

PLAY THERAPY & THE LAW: Play Therapy as a ‘Special Measure’ in Sexual Abuse Cases

Examining the use of play therapy as a special measure for vulnerable child witnesses in sexual abuse cases in light of the Evidence (Special Measures) Act, 2012.

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ABSTRACT

With reports of the incidence of child abuse in Jamaica increasing, play therapists are regularly coming into contact with children suffering from the resultant psycho-logical trauma. A central issue is the right of children to be listened to and taken seriously when making allegations of abuse. To this end, this paper explores the possibility of spontaneous play-therapy images being admitted in evidence in sexual-abuse cases and elucidates these hypotheses with cases involving children the author examined the jurisdictions of Britain and Minnesota. Findings are compared with those made by other child-practitioners, and help establish the important role play-therapy plays in helping vulnerable children give evidence.

Evidence: "The Concept of Admissibility"

Evidence comes in four basic forms:

1. Demonstrative evidence
2. Documentary evidence
3. Real evidence
4. Testimonial evidence

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Some rules of evidence apply to all four types and some rules apply to one or two of them. All of these forms of evidence must be admissible, though, before they can be considered as probative of an issue in a trial. Basically, if evidence is to be admitted at court, it must be relevant, material, and competent. To be considered relevant, it must have some reasonable tendency to help prove or disprove some fact. It need not make the fact certain, but at least it must tend to increase or decrease the likelihood of some fact. Once admitted as relevant evidence, the finder of fact (judge or jury) will determine the appropriate weight to give a particular piece of evidence. A given piece of evidence is considered material if it is offered to prove a fact that is in dispute in a case. Competent evidence is that evidence that accords with certain traditional notions of reliability. Courts are gradually diminishing the competency rules of evidence by making them issues related to the weight of evidence.

The whole issue of whether a child witness would always be believed continues to be a subject for contemptuous debate in many jurisdictions, with proponents who state that children never lie developing one line of research, while others who tend to believe the truth is more situational comprising other research directions. The ecological validity of

research in child witness testimony is a thorny issue which may not be resolved quickly (c.f., DeAngelis, 1989; Ceci, Ross, & Toglia, 1989).

The position as it relates to giving of evidence in Jamaica by children as followed the common law position from the United Kingdom for years and while the position in the United Kingdom has changed over the years to accommodate children with special needs and vulnerable persons, the situation in Jamaica still moves at snail pace. The recent amendments to the Evidence Act still reflect the conservative and cautionary nature of the Jamaican legislature. The definition in the Evidence (Special Measures) Act, 2012 is very limiting in nature and does not countenance the wide ranges of other special measures that have been used in other parts of the world. "Special measure" as defined by the Act; "special measure" means the giving of evidence by a witness in proceedings, by means of a live link or video recording, in the manner and circumstances provided for pursuant to the provisions of this Act.

However, in England, the Youth Justice and Criminal Evidence Act 1999 (YJCEA) introduced a range of measures that could be used to facilitate the gathering and giving of evidence by vulnerable and intimidated witnesses. The measures were collectively known as "special measures".

Special measures are a series of provisions that help vulnerable and intimidated witnesses give their best evidence in court and help to relieve some of the stress associated with giving evidence. Special measures apply to prosecution and defence witnesses, but not to the defendant and are subject to the discretion of the court.

Vulnerable witnesses are defined by section 16 YJCEA as:

- All child witnesses (under 18); and
- Any witness whose quality of evidence is likely to be diminished because they:
 - are suffering from a mental disorder (as defined by the Mental Health Act 1983);
 - have a significant impairment of intelligence and social functioning; or
 - have a physical disability or are suffering from a physical disorder.

The special measures available to vulnerable and intimidated witnesses, with the agreement of the court among others, include:

Examination of the witness through an intermediary (available for vulnerable witnesses): an intermediary may be appointed by the court to assist the witness to give their evidence at court. They can also provide communication assistance in the investigation stage - approval for admission of evidence so taken is then sought retrospectively. The intermediary is allowed to explain questions or answers so far as is necessary to enable them to be understood by the witness or the questioner but without changing the substance of the evidence, (s29 YJCEA);

Aids to communication (available for vulnerable witnesses): aids to communication may be permitted to enable a witness to give best evidence whether through a communicator or interpreter, or through a communication aid or technique, provided that the communication can be independently verified and understood by the court, (s30 YJCEA).

The use of communication aids is a special measure which is intended to help vulnerable witnesses who need to use a "device" to communicate. This can include computers, voice synthesisers, symbol boards and books. The case of *R v Watts [2010]* EWCA Crim 1824 is a leading example of the use of this special measure, which was granted in combination with a number of other special measures to enable non-verbal witnesses with severe communication needs to give evidence.

Note the major differences between the two jurisdictions, in Britain, the legislation is far-reaching and has attempted to keep up with the technological and psychological needs of the times. However, note that in the Jamaican context the legislation has still fallen woefully behind the times and begs the question as to whether we are serious about prosecuting sexual abuse crimes against children and especially children with special needs. Note that the British legislation allows for the best evidence to be given and this can also be done through a communication aid or technique, provided that the communication can be independently verified and understood by the court. It is my humble submission that this is where play therapy would find its expression; that is play therapy would be defined as a communication aid that would be used to aid the child who is the victim of a sexual abuse to give the best evidence possible. It is my humble opinion that the recent amendments to the Evidence Act which have resulted in the Evidence (Special Measures) Act do not go far enough in aiding the successful prosecution of sexual abuse cases involving children especially children with special needs.

Recommendation 1

There needs to be more far-reaching amendments to the Evidence (Special Measures) Act, 2012 that enable children especially those children with special needs to give the best evidence in sexual abuse cases.

Case Synopsis: State v. Huss

This case is an appeal by appellant Robert Huss of his conviction for criminal sexual conduct in the second degree for the sexual abuse of his three-year-old daughter. The court of appeals affirmed the conviction, but modified the sentence.[1] Robert complains that the evidence was insufficient to support his conviction. We reverse.

Robert and Nancy Huss were married in March 1985. In January 1987, a daughter was born to the couple. The following spring, the couple experienced marital problems and separated. Between 1988 and 1989, the couple attempted to reconcile, but failed and again separated. In April 1990, the couple were divorced and Nancy received legal and physical custody of the child. Under *291 the divorce decree, Robert's visitation was to increase incrementally so that he could have overnight visitation within a year of the divorce. Nancy admitted that she did not want Robert to have unsupervised visits with the child.

Nancy testified that within a few weeks of the divorce, the child began exhibiting changed behavior that included destructive acts such as ripping up a book, as well as not picking up her toys, trying to urinate standing up like a boy and kissing on the lips.

Nancy also observed that she had developed nicknames for body parts, which the child indicated she had learned from Robert.

Although she never stayed overnight with her father, the child came back wearing different clothes several times, according to her mother. Robert testified that he only changed her clothes when she got dirty, or when she came in play clothes and she changed into a dress for church. Nancy also noticed that although the visits were short (ranging from two to seven hours), over the course of a year, the child had apparently taken a shower on approximately four occasions while visiting appellant. On several occasions, after visitations, Nancy noticed that the girl's vaginal area was "bright red." She was examined by a specialist familiar with sexual abuse cases; the doctor was unable to find any evidence of penetration or abuse, but because mere touching would not leave any evidence of trauma to the genital area, he could not rule out sexual abuse. During June 1990, while the child was bathing, Nancy saw her rubbing her vaginal area with a bar of soap. Nancy asked the child if someone had done that to her before, and she said that her daddy had done it. All of these circumstances led Nancy to believe that the child was being sexually abused, and she began to expose the child to a number of books and a video about sexual abuse.

In May 1990, about a month after the divorce became final, Nancy began taking her daughter to a therapist, Marlyn Sternal, who has a master's degree in psychology. The course of therapy lasted through the time of trial, nearly a year and a half. During the period from May to October 1990, Sternal used "play therapy" with the child, which uses various toys and dolls to allow the child to communicate with the therapist. Sternal also utilized a number of books about the sexual abuse of children, including, Sometimes It's

OK to Tell Secrets (hereinafter "Secrets"). Secrets, which is at the center of this case, comes with an audio tape that contains the words of the book set to music. The book uses the words "yucky secrets" in reference to acts of abuse.

After the child saw Secrets at Sternal's office, Nancy checked out the book with its accompanying tape from the public library many times throughout the summer and fall with the express intention of encouraging the child to state that Robert had abused her. The child listened to the tape often. From May through September 1990, the child made no mention of any mistreatment, either to her mother or to the therapist.

Nancy testified that on October 1, 1990, the child told her that she had a "yucky" secret, that appellant had "put his fingers in her vagina and her butt." Nancy told the child "that she was very brave, that it was a good thing for her to tell me that and I was proud of her for telling me that." Nancy admitted on the stand that she had been waiting for months for the child to say something about the abuse. Nancy then informed Sternal of the child's statement about the abuse.

On October 9, 1990, the child brought with her to a session with Sternal the Secrets book and tape. They listened to the tape and danced to its music. During the portion of the tape that dealt with "yucky secrets," Sternal asked the child: "Do you tell your mommy and do you tell your daddy if you have a secret or secrets?" She answered: "No, he did. He touched my private parts." When Sternal asked who did, the child replied: "My daddy did." When Sternal asked what he used, the child displayed her thumb and said "his hammer." Sternal did not report the abuse to the police at this time,

but instead, out of caution, waited several weeks to do so. During this time, the child repeated the allegations.

At trial, the state's only direct evidence that the child was abused came from the *292 child herself. However, her testimony was far from conclusive. Additional evidence of the abuse included Nancy Huss' reports of her daughter's changed behavior and her allegations of abuse, Nancy's friends' testimony that appellant inappropriately kissed the child, and the testimony of the child's therapist.

In addition to Robert, who denied the charges, witnesses for the defense included the Huss family physician and two Ph.D clinical psychologists, one who examined Robert, Nancy and their daughter under a court order from the family court relative to the visitation dispute, and the other a child clinical psychologist who testified about the use of the book *Secrets* and its audio tape.

The family physician testified that neither he nor any of his partners ever saw any evidence of sexual abuse of the child, though they once treated her for a vaginal rash. The psychologist who performed individual court-ordered examinations on the Huss family testified that the child, who was apparently very nervous during the interview, made no allegation that Robert abused her. The second psychologist testified as to the suggestiveness of the book *Secrets* and its tape. He further testified that he would not use the book in his practice. He also said that the child's therapist's notes made him unsure as to whether the child's therapist was treating the child or investigating allegations of abuse. Finally, he believed that the therapist's notes revealed suggestive and repetitive techniques with regard to telling secrets. He based this conclusion on the

frequency with which Secrets was used and the repeated requests of the child to hear the accompanying tape.

Robert's principal argument[2] is that, as a matter of law, the evidence was insufficient to sustain his conviction. When reviewing a claim of the sufficiency of the evidence, this court's inquiry is limited to whether, given the evidence as it was presented in court, a jury could have reasonably concluded that appellant was guilty beyond a reasonable doubt. State v. Norgaard, 272 Minn. 48, 52, 136 N.W.2d 628, 631-32 (1965). The reviewing court must view the evidence in a light most favorable to the verdict and assume the jury believed the state's witnesses and disbelieved the contrary evidence presented. State v. Lanam, 459 N.W.2d 656, 662 (Minn.1990), cert. denied, 498 U.S. 1033, 111 S. Ct. 693, 112 L. Ed. 2d 684 (1991). The weight and credibility of the witnesses is for the trier of fact. State v. Moore, 438 N.W.2d 101, 108 (Minn.1989). Although the standard for overturning a conviction for insufficiency of the evidence is a high one, we conclude that the state did not meet its burden of proving that Robert was guilty beyond a reasonable doubt.

The only direct evidence presented by the state was the testimony of the alleged victim, and it is that testimony which is particularly troublesome. The child was on the stand for almost an hour before she made any accusation of abuse, and then she said both her mother and her father had touched her in a bad way. When she was asked repeatedly on direct examination whether she had any "yucky secrets," she answered in the negative. Further she testified that she knew that no one was supposed to touch her private parts, but that six people had touched her there, including a playmate. She also called a hug and a touch to her hair "bad touches." Although the child had not seen her

father for approximately a year before trial, she testified that she had taken a shower at his house on the day she gave her testimony. The child was not able to identify appellant in the courtroom, although he was pointed out to her and she testified that her father was bald and blind, although appellant is neither. In sum, the child's testimony was contradictory as to whether any abuse occurred at all, and was inconsistent with her prior statements and other verifiable facts. However, even given this contradictory testimony, we might not be persuaded to reverse absent the repeated use of a highly suggestive book on sexual abuse.

We believe that the use of *Secrets*, along with other similar books, is key to Robert's *293 claim of insufficiency of the evidence. *Secrets* is a highly suggestive book and we are concerned that its repeated use by the child's mother and therapist, combined with the mother's belief that abuse had occurred, may have improperly influenced the child's report of events. It is undisputed that Nancy exposed her daughter to books and a video about sexual abuse before she took her to see a therapist. Further, Nancy checked out books from the library repeatedly, including *Secrets* with its accompanying tape, throughout the summer and fall of 1990, and the child listened to the *Secrets* tape many times. Nancy testified that she had waited throughout the summer and fall for her daughter to say something about the abuse. It is also undisputed that, although her exposure to this material began in April or May, the child made no mention of any sexual abuse until October after five months of therapy. The child first mentioned the abuse while she was listening to the *Secrets* tape with her mother.

The defense expert, a licensed consulting psychologist, testified that the book was suggestive and that he would not use it in his private practice. He believed that use of

the book might cause a child to make false statements about being abused. Further, the fact that the child phrased her report of the abuse as a "yucky secret" suggests that the repetitive use of Secrets and its tape may have caused the child to imagine the abuse. In light of the entire record, we conclude that the evidence was insufficient to support the conviction.

It is important to emphasize that the use of aids, including books, tapes, dolls and videos, is permissible when trying to ascertain whether a child has been sexually abused. However, in this case, the repetitious use of Secrets, and its tape, raise questions about the validity of the accusations made against Robert. This is especially so in light of the child's testimony. We conclude, on these unusual facts, that the state did not meet its burden of proof beyond a reasonable doubt and that the conviction should be reversed.

This case from Minnesota highlights the varied problems of play therapy and the law, and while the Supreme Court of Minnesota did underscore the importance of the use of aids including books, tapes etc. There is the caution that the repetitious or overuse of such aids could seriously impair the validity of the case.

Interpretation of Drawings

Children's drawings, such as the House-Tree-Person (HTP) and Kinetic Family Drawings, as well as free drawings, which are often used in assessing possible sexual abuse, are subject to the same criticisms as the dolls (Underwager and Wakefield, 1990; Wakefield and Underwager, 1988a, 1989, 1994c). The assumption is that the drawings of children who have been abused will differ from those of nonabused

children. Qualitative features of the drawings, such as the colours used, the size and detail of body parts, and the shape of the figures may be used to support the claim of abuse.

Drawings lack validity and reliability as projective assessment devices. In a review of the Draw-A-Person test in the *Seventh Mental Measurements Yearbook*, Harris (Buros, 1972) notes that there is very little evidence for the use of "signs" as valid indicators of personality characteristics. There is so much variability from drawing to drawing that particular features of any one drawing are too unreliable to say anything about them. Reviews by Cundick and Weinberg in the *Tenth Mental Measurements Yearbook*, (Buros, 1989, pp. 422-425), support the consistent finding that interpretations of drawings (as are often done in forensic evaluations) are not supported by data. Both reviewers note that there are no normative data establishing reliability and validity of the Kinetic Drawing System.

Another type of drawing often used in interviews and evaluations of children is an outline of the back and the front of a boy or a girl. The child is shown the outline and instructed to put an X where he or she was touched. There is no research on this technique. It may give the child the message: "You were touched, now show me where." The use of booklets with outline drawings is essentially a programmed text that teaches the child to focus on genitalia and produce statements about sexuality.

There are serious problems with the few studies which claim to find differences between the drawings of abused and non-abused children. For example, Hibbard et al. (1987) concluded that, since five abused children but only one non-abused child in their samples had genitalia in their drawings, genitalia in drawings is an indicator of possible

sexual abuse. But the drawings were obtained by different people for the abused and the non-abused groups and no information was given about how often the abused children had been interviewed about abuse. In addition, the differences between the groups were not statistically significant.

General Guidance on using Drawings, Pictures, Photographs, Symbols, Dolls, Figures and Props with Children

Drawings, pictures, photographs, symbols, dolls, figures and props may be used for different reasons:

1. To assess a child's language or understanding;
2. To keep a child calm and settled and in one place;
3. To support a child's recall of events;
4. To enable a child to give an account of events.
5. It is these last two categories that the most controversy tends to arise. Children and children with communication difficulties may be able to provide clearer accounts when drawings, pictures, photographs, symbols, dolls, figures and props are used, compared with purely verbal approaches. For example, drawings or dolls may allow a child to clarify body parts or demonstrate an abusive act, while props may help the child to describe the environment in which an incident took place. Drawings or props can also enable children to demonstrate an understanding of truth and lies at a younger age than previously thought possible. Drawings, pictures, photographs, symbols, dolls, figures and props can, therefore, function as very useful communication aids, but when

considering whether their use is appropriate in any given circumstances, interviewers need to be aware of the risks and pitfalls as well as the advantages associated with their use. The risks and pitfalls of using drawings, pictures, photographs, symbols, dolls, figures and props include:

1. Potential challenge in the legal arena followed by admonitions not to use or cautionary statements;
2. Some props, e.g. anatomical dolls, can result in distortions or inaccuracies;
3. Some props, e.g. teddies, animals, dolls houses, may engender play or fantasy;
4. Children or carers may be upset by the use of explicit dolls or drawings;
5. Children aged three and under are usually not able to use dolls, models or anatomical drawings as representational objects. (Adapted from Hewitt 1999, Everson & Boat 2002, Faller 2007 and Lamb 2008.)

The advantages of using drawings, pictures, photographs, symbols, dolls, figures and props include:

1. Children may be more competent to demonstrate what happened rather than explain in words;
2. Allows two modes of communication, so children can both show and tell;
3. May mean detailed information can be collected with fewer questions;
4. Can provide retrieval cues or memory triggers;
5. Can overcome reluctance or fear, e.g. children who take 'don't tell' literally;
6. May be less stressful for children to show than tell;

7. May resolve concerns about false allegations;
8. May provide an organisational framework for children to give a fuller account.

However, drawings, pictures, photographs, symbols, dolls, figures and props should be used with caution and never combined with leading questions. The key issue is that the child recognises the drawing, and if it is to be used to aid recall or communication, that the child assigns a stable identity to the drawing. Interviewers can check this by asking 'who's this?' and by making at least one deliberate identity error 'so this is x?' Research suggests that asking children to draw what happened after an initial interview can help them to focus, retrieve more information and reduce their anxiety and that 96% of children who draw in these circumstances recall more information in a second interview.ⁱ

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ⁱ 'Draw me what happened' looked at the effects of event drawing on children's accounts of sexual abuse. 125 children aged 4-14 in real NICHD protocol interviews. Looked at the impact of using drawing to prompt a second retrieval. Blind trial: interviewers opened the envelope with the condition (drawing or no drawing) only after first interview completed. Children instructed to draw 'what happened' for seven minutes, children in the control group had a seven minute break. Both sets of children then re-interviewed using open ended questions, interviewers were instructed to ignore the drawing and focus only on the child's verbal account (Katz and Hershkowitz 2009).