



The credibility of testimony from minors allegedly victims of abuse within the Italian legislative framework



G. Montanari Vergallo, E. Marinelli, V. Mastronardi, N.M. di Luca, S. Zaami *

Department of Anatomical, Histological, Forensic and Orthopaedic Sciences, Sapienza University of Rome, Viale Regina Elena 336, 00161 Rome, Italy

ARTICLE INFO

Article history:

Received 28 April 2017
 Received in revised form 16 November 2017
 Accepted 16 November 2017
 Available online xxxx

Keywords:

Sexual violence
 Child
 Competence to testify
 Psychological evaluation

ABSTRACT

The authors aim to analyze the key aspects related to the testimony of children who might have been victims of sexual harassment and abuse. The issue of medico-legal psychiatric assessment of minors who claim to have been sexually abused is extremely contentious and widely-debated, not only due to the growing spread of such claims, but also on account of the technical challenges it raises. For these reasons, national as well as European law-makers have intervened by enacting new legislation, and scientific communities have established new sets of guidelines aimed at improving the overall conditions under which a child is called to testify as well as the process through which depositions are collected and evaluated, so as to ensure that any assessment of the reliability of the testimony is scientifically grounded. The authors also highlight the importance of regulatory measures meant to minimize the risk that the questioning of a child might negatively affect his or her emotional balance by limiting and lessening stressful conditions and anxiety, which may traumatize and irretrievably scar the child. Moreover, they stress the importance of dealing with the social issue of child abuse by strengthening a preventive set of measures.

© 2017 Elsevier Ltd. All rights reserved.

Contents

1. Introduction	58
2. A minor's testimony: the role of the psychologist	59
3. Uncertainty, contradictions and suggestions in a child witness's testimony	60
4. Particular safeguards reserved to child witnesses within sexual abuse-related criminal trials	62
5. Some closing remarks	63
Conflict of interest declaration	63
References	63

1. Introduction

The phenomenon of abuse against minors has always occurred, but over the past years, it has become alarmingly widespread (WHO, 2013). Media outlets cover stories of children sexually victimized by adults almost daily. According to the American Academy of Pediatrics (2005), sexual abuse occurs when a child is involved in sexual activities that he or she is unable to understand, for which he or she is not ready and cannot give consent, and/or that go against the law or social taboos. The Italian Society of Child Neuropsychiatry (SINPIA) identifies child sexual abuse on the basis of the relationship between the victim and

the abuser: 1) "Intra-familial" abuse occurs if the abuser is a family member of the abused child. Such abuse may be carried out by close relatives (parents, including adoptive and foster ones, stepfathers, live-in partners, cohabitants, brothers) or by members of an extended family (grandparents, uncles, cousins, close family friends). It may involve girls and, somewhat less commonly, boys. 2) "Extra-familial" abuse takes place when the abuser is someone outside of the family setting; this kind of abuse is commonly perpetrated by neighbors or acquaintances and may affect boys and girls. Often times, a state of emotional distress pushes the minor to accept "attentions" he or she finds outside the family. The awareness that minors should be protected from abuse and violence is reflected in national and international legislation through Conventions, Recommendations, and Directives. Among such significant measures are the Council of Europe's framework decision

* Corresponding author.
 E-mail address: simona.zaami@uniroma1.it (S. Zaami).

on the standing of victims in criminal proceedings, eventually followed by Directive 2011/92/EU “on combating the sexual abuse and sexual exploitation of children and child pornography”, and the European Parliament and Council Directive from 25th October 2012 (2012/29/EU) establishing minimum standards on the rights, support and protection of victims of crime, which place in the judge’s discretion, without prejudice to the rights of the defense, a personalized approach to enable victims to follow the proceedings (Pascucci, 2016).

With the Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention), signed on 25th October 2007 and ratified on 19th January 2010, all States of the Council of Europe have made the commitment to strengthen the protection of minors against sexual exploitation and abuse through the adoption of a common set of standards and measures aimed at preventing these crimes, prosecuting the culprits, and protecting the victims (Cesari, 2013; Forza, 2013; Gemelli, 2013).

Over the past decades, growing attention has been paid to the issue of child witness credibility, as reflected in several scientific publications, in the evolution of the jurisprudence, and in internationally laid out guidelines.

Any minor who is an alleged abuse victim constitutes a fragile and anxious witness, primarily when compelled to conjure up painful, traumatic events in a legal setting. Often times, the minor is victim and witness at the same time; thus, sexual abuse charges are based on his or her testimony, with little other corroborating evidence. That is the reason why it proves so difficult to establish conclusively whether the child is telling the truth or whether his or her testimony is skewed by third parties (Rotriquenz & Mazzoni, 2007). In order to help judges fulfill their duty of assessing minors’ testimony and, at the same time, find a way to set their mind at ease, the psychological expert witness profile has been introduced in the United States (Revnitskaia, Ivanina, & Ivanina, 2014), and a preliminary set of guidelines has been put forth (Adams et al., 2016). On the heels of the US’s initiative, scientific societies in Italy have devised a set of guidelines aimed at guaranteeing the soundness of technical proceedings as well as the psychological protection of minors. The most well-known ones are the “National Guidelines”, the “Protocol of Venice” (specifically designed for cases of collective abuse) (Pingitore, 2015) and the “Chart of Noto” (Carta di Noto) from 9th June 1996, updated in 2002, and lastly on 12th June 2011 (De Cataldo Neuburger & Gulotta, 2004, chap. 1). These all include methodology guidelines focused on the minor witness questioning, which counselors need to take into account, namely: (a) resort to as few hearings as possible; (b) make sure that all meetings take place in a way that ensures a level of ease and serenity for the witness being examined; (c) clearly define the ultimate goals of the hearing, taking into account the witness’s age and ability to understand; (d) avoid resorting to suggestive questioning and generally refer to internationally sanctioned questioning protocols; and (e) verify the circumstances in which possible previous questioning may have taken place. Any failure to abide by such recommendations represents a serious methodological flaw.

2. A minor’s testimony: the role of the psychologist

Article 96, Subsection 1 of the Italian Code of Criminal Procedure states that “every individual has the ability to testify”; it therefore entails no distinction among witnesses, not even based on their age. Hence, a defendant’s liability may be based solely on a minor witness’s testimony, which must be rigorously scrutinized for objective and subjective credibility (Cass. pen. Sez. Un. n. 41461/2012, <http://www.foro-europeo.it/home/materie/506-penale/2176-mezzi-di-prove-testimonianza-oggetto-e-limiti-persona-offesa>).

In that regard, Law No. 172 of 1 October 2012 and the Code of Criminal Procedure (art. 498) assert that the judge must resort to the aid of a consultant, usually a child psychologist or psychiatrist. Such professionals must be able to rely on a thorough expertise in forensic

psychology, psychology of testimony and developmental psychology, but they must also be expert users of specific investigative interview protocols (Marinović et al., 2010; Cass. pen. n. 39959/2003). Any lack of specific knowledge may in fact give rise to most serious judicial mistakes, which could, for instance, lead to the acquittal of a guilty defendant or the conviction of an innocent one.

Nevertheless, it must be noted that said experts are not tasked with establishing whether the “fact” has ever taken place as recounted, but whether the minor is fit to testify at all and to what extent his or her testimony can be reliable and credible (Leetch, Leipsic, & Woolridge, 2015). In other words, an expert is not called on to ascertain what really occurred (“judicial truth”), but rather to collect data on which to base the considerations to be submitted to the judge (“clinical truth”). It is up to the judge to evaluate, with proper impartiality and thoroughness, an array of factors (e.g., family environment, emotional background, the ability to recall, possible suggestions or conditioning) before being able to declare a testimony to be credible (Brichetti & Pistorelli, 2012; Gentile, 2015).

Ultimately, the questioning of child witnesses pursues a dual goal: it must guarantee a degree of psychological protection that the child/adolescent needs and, at the same time, ensure the acquisition of useful evidence from proven sources that is instrumental in reconstructing the events and in identifying a culprit (“criminological value”). Such oversight must be put in place with extreme caution, by means of a particularly rigorous examination designed to take into account other elements that might surface from Court records (Cass. pen., n. 29612/2010, *Cassazione penale*, 2011, 3520). In order to establish whether child witnesses are fit to testify, consultants need to assess their psychological profile, the possible presence of mental or behavioral disorders, and their level of maturity. The National Guidelines, under art. 3.3 (Liberatore, 2014), posit that the ability and fitness to testify include “generic” and “specific” competencies on the part of the minor. The former include cognitive skills such as memory, attention, good linguistic and comprehension capabilities, as well as the ability to tell reality from fantasy. Specific competencies consist in the ability to conjure up and recount any given memory as related to suggestive influences.

According to the Italian Supreme Court, a child witness is fit to testify if he or she proves capable of “perceiving pieces of information, connecting them with others, recalling and expressing them in a wider, more complex picture, all of which are to be considered in relation with age, emotional conditions that regulate his or her relation with the outside world, and the quality and nature of his or her family relationships” (Cass. pen. n. 8057/2013, <http://www.ilcaso.it/giurisprudenza/archivio/8613.pdf>).

Therefore, child witnesses may testify if they are proven to have the psychological aptitude, related to their age, for memorizing events and recounting them in a coherent fashion. Such an ability needs to be placed within social, familial, and environmental settings. In fact, especially in alleged cases of intra-family abuse, it is necessary to consider so-called “family dynamics” since charges of abuse leveled at either parent may stem from parental alienation syndrome, a condition that often manifests itself within the context of parental conflict and may lead to false sexual abuse charges.

Declaring witnesses suitable to testify does not necessarily entail a truthful testimony on their part. It simply means that they are capable of telling the truth, provided that they want to do so, through a narrative unswayed by either family or outside conflicts (Fornari, 2008).

In order to thoroughly assess a child witness’s credibility, consultants need to examine the way in which the alleged victim has lived through and re-elaborated the events; this way, it is possible to establish whether he or she has been truthful, twisting the facts, or knowingly lying.

The experts’ assessment includes: (a) the relationship between what happened and what is alleged to have happened, i.e., the relationship between subjective and objective reality; (b) the relationship between what one purportedly knows and what they claim to know, i.e.,

the relationship between subjective and referred reality; and (c) a competency assessment, that is the verification of perceptual, mnemonic, cognitive, and linguistic capabilities in terms of competency and accuracy. The assessment refers to possible motivational and suggestive influences that, either explicitly or implicitly, may have impacted the witness and/or the testimony externally or internally (clinical credibility).

In order to verify the reliability of a child's testimony, it is customary to look for clues that might buttress the veracity of his or her allegations. This is a mistake, as it would be important to seek out alternative versions, which may in turn refute the witness's recounting of events.

As a matter of fact, minors are liable to mistake a real event with a suggestion, but they might also twist the facts, either voluntarily or unwittingly (Birkhoff, 2008; Davids, 1994). In order to minimize the risk of a minor being influenced by the suggestibility factor, psychology societies have laid out sets of rules for the purpose of conducting a conversation with a potential interviewee (Chae, Goodman, Eisen, & Qin, 2011; Ernberg, Tidefors, & Landström, 2016). For instance, the Italian National Guidelines states the following about the questioning of a minor witness (art. 49): "Establishing a good relationship with the minor lays the groundwork for effective communication." Empathy constitutes a quality in an interviewer's demeanor that is instrumental in fostering communication, but cannot become a predominant diagnostic tool in a legal setting."

Scientific doctrine recommends that the interview happens in a neutral setting, so that the child cannot be influenced by the expert's authority figure (Rotriquenz, 2012). The latter needs to establish an amicable, positive relationship with the child. The conversation should start on some topic other than the subject on which the trial will be centered, thus encouraging the child to adopt a relaxed approach to the interview. Answers provided by the child at this stage help the interviewer determine how to best conduct the questioning: how to begin, how to phrase the questions, etc.

It is necessary during the interview to verify the child's comprehension level, i.e., whether he or she appreciates the difference between truth and untruth, sincerity and lying, to explain to him or her the need for truth-telling, and to encourage him or her to voice his or her opinions even when they might conflict with the interviewer's. Lastly, it should be explained to the child that if some questions are repeated over the course of the conversation, it does not necessarily imply that previous answers were incorrect (de Cataldo Neuburger, 2005, chap. 19).

According to Fornari (2008), it is important to use short sentences and words befitting a child's age. According to Marcassoli (2015), until the age of four, children do not possess communication skills that are well-developed enough, and they do not have the ability to tell the difference between semantic language and the actual meaning of words and concepts: they cannot understand negative sentences such as "I am not telling you not to go" and they do not ask for explanations. When they do reply, they do so randomly or due to the influence of suggestive components. Between the ages of four and six, children can hardly ever provide credible answers. They may conjure up early traumatic experiences as emotional memories rather than explicit ones, with the risk of developing inaccurate reminiscences. In fact, children often recount events that they have lived, heard of, or imagined, but with no capacity to discern between real and imaginary ones, between the inner and outer dimensions. Their awareness of reality is still insufficient, whereas at the age of nine or ten, they have usually acquired the concepts of truth and falsehood. According to Fornari (2008), it should be kept in mind that up to six years of age, the level of understanding is at roughly 65%, and only at around 13 years of age can children fully understand the meaning of questions.

Italian lawmakers, in order to regulate such a complex issue, have instated the ban (art. 499, Code of Criminal Proceedings, subsection 2) "on asking questions that might harm the sincerity of the answers" from the witness being questioned. However, such a norm is loosely phrased and thus not easily checked. In fact, there is no clear indication

that could help consultants identify what structural and content-related characteristics make a given question suggestive, what is the degree of suggestibility, etc. In conclusion, any testimony from a child witness has the same value as one offered by an adult witness, although in practical terms, it poses greater issues relative to its assessment, issues that must be solved within the scope of psychological science.

The scientific community has set up several methodologies to be applied to the questioning of child and adolescent witnesses in a judicial setting, e.g., the Step-Wise interview (Goodman et al., 1998), the Cognitive Interview (Koehnken, Thurer, & Zorberbier, 1994; Mestitz, 2003, chap. 2), and the Structured Interview (Klettke, Hallford, & Mellor, 2016; Lamb, Orbach, Hershkowitz, Esplin, & Horowitz, 2007). The application of such forensic interview protocols may help minimize any source of error and possible contamination while retrieving memories. They vary according to age: for instance, the cognitive interview is best suited for minors of around eight years of age, whereas the Structured Interview and the Step Wise interview are better aimed at younger children and preschoolers (Caso & Vrij, 2009, chap. 5).

By taking into account the age and the psychological, social, and relational competences of the child, these protocols unfold through different stages oriented toward the climate of familiarization, which goes a long way in letting the child or adolescent feel at ease while at the same time fostering the free recounting of the facts that allegedly took place. Psycho-judicial research has devised the so-called *validation* procedure, which is designed to ensure the veracity of a minor witness's revelations both through an analysis of his or her emotional, relational, and cognitive development, and via an evaluation of certain aspects of the alleged crime: the language used, the thoroughness, the spontaneity, and the possible presence of details ill-suited to the sexual knowledge compatible with a given age (Gulotta et al., 2002; Talwar, Lee, Bala, & Lindsay, 2006; Cass. pen., n. 42984/2007).

3. Uncertainty, contradictions and suggestions in a child witness's testimony

Any evaluation of a child's testimony is an extremely delicate and complex matter, especially when such children are of very young age and, consequently, have a limited ability to properly place events and associate them to each other on his or her own. In fact, psychological research has confirmed that children, however young, are generally capable of recounting past events if appropriately interviewed (De Cataldo Neuburger, 1997). Therefore, the way such interviews take place is key, since the child's recounting largely depends on how adult interviewers steer his or her memories (Mazzoni, 2012). As young children are able to provide much less information compared to older ones, it is necessary to ask questions meant to stimulate their memories into surfacing. It is necessary to determine how to question young children and avoid twisting their original memories with the questions asked. Moreover, minors cannot recount what they ignore, and their grasp of concepts such as time and space is extremely limited. Thus, a thoroughly coherent recounting cannot be expected. (Cass. pen. n. 8057/2013, <http://www.ilcaso.it/giurisprudenza/archivio/8613.pdf>; Lisi & Grattagliano, 2008; Poole & Lindsay, 2001).

Nonetheless, a child's testimony may in some cases turn out to be more reliable than an adult's, because a child acts more spontaneously and often tells everything that he or she knows. An adult witness, on the other hand, could make partial and false statements, because they have the ability to assess the appropriateness of revealing or withholding given things. According to the judges, it is unthinkable that very young children could make up facts that are foreign to their experience, even when they are fantasies (Cass. pen. n. 8057/2013, <http://www.ilcaso.it/giurisprudenza/archivio/8613.pdf>). The Italian Supreme Court views "the credibility of a minor allegedly victim of sexual abuse as directly tied to his or her age. Statements from minor victims may be deemed credible when their age (two and a half years in the case under investigation) is such as to rule out any possible previous

experience or knowledge of sexual activities vividly detailed and described. It is inconceivable that a child might make up, and then describe traumatic and painful experiences without direct knowledge and experience" (Cass. pen. n. 21406/2001). In fact, in order to imagine something, one needs to at least have a vague idea of the object of such fantasy, and a two or three-year-old cannot have the psychological or physiological capability to infer or imagine the scenario he or she tells about (Cass. pen., n. 21406/2001, *Famiglia e diritto*, 2002, 293). Nevertheless, behaviors that reveal a degree of sexual knowledge incompatible with childhood do not necessarily prove that the child was ever the victim of any abuse, since the child might have perceived such sexual acts witnessing similar scenes on television.

It is then apparent that greater attention is absolutely necessary when assessing a child's statements (Cass. pen. n. 5169/2015, *Diritto & Giustizia*, February 5th, 2015; Barbieri & Volpini, 2012).

Theoretically, any child, however young, may be capable of providing useful and thorough testimony; however, their statements need to be set in a social, familial, and environmental context because there might be a risk that the child recounts facts that were instilled in him or her purposely by adults (Rotriquenz & Mazzoni, 2007).

Studies centered on memory have confirmed that the capability to retrieve information is directly proportional to the child's age: "at the age of two, a child is able to positively fulfill recognition-related tasks, and by age five, the capacity for recollection arises" (De Leo, Scali, & Caso, 2005, chap. 3). It is only from the age of ten that memories begin to acquire structuring, content, and more effective an organization, reaching, at around fourteen or fifteen years, the same autobiographical functionality as an adult's (Di Cori, 2013). In children of up to six years of age, such a narrative usually unfolds in cooperation with an adult, who might then influence its content and conclusions. As a matter of fact, in accounts following an event, what the child characterizes as "memory" might be twisted not only by what he or she recounted the previous time, but by external factors as well (e.g., conversations with other children or adults, information or suggestions previously received, etc.) A factor that seems to hold relevant weight is the time span elapsed between the event and the child's questioning (Larotonda, 2016; Leetch et al., 2015). In order to accurately appraise the witness's testimony, there needs to be a thorough survey into when the original accounts originated. Conventional doctrine holds that the most credible and reliable testimony is rendered close to the alleged event. If, instead, the minors are heard a long time thereafter, they are more likely to have been manipulated from the outside or to express a recollection warped by imaginary events. (Di Cori, 2013; Malloy, Brubacher, & Lamb, 2013).

It is then necessary to verify in what way he or she has been questioned by relatives, since it is the family setting itself that might expose the child to manipulation, however unwittingly; therefore, his or her account of the events may have been shaped by the suggestibility factor. However unwavering and consistent a witness account may be, in absence of such a verification, the doubt lingers that the child witness may be recounting events instilled by others, thus making the account unreliable for the purpose of assigning blame and placing liability, resulting in the defendant's acquittal (Gordon, Baker-Ward, & Ornstein, 2001).

The assessment of possible inconsistencies, uncertainties, and contradictions in a minor's account constitutes another utterly delicate aspect. The predominant doctrine holds that it is possible to ascribe liability unto a defendant provided that fundamental elements within an account of the facts (i.e., the abuses suffered, the location at which they had taken place, and the alleged perpetrator's identity) remained unchanged in time (Faller, 2008, chap. 1; Klettke et al., 2016). A very young child witness is likely to resort to lying and to give accounts where the lines between reality and fantasy are blurred. Conventional doctrine tends to deem credible a given testimony provided that any fantasy-induced re-elaboration manifests itself not in the beginning of the cooperation with the judicial authorities, but at a later time. In fact, the longer time goes by since the events took place, the more likely

it is that the account of said facts has been influenced or twisted by external factors (Goodman, Bottoms, Rudy, Davis, & Schwartz-Kenney, 2001; McAuliff, Lapin, & Michel, 2015). If there are inconsistencies or any degree of uncertainty, it can be explained away by the child's suffering while conjuring up a traumatic experience. In such cases, the phenomenon is characterized as "secondary victimization" (Scali, Calabrese, & Biscione, 2003, chap. 2), i.e., the child, once again, lives through the same state of fear, anxiety, frustration, and shame that he or she had lived through at the time the abuse took place.

However, even though the child's versions of what happened might differ, such discrepancies are not enough to label the whole account as a figment of his or her imagination (Henderson, Hanna, & Davies, 2012).

Discrepant versions might in fact simply reflect the child's forgetting of exactly how the events unfolded or might stem from a confusion between real occurrences and imaginary ones (Bederian-Gardner & Goldfarb, 2014; Ceci & Bruck, 1993; Yates & Musty, 1988).

What matters the most is that no inconsistencies that can cast doubt on the witness's/victim's recollection and its account surface. (Cass. pen., n. 35224/2007, <http://www.penale.it/page.asp?mode=1&IDPag=477>; Birkhoff, 2008).

Several studies have pointed out that suggestibility can be a factor in terms of warping the testimony and its credibility. Such studies have proven how suggestibility is more prevalent among child witnesses; it is of variable scale, according to age, cognitive, social and communicative competences, and tends to wane over time. According to National Guidelines 2010 (Linee Guida Nazionali, *L'ascolto del minore testimone*, 2010), "the suggestibility factor does not disqualify a child from being able to testify, although it does constitute a risk factor." Although suggestibility may well play a role, if the questioning takes place in an orthodox fashion, the child can still provide answers consistent with his or her memory contents. Vulnerability to suggestive questioning is inversely proportional to the age of the minor.

According to research, at age four, suggestive questioning elicits incorrect answers in twice as many cases as at age ten, and three times as many as in an adult. It is not uncommon for an adult to intervene in order to help the minor select and organize given memories. Yet, not only does such an influence foster organization and cohesion of memories, but it might at times modify or warp them too. Suggestive questioning may alter the contents of any given memory. Memories and their recounting must be put into context, since suggestibility depends on the context within which a situation takes place. Therefore, it is necessary to take into account the connections between individual, social, and contextual factors, which may increase the likelihood of a child being influenced (Camerini, 2005). The jurisprudence has acknowledged such a rationale through a recent ruling from the Italian Supreme Court: it is empirically proven that when children are questioned by authority figures (any adult can be one in the eyes of a child) who may be encouraging and stimulating them to recount an event, they tend to provide the answer that the adult interviewer expects of them, which depends in large part on the way the question is phrased. Children may then start humoring their interviewers by telling them what they expect (or fear) to hear; adult interrogators unwittingly let on what they expect from the children through suggestive questions. Ultimately, interviewers think they are asking questions to find out about the facts that allegedly occurred, but they actually convey information to the child witnesses as to what they, the interviewers, believe has happened. If repeatedly stimulated through inappropriate interrogation techniques that imply the answers or convey information, minors may gradually take in such information, which are liable to sway the answers that they provide to the point of fabricating biographical memories. Memory experts teach that while adults "recount as they remember", children "remember as they recount", thus molding their memories based on what they tell. Once a version has been provided by a child, however induced it may be, it becomes rooted and, over time, is perceived as real. That is possible because of the human mind's natural tendency to buttress any idea it has accepted as true through the

acquisition of new information that are consistent with such narrative and to forget any data that might be at odds with it (Cass. pen. n. 121/2007; Cass. pen. n. 24248/2010). As young children do not lie deliberately, their assertions are dependable if they are allowed to freely make them, but may become unreliable if subjected to suggestive questioning because, as mentioned before, children tend to meet the expectations of the interviewer (Cass. pen. n. 37147/2007, <http://www.penale.it/page.asp?mode=1&IDPag=476>). Therefore, in order to make sure a child told the truth and did not just meet the interviewer's expectations, it is essential to reconstruct the original account of the alleged crime, i.e., getting back to the initial assertion (which, if spontaneously rendered, tends to be the most genuine assertion, unswayed by external interventions). It is essential to assess "whether the child's narrative has been amplified over time, and verify whether the amplification of his or her account is because of the deftness of the interviewers or to their undue influence" (Cass. pen. n. 1752/2017, <https://www.psicologiagiuridica.eu/cassazione-sulla-idoneita-testimoniare-minori/2017/01/29/>).

4. Particular safeguards reserved to child witnesses within sexual abuse-related criminal trials

International legislation codifies the vulnerability of minor witnesses/victims, thus the need for extra "safeguards" on their behalf. Nonetheless, a balance needs to be struck between the need to verify how the events took place, the preservation of the child witness's psycho-physical integrity, and compliance with the defendant's constitutional guarantees. The Convention of Lanzarote (Forza, 2013) and a recent ruling from the Italian Supreme Court agree on such principles as well. Specifically, the latter states that "our legislative framework is designed to strike a balance between the need to verify alleged facts and the preservation of a child's psycho-physical integrity". It also reiterates how a minor's questioning involves aspects of uncommon complexity, as it is pivotal to preserve his or her psychological well-being, which not only affects the child's development, but also directly impacts the genuineness of the contribution that such a witness can bring to establish alleged events (Cass. pen., n. 5854/2012, *Diritto & Giustizia*, February 15th, 2013). By virtue of these new provisions, lawmakers intended to protect children from the risk of repeated testimonies, while at the same time protecting the defendant from potentially imaginary charges, possibly formulated by third parties within the minor's family.

In order to provide appropriate safeguards for child witnesses, Italian lawmakers have devised Art. 392, subsection 1-*bis*, Code of Criminal Procedure, by virtue of which prosecutors and defendants may demand that any testimony from children under sixteen be acquired during pre-trial hearings held to gather evidence before a criminal trial (Carini, 2006).

Such pre-trial hearings "constitute the acquisition of proof in presence of an element of urgency or there being the risk of such proof being prejudiced, with its acquisition postponed until the trial phase. According to such procedure, the child witness would be heard only in presence of exceptional conditions, i.e., if the judge or either party deem it necessary on the basis of specific needs" (art. 190 *bis*, subs. 1 ed. 1-*bis*, c.p.p.), for instance about facts which, following further investigation, may not turn out as fully clarified, or in presence of lingering inconsistencies or contradiction against other testimonies or defensive statements.

Pre-trial hearings aim to minimize unease on the part of the victims when recounting given events while enhancing their reliability at the same time (Rizzo, 2014). It is instrumental, during pre-trial hearings, to ask the minor each and every question that might be deemed useful by the judge. In fact, any deficiency or hole in the testimony may cause defense attorneys to demand that the alleged victim be questioned again in court. The judge may rule that any testimony be rendered in writing (oral questioning with answers in writing) if he or she considers

that such proceedings may preserve the psychological frailty of the witness and foster the genuineness of his or her testimony. Art. 498, subsection 4, Code of Criminal Procedure, mandates that questioning be carried out directly by the chair of the judicial panel, on the basis of questions and challenges set forth by the prosecution and the defense. It is then vital that the minor's questioning be approached with extreme caution, in order to safeguard and preserve both his or her emotional well-being and the veracity of the answers provided. Consequently, it is inadmissible to ask "questions formulated to elicit a yes or no answer", or questions "tending to suggest or rule out a given answer" (Fornari & Ornato, 1999). The presiding judge may decide to resort to the help of a family member or an expert psychologist. The choice to have a relative present is strongly advised against by the scientific community, in that a family member may end up influencing the child, particularly in those cases where the alleged abuses might have happened within the family itself; in such cases, the risk for evidence spoliation would be high (McAuliff et al., 2015). If the child requests the presence of an adult family member, his or her demand must be met, while at the same time minimizing the risk that said relative might sway the answers. Thus, there is a need to position the relative out of the child's sight.

With all the above-mentioned conditions and precautions being met, pre-trial hearings are undoubtedly the best solution to the complexities of acquiring a child's testimony.

As far as the procedural methodologies are concerned, in particular the acquisition of the child's statements and the protective measures required, the Lanzarote Convention considers necessary, under Art.35, that: (a) interviews with the child take place without unjustified delay after the facts have been reported to the competent authorities; (b) interviews with the child take place, where necessary, in premises designed or adapted for this purpose; (c) interviews with the child are carried out by professionals trained for this purpose; (d) the same persons, if possible and where appropriate, conduct all interviews with the child; (e) the number of interviews is as limited as possible and in so far as strictly necessary for the purpose of criminal proceedings; and (f) each party shall take the necessary legislative or other measures to ensure that all interviews with the victim or, where appropriate, those with a child witness, may be videotaped and that these videotaped interviews may be accepted as evidence during the court proceedings, according to the rules provided by its internal law. According to a set of guidelines focused on child questioning issued by the Police department of Rome in 2011, the minor needs to be heard soon after the report at a location other than the department's premises, in suitable facilities, and not by a policeman or carabinieri, but rather by an expert. In this way, two advantages are attained: (a) the child is not traumatized, and (b) his or her testimony is rendered through a procedure that minimizes the number of interviews and staves off possible re-elaboration or spoliation of evidence (Cesari, 2014).

Besides, any testimony thus rendered is useful to advance of the investigation. In fact, it may help identify places, individuals involved in the events, etc.

On the heels of such indications, the Italian Code of Criminal Procedure has been modified in Articles 351, subs. 1-*ter*, 362, subs. 1-*bis* e 391-*bis*, subs. 5-*bis*, code of criminal procedure, an update based on the conviction that a child needs to be interviewed with all of the proper safeguards in place. For instance, a child's examination must be audio/videotaped, and such recordings need to be included as pieces of evidence in criminal proceedings. Such criteria are well-established in international legislation and acknowledged and adopted by Italian legislators through Law n. 66, enacted in 1996.

Protected questioning sessions (*Closed Circuit Television*), introduced at first in pre-trial hearings only (art. 398, subs. 5 *bis*, code of criminal procedure), have eventually been adopted and extended throughout the trial stages through Law n. 269/1998, which mandates that, for sexual abuse-related offenses, any interview of a alleged child victim "be conducted, upon his or her demand or defense's, using a one-side mirror

along with an inter-phone system” (art. 498, subs. 4 *ter*, code of criminal procedure). Practically speaking, the minor witness's interview takes place in front of a one-side mirror: the child is located in a room, along with a psychologist or one of the judges who will be conducting the interview. The other judges, along with law-enforcement officials, the defendant, and attorneys are placed on the other side of the mirror, thus unseen by the minor. They may communicate via an inter-phone, which enables them to cross-examine the witness, thus abiding by their guaranteed rights to defense and to challenge whatever is said.

Such a methodology is widely shared. In fact, only through videotaping can the absence of undue conditioning (voluntary or not) of the witness be documented, as well as the appropriateness of the child witness/victim questioning procedures. It is apparent how a conventional record that is merely in writing would be unfit to fully guarantee effective oversight and safeguards. Often times, in fact, the genuineness and spontaneity of statements may be severely compromised by the interviewer's demeanor (Goodman et al., 1998). That explains why a conviction is reversed by appellate courts or by the Supreme Court of Cassation as a result of a re-assessment of the testimony by alleged sexual abuse victims. To buttress this point, one may cite the Supreme Court decision (Cass. pen. n. 37147/2007, Cass. pen. n. 37147/2007, <http://www.penale.it/page.asp?mode=1&IDPag=476>) revoking custodial measures as a result of videotaped interviews revealing “considerable and unremitting pressure on the part of the parents on the children” and “a blatant purpose of pressing and suggesting given answers”. In fact, the lack of videotaped interviews prevents those indicted from exercising “their right to oversee, through his or her attorneys and technical consultants, an expert witness's findings”. Not even a merely audio-taped interview is enough to prove the correct unfolding of the questioning. A simple gesture or facial expression may in fact constitute undue pressure or unorthodox solicitation. Only the videotaping of the proceedings may bear witness as to the accuracy of the interviewer's performance, and thus the reliability of the answers thereof. In the case of protected procedures, the videotaping should document every stage of the child's questioning, including possible preparatory meetings (Buck, London, & Wright, 2011; Goodman et al., 1998; Redlich, Myers, Goodman, & Qin, 2002).

Protected interviews, in spite of lawmakers' good intentions, have not been bearing fruit as it had been hoped. In fact, even though technological advances now enable anyone to purchase cheap recording devices, not all judicial facilities can rely on such equipment and rely on experts who can competently aid judges during the proceedings. It is not uncommon to witness questioning procedures being carried out inappropriately, with the function of experts reduced to a mere presence: the child witness is asked “closed”, suggestive questions, which tend to directly clinch the prosecution's case. Moreover, there are no penalties in place if the above-mentioned precautions are not met or disregarded, so they are often breached, out of inattentiveness or negligence.

5. Some closing remarks

The issue of sexual abuse (wherein charges are easily leveled, but much harder to prove) needs effective methodologies aimed at guaranteeing the soundness of both the investigations and the outcomes and aimed at helping judges thoroughly assess the validity of abuse charges made by minors.

First and foremost, stronger safeguards for the sake of the children involved are desirable, in order to include the crime of abuse within the family, abduction for ransom, or child trafficking, all cases in which a child may be a witness too and thus in need of the same safeguards. By virtue of all that, the modifications in legal norms about sex crimes ought to be widened to include all offenses that victimize children, considering that the unintended consequences of traumatic, unorthodox interviews might turn out as equally devastating, irrespective of the specific alleged crime suffered by the children. Expert witness testimony in sexual abuse cases is an extremely complex field, one that

requires very specific background and expertise. Clinical competence is not enough: legal knowledge and skills are also essential. The protection of the children involved can only be ensured if expert witnesses comply with proper procedures. Therefore, it is imperative to outline a code of ethics aimed at regulating expert witness activities on a national level, so that professional orders can possibly punish those experts who fail to live up to the proper standards of conduct, applying subjective, scientifically unfounded criteria or other inappropriate practices. That appears to be necessary in light of the magnitude of the interests at stake.

Lawmakers have arguably improved the overall framework, but it still appears urgent to stress and incentivize prevention in order to effectively deal with the alarming phenomenon of child sexual abuse in our society. Such a goal does not seem to be attainable merely through the criminal justice system. Rather, it could prove beneficial to introduce aptitude and psychological tests for all workers involved in child-related activities and to compel employers and government bodies to reassign to different functions all those suspected of being potentially dangerous for the children's well-being.

It would be just as important to enhance the level of knowledge of parents in this respect. In fact, a minor victim, probably owing to an overzealous attitude, enjoys an overexposure that often borders on true judicial aberration. The phenomenon of “homemade tape-recordings” has been getting widespread, in which a child is grossly manipulated by a relative who “questions” him or her, while another one is in charge of the recording. Such initiatives fall within the realm of “autarchy of evidence”, which, in addition to the risks involved for the child's psycho-physical well-being, contaminate at the core, often irretrievably, any genuine memory that a child may bear of any event. A constant, unwavering commitment on the part of those involved with child-care and child-protection risks being severely impaired by any such initiative, which must be steadfastly repressed and punished.

Conflict of interest declaration

The Authors declare no conflict of interest.

This research did not receive any specific grant from funding agencies in the public, commercial, or not-for-profit sectors.

References

- Adams, J. A., Kellogg, N. D., Farst, K. J., Harper, N. S., Palusci, V. J., Frasier, L. D., ... Starling, S. P. (2016). Updated guidelines for the medical assessment and care of children who may have been sexually abused. *Journal of Pediatric and Adolescent Gynecology*, 29, 81–87.
- American Academy of Pediatrics (2005). The evaluation of sexual abuse in children. *Pediatrics*, 116, 506–512.
- Barbieri, C., & Volpini, S. (2012). La testimonianza del minore quale presunta vittima di reati sessuali: Riflessioni teoriche da un caso peritale. *Rivista Italiana di Medicina Legale*, 34, 1459–1477.
- Bederian-Gardner, D., & Goldfarb, D. (2014). Expectations of emotions during testimony: The role of communicator and perceiver characteristics. *Behavioral Sciences & the Law*, 32, 829–845.
- Birkhoff, J. M. (2008). Per un cauto approccio alle denunce di abuso sessuale ai danni di minori. *Rivista Italiana di Medicina Legale*, 30, 35–57.
- Brichetti, R., & Pistorelli, L. (2012). Psicologo, valido aiuto nell'attività informativa. *Guida al diritto*, 43, 104–107.
- Buck, J. A., London, K., & Wright, D. B. (2011). Expert testimony regarding child witnesses: Does it sensitize jurors to forensic interview quality? *Law and Human Behavior*, 35, 152–164.
- Camerini, G. B. (2005). Colloquio clinico con il bambino e ascolto giudiziario. Definizione e valutazione dei fattori suggestivi. In F. Rovetto, & P. Moderato (Eds.), *Progetti di intervento psicologico* (pp. 379–392). Milano: McGraw Hill.
- Carini, A. (2006). L'incidente probatorio nell'abuso sessuale sui minori: giudici e psicologi a confronto. *Minori Giustizia*, 13, 22–31.
- Cass.pen (14 June 2011). n. 3520. *De jure Database*.
- Caso, L., & Vrij, A. (2009). *L'interrogatorio giudiziario e l'intervista investigativa*. Bologna: Il Mulino.
- Ceci, S. J., & Bruck, M. (1993). The suggestibility of the child witness: A historical review and synthesis. *Psychological Bulletin*, 113, 403–439.
- Cesari, C. (2013). Il “minore informato sui fatti” nella legge n. 1721/2012. *Rivista Italiana di Diritto e Procedura Penale*, 56, 168–189.
- Cesari, C. (2014). The testimony of minors, new legislation is betrayed by the supreme court. *Cassazione Penale*, 54, 1178–1200.

- Chae, Y., Goodman, G. S., Eisen, M. L., & Qin, J. (2011). Event memory and suggestibility in abused and neglected children: Trauma-related psychopathology and cognitive functioning. *Journal of Experimental Child Psychology*, *110*, 520–538.
- Davids, J. (1994). Conference on recovered memories of abuse true or false? A personal review. *Bulletin of the Anna Freud Centre*, *17*, 353–356.
- De Cataldo Neuburger, L. (1997). L'esame del minore. In L. De Cataldo Neuburger (Ed.), *Abuso sessuale di minore e processo penale: Ruoli e responsabilità* (pp. 136–154). Padova: Cedam.
- De Cataldo Neuburger, L. (2005). *La testimonianza del minore*. Padova: Cedam.
- De Cataldo Neuburger, L., & Gulotta, G. (2004). *La carta di Noto e le linee guida deontologiche per lo psicologo giuridico*. Milano: Giuffrè.
- De Leo, G., Scali, M., & Caso, L. (2005). *La testimonianza. Problemi, metodi e strumenti nella valutazione dei testimoni*. Bologna: Il Mulino.
- Di Cori, R. (2013). Testimoniare il trauma: considerazioni teorico-cliniche in tema di rappresentazione e ricordo nel child sexual abuse. *Psichiatria dell'infanzia e dell'adolescenza*, *80*, 193–209.
- Ernberg, E., Tidefors, I., & Landström, S. (2016). Prosecutors' reflections on sexually abused preschoolers and their ability to stand trial. *Child Abuse & Neglect*, *57*, 21–29.
- Faller, K. C. (2008). *Interrogare il bambino sull'abuso sessuale*. Torino: Centro Scientifico Editore.
- Fornari, U. (2008). *Trattato di psichiatria forense*. Torino: UTET (Part 3).
- Fornari, U., & Ornato, S. (1999). La metodologia di indagine nella valutazione della testimonianza del minore vittima di abuso sessuale: le regole minime. *Rassegna Italiana di Criminologia*, *30*, 39–52.
- Forza, A. (2013). L'ascolto del minore dopo la Convenzione di Lanzarote. *Archivio della Nuova Procedura Penale*, *24*, 143–149.
- Gemelli, M. (2013). Gli abusi sessuali sui minori dopo Lanzarote e le nuove opzioni difensive. *Giustizia Penale*, *118*, 230–245.
- Gentile, S. (2015). Il giudice può demandare al perito la valutazione della capacità a testimoniare del minore, ma non l'accertamento della sua attendibilità. *Diritto & Giustizia*, *4*, 63–64.
- Goodman, G. S., Bottoms, B. L., Rudy, L., Davis, S. L., & Schwartz-Kenney, B. M. (2001). Effects of past abuse experiences on children's eyewitness memory. *Law and Human Behavior*, *25*, 269–298.
- Goodman, G. S., Tobey, A. E., Batterman-Faunce, J. M., Orcutt, H., Thomas, S., Shapiro, C., & Sachsenmaier, T. (1998). Face-to-face confrontation: Effects of closed-circuit technology on children's eyewitness testimony and jurors' decisions. *Law and Human Behavior*, *22*, 165–203.
- Gordon, B. N., Baker-Ward, L., & Ornstein, P. A. (2001). Children's testimony: A review of research on memory for past experiences. *Clinical Child and Family Psychology Review*, *4*, 157–181.
- Gulotta, G., et al. (2002). *Elementi di psicologia giuridica e di diritto psicologico*. Milano: Giuffrè.
- Henderson, E., Hanna, K., & Davies, E. (2012). Pre-recording children's evidence: The western Australian experience. *Criminal Law Review*, *1*, 3–13.
- Klettke, B., Hallford, D., & Mellor, D. (2016). Perceptions of credibility of sexual abuse victims across generations. *International Journal of Law and Psychiatry*, *44*, 91–97.
- Koehnken, G., Thurer, C., & Zorberbier, D. (1994). The cognitive interview: Are interviewers memories enhanced too? *Applied Cognitive Psychology*, *8*, 13–24.
- Lamb, M. E., Orbach, Y., Hershkowitz, I., Esplin, P. W., & Horowitz, D. (2007). Structured forensic interview protocols improve the quality and informativeness of investigative interviews with children: A review of research using the NICHD investigative interview protocol. *Child Abuse & Neglect*, *31*, 1201–1231.
- Larotonda, E. (2016). Tenera età e condizionamento: quando la credibilità della vittima è a rischio. *Diritto & Giustizia*, *65*, 15–16.
- Leetch, A. N., Leipsic, J., & Woolridge, D. P. (2015). Evaluation of child maltreatment in the emergency department setting: An overview for behavioral health providers. *Child and Adolescent Psychiatric Clinics of North America*, *24*, 41–64.
- Liberatore, M. (2014). Metodologia dell'accertamento. In G. Camerini, & G. Gulotta (Eds.), *Linee guida nazionali. L'ascolto del minore testimone* (pp. 172–187). Milano: Giuffrè.
- Linee Guida Nazionali (2010). L'ascolto del minore testimone. https://www.psicologiagiuridica.eu/phocadownload/consensus_lineeguida_minori_061110.pdf Accessed date: 21 December 2017.
- Lisi, A., & Grattagliano, I. (2008). Ipotesi di abusi sui minori e valutazione dell'attendibilità testimoniale: tra verità, menzogne e false credenze. *Rivista Italiana di Medicina Legale*, *30*, 59–94.
- Malloy, L. C., Brubacher, S. P., & Lamb, M. E. (2013). Because she's one who listens: Children discuss disclosure recipients in forensic interviews. *Child Maltreatment*, *18*, 245–251.
- Marcassoli, C. (2015). La testimonianza del minore vittima di reato. In M. S. Lembo, A. Casale, & P. De Pasquali (Eds.), *La perizia psichiatrica nel processo penale* (pp. 379–387). Rimini: Maggioli.
- Marinović, D., Palijan, T. Z., Marinović, M., Krpina, M. G., Piglič, I., & Nikolić, H. (2010). Obtaining the child testimony in the criminal proceedings. *Collegium Antropologicum*, *34*, 253–256.
- Mazzoni, G. (2012). Il problema del ricordo e delle tecniche d'intervista. In G. Mazzoni, & E. Rotriquenz (Eds.), *La testimonianza nei casi di abuso sessuale sui minori* (pp. 241–273). Milano: Giuffrè.
- McAuliff, B. D., Lapin, J., & Michel, S. (2015). Support person presence and child victim testimony: Believe it or not. *Behavioral Sciences & the Law*, *33*, 508–527.
- Mestitz, A. (2003). *Chiedere, rispondere e ricordare. Interviste con minorenni vittime e/o testimoni in ambito giudiziario*. Roma: Carocci.
- Pascucci, N. (2016). The "acquainted with the facts" Minor's declarations after the accomplishment of the directive 2012/29/EU. *Cassazione Penale*, *56*, 3067–3090.
- Pingitore, M. (2015). *L'ascolto del minore nel caso di presunti abusi sessuali*. <https://www.ordinepsicologifvg.it/ordine-fvg/92-formazione/materiali-convegni/140-corso-11-aprile-2015-abusi-sessuali-sui-minori-ascolto-del-minore.html>. Accessed date: 21 December 2017.
- Poole, D. A., & Lindsay, D. S. (2001). Children's eyewitness reports after exposure to misinformation from parents. *Journal of Experimental Psychology: Applied*, *7*, 27–50.
- Redlich, A. D., Myers, J. E., Goodman, G. S., & Qin, J. (2002). A comparison of two forms of hearsay in child sexual abuse cases. *Child Maltreatment*, *7*, 312–328.
- Revnitskaia, L. A., Ivanina, T. V., & Ivanina, A. A. (2014). The role of forensic medical expertise of material evidence in the investigations into the cases of sexual offence. *Sudebno-Meditsinskaia Ekspertiza*, *57*, 18–21.
- Rizzo, C. (2014). The rules for "protection" of a child witness. *Cassazione Penale*, *54*, 3808–3827.
- Rotriquenz, E. (2012). I casi di abuso sessuale su minori: aspetti giuridici. In G. Mazzoni, & E. Rotriquenz (Eds.), *La testimonianza nei casi di abuso sessuale sui minori* (pp. 4–32). Milano: Giuffrè.
- Rotriquenz, E., & Mazzoni, G. (2007). È facile distinguere tra racconti veri e racconti falsi? *Maltrattamento e abuso all'infanzia*, *9*, 67–91.
- Scali, M., Calabrese, C., & Biscione, M. C. (2003). *La tutela del minore: le tecniche di ascolto*. Roma: Carocci.
- Talwar, V., Lee, K., Bala, N., & Lindsay, R. C. (2006). Adults' judgments of children's coached reports. *Law and Human Behavior*, *30*, 561–570.
- World Health Organization (2013). European report on preventing child maltreatment. http://www.euro.who.int/_data/assets/pdf_file/0019/217018/European-Report-on-Preventing-Child-Maltreatment.pdf.
- Yates, A., & Musty, T. (1988). Preschool children's erroneous allegations of sexual molestation. *American Journal of Psychiatry*, *145*, 989–992.