

*Ward v R* is a conviction and sentence appeal by a man convicted of three charges of indecent act with a child under 16 and three charges of sexual penetration of a child under 16, all against the same complainant, J.

At trial, the primary issue was J's reliability and credibility. The single ground of appeal against conviction was that the convictions were unsafe and unsatisfactory due to inconsistencies between J's VARE and answers given in cross-examination. The appeal against sentence was on the ground that the sentence was manifestly excessive. Both appeals were dismissed.

This case note focusses on the conviction appeal and on the majority judgment's (Maxwell P and Redlich JA) extended *obiter dicta* about the questioning of children, the role of the trial judge and the obligations on counsel to comply with the rule in *Browne v Dunn* in relation to a child witness. The majority judgment concludes that general or ambiguous questions will not be sufficient to satisfy the obligation. Instead, where defence counsel elicits an inconsistency in cross-examination, the obligation of fairness to the witness requires counsel to confront the witness with that inconsistency and ask whether the witness maintains their original account.

## Part 1 – Conviction appeal

At an early stage, the majority (Whelan JA agreed with Part 1) observed at [36]:

First, the evidence of a child is not to be approached as though it is 'inherently' unreliable or deserving of less weight than that of an adult. Secondly, as we will explain, particular forms of questions asked of J were likely to be productive of a misleading or inaccurate response. (citations omitted)

The second point particularly affected the majority's assessment of how the jury may have reasoned. For example, at [85], the majority concluded:

With the benefit of the instructive submissions of the prosecutor, the jury were alive to the view that some answers were no more than inaccurate contradictions, resulting from misunderstanding or a willingness to agree with suggestions. Only non-leading questions, much more explicitly referring to J's initial allegations on the VARE, would have eliminated the risk that apparent inconsistencies would be seen by the jury as inconsequential or inaccurate.

The majority rejected comparisons with *O'Reilly v R* [2015] VSCA 19, where the court had found that the complainant in evidence had recanted her previous allegations. The recantation in *O'Reilly* involved direct questions about specifics of particular charges, whereas J's inconsistencies were dismissed as potentially the production of suggestibility or confusion, rather than as retractions (at [94]).

## **Part 2 – The testimony of children**

Paragraphs [96] to [135] contain extended *obiter dicta* about the questioning of children. The majority observed at [100] that:

A child’s immaturity necessarily limits their capacity to understand the process in which they are participating and to appreciate the importance of what they say when subjected to cross-examination.

The majority referenced the Australian Law Reform Commission report, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997), which states that the contest between lawyer and child is an ‘inherently unequal one’ (at [14.111]). This has implications for the need to ensure fairness when examining a child witness (Ward at [97]).

The judgment reviewed research calling attention to the disconnect between the language used in court and the language capacities of a child, and the potential for this to undermine the reliability and accuracy of the evidence a child gives in cross-examination (at [101]-[103]). It noted the use of ‘intermediaries’ in other jurisdictions and the Victorian Law Reform Commission’s recommendation regarding the introduction of intermediaries in its 2016 report *The Role of Victims of Crime in the Criminal Trial Process* (at [104] – [108]).

At [109], the majority continued:

The likelihood of self-contradiction by a child, or misleading or inaccurate answers to certain types of questions, is now relatively well recognised. There is a range of possible innocent explanations for inconsistency of testimony. They encompass: intimidation; confusion; lack of understanding of the question; inability to process what is being put; acquiescence; and an over-willingness to agree with suggestions. There are numerous reported decisions in which apparent inconsistencies in the evidence have been attributed to the inherent difficulties in cross-examining children, rather than to any specific deficiencies in the evidence itself. (citations omitted)

The majority referred to multiple resources<sup>1</sup> that outline practical tips on questioning children, including the following suggestions (at [111] - [112] and [114]):

- Avoid ‘tag’ questions, where a factual assertion is made followed by a ‘tag’ to turn it into a question such as ‘did he?’, ‘didn’t he?’
- Avoid complex vocabulary and syntax
- Avoid leading, multi-part questions
- Use active rather than passive voice
- Use the child’s words to describe people, actions and objects
- Discuss events in a logical sequence

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<sup>1</sup> These resources include the UK Judicial College Equal Treatment Bench Book 2013, the Australian Institute of Judicial Administration Bench Book for children giving evidence in Australian courts, the Judicial College of Victoria Uniform Evidence Manual and a report by the Inns of Court College of Advocacy entitled ‘Raising the Bar: the handling of vulnerable witnesses, victims and defendants in court’.

- Only ask one question at a time
- Use signposting
- Avoid sequential questions requiring a yes or no response, as it may condition an expected response to subsequent questions
- Avoid repeating a question in a manner which might be taken to indicate that the first answer was wrong
- Avoid statements which do not contain a question
- Avoid closed choice questions if there is a risk that the correct option is not present
- Avoid multiple negatives in a question
- Avoid questions suggesting the witness is lying or confused

### Task of cross-examining counsel

The majority observed at [122]-[123] that:

cross-examining counsel seeking to impugn the credibility or reliability of the child's account has two overlapping obligations to discharge. The first is counsel's obligation to the accused person, to seek to cast doubt on the complainant's evidence. The second is the obligation of fairness to the child complainant, expressed in the rule in *Browne v Dunn*. Discharge of that obligation requires that the child be given a fair opportunity to make clear whether he or she adheres to the account given in the VARE. The obligation being an aspect of procedural fairness, its content varies according to the circumstances of the case. We are concerned here with its content in the case of a child witness whose age or capacity renders them vulnerable.

In our view, discharge of these obligations will ordinarily require counsel to address those specific allegations made by the child which the defence disputes. Simply to 'put' matters which the child accepts will be unlikely, for the reasons already explored, to discharge either obligation. (citations omitted)

The majority further noted that a child's acceptance of a proposition may not assist the cross-examiner because a child cannot be expected to respond to option-posing, suggestive or assertive questions in an explanatory or expansive way. Questions should be asked in a form that is appropriate to the age of the child (at [124] – [125]).

In terms of complying with the rule in *Browne v Dunn*, if counsel does not give the child a fair opportunity to respond to the attack or to state whether the child maintains their initial account:

- The judge or opponent may take the view that the rule has been breached; and
- The tribunal's ability to assess the merits of the issue is diminished (at [125]).

The majority observed that there is a risk a jury may not view an inconsistency as a material qualification or retraction of the witness's primary allegations because of the circumstances in which the particular inconsistency emerged. For example, if counsel employs indirect or subtle methods, if the questions asked were

unclear or suggestive, or if the answers provided were ambiguous (at [127] – [128]).

## Role of the trial judge

The majority observed that a primary function of the trial judge is to control questioning that could jeopardise a fair trial and that judges are required to ensure that counsel observe accepted standards in the manner in which evidence is elicited (at [129]). At [130]-[131], they referred to ss 41 and 42 of the *Evidence Act 2008*, which contains powers to assist including:

- The court’s power to disallow an ‘improper question’ put to a ‘vulnerable witness’ (defined to include a witness under the age of 18). The question will be improper if it is ‘misleading or confusing’;
- Trial judge’s power to disallow leading questions having regard to the age of the witness; and
- Requirement for trial judges to disallow leading questions if they conclude ‘that the facts concerned would be better ascertained if leading questions were not used’.

The majority (with whom Whelan JA agreed on this point) supports the introduction of pre-evidence hearings, at which the parties can discuss the capacity of the child witness and where it may become apparent that an expert will assist the court in better understanding the capacity of the child. Such hearings will in most cases reduce the prospect of the judge having to intervene during trial and provide defence counsel with guidance regarding cross-examination (at [132] – [133]).

## Re-examination as to allegations made on the VARE

If cross-examination relates to facts initially referred to in evidence in chief (such as the VARE), the judgment notes that a witness may be re-examined to ascertain whether they adhere to those facts. Particularly when defence counsel has elicited arguable inconsistencies but has not taken the child to the terms of the allegations on the VARE and asked whether they are true (at [134] – [135]).