prevent children from retracting. There is generally likely to be little difficulty if the videotape is shown to the non-offending parent to encourage their support, but if it is shown to the child to try to force them to testify, it raises the ethical issue of whether or not professionals have the right to coerce reluctant children/teenagers who have decided that their involvement in proceedings would be more damaging than to avoid it. On the one hand, children have the 'right to say "no" just as a rape victim has the right to refuse to make a complaint, knowing what is likely to happen to her during the prosecution process'.[76] On the other hand, how free and voluntary is such a choice if chidren are under pressure from the perpetrator and their family?

[76] M Rayner, 'The right to remain silent: The interrogation of children' (1988). Paper presented at the Australian Institute of Criminology Seminar on Children as Witnesses at 3.

CONCLUDING COMMENTS

The two main forms of video technology with their several variations do provide some relief to some of the most significant problems facing child witnesses, especially those who are victims of child sexual assault. These problems include facing the accused in court, and having to face detailed questioning about intimate events in front of a room full of strangers in the intimidating environment of a formal courtroom. These techniques do not, however, provide the panacea to all the problems faced by child witnesses, and do not reduce the need to prepare children to testify or to educate lawyers and judges about the relevant issues.

Although there is no consensus about the merits of the use of video technology, even among prosecutors,[77] there generally appears to be more positive comment and less concern about the possible negative consequences of closed circuit television than of videotaping. It appears that closed circuit television is seen as representing less of a departure from traditional court procedures than videotaped depositions because it provides live and not pre-recorded testimony. The report of a government committee in California, for example, recommended measures to extend the use of closed circuit television but was unable to resolve the issue of video- or audiotaping of interviews with children and recommended a trial project.[78]

Some commentators,[79] however, see closed circuit television as the second, and perhaps less important step in the process of improving the reliability of children's testimony and decreasing the trauma of testifying. MacFarlane seems to sum up overall feeling in her comments about the procedures:

> The use of closed circuit television as a means of enabling a child to testify constitutes one measure toward reforming a legal system ill-suited to child witnesses. . .[80] [and]
> The potential use of videotapes represents an advancement in the electronic age that hold both great promise and certain pitfalls.[81]

Whether the promise of the various procedures holds substance and what the pitfalls are in practice, however, needs to be determined by careful implementation on a trial basis with proper evaluation of the costs and benefits. Despite the availability of the technique in a number of jurisdictions and the consideration of its use in others, there is a distinct and surprising lack of information about the efficacy and effects of such procedures.[82] There has, however, been considerable speculation about the likely effects, and more particularly the likely negative consequences of their use. Much of this has come from the United States and has concerned doubts about the consti-

[77] US National Centre, supra n 5 at VI-1.
[78] California Child Victim Witness Judicial Advisory Committee, op cit n 6.
[79] R Cahill, *TV or Not TV: Developments concerning Child Witnesses* (Paper presented to Magistrate's Seminar, Sydney November 1989); G Davies,'Use of Video in Child Abuse Trials' (1988) *The Psychologist* 20; Spencer supra n 26 at 41.
[80] MacFarlane, supra n 15 at 149.
[81] Id 162.
[82] Melton and Thompson, supra n 15 at 222.

tutionality and the possible effect of such procedures on the impact of child witnesses. Indeed, systematic evaluation in the United States has been rendered impossible because it is so rarely used.[83] It is instructive, however, that Toth comments in relation to videotape interviews that where they have been used (Texas, New Mexico and California), those involved with them are 'very happy with them'.[84]

The opportunity for evaluation of the use of closed circuit television has, however, arrived in England and in the Australian Capital Territory, and pilot studies both in the Perth Children's Courts in Western Australia and in New Zealand have recently been carried out. Preliminary results from all four trials are 'encouraging' and indicate that the use of closed circuit television has been a 'technical success'. In particular, the New Zealand evaluation, the only one to examine trials involving juries, concluded that the use of closed circuit television was not unfair to either the prosecution or the accused.[85]

Ultimately, only further research and experience with the different forms of video technology will determine their value to the judicial system.[86]

[83] Whitcomb, Shapiro and Stellwagen, op cit n 1; Whitcomb, 1989, personal communication.

[84] Toth cited in Murray, supra n 31 at 18.

[85] G Davies, *Children on Trial? Psychology, Videotechnology and the Law* (Unpublished Manuscript); WA Department for Community Services, supra n 2; New Zealand Department of Justice, *The Use of Closed-Circuit Television in New Zealand Courts: The First Six Trials* (1990).

[86] Note, supra n. 56 at 644.