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How does the legal system respond when children with learning difficulties are victimized?[☆]

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Abstract

Objective: To understand how the Swedish legal system perceives and handles mentally handicapped children who may have been victimized.

Method: Twenty-two judicial districts in Sweden provided complete files on 39 District Court cases (including the Appeals Court files on 17 of these cases) involving children with learning difficulties or other handicaps as alleged victims of abuse, threat and neglect. The children (25 girls and 14 boys) averaged 11.8 years of age when first allegedly victimized. Sexual abuse was the most frequently alleged crime (33 cases). Court transcripts, court files and expert assessments of the alleged victims' handicaps and their possible consequences were examined to elucidate the ways in which courts evaluated the credibility of the alleged victims.

Results: The children's reports of their victimization were expected to have the characteristics emphasized by proponents of Statement Reality Analysis (SRA) and Criterion Based Content Analysis (CBCA) in order to be deemed credible. Expert reports were seldom available or adequate. Because many reports were poorly written or prepared by experts who lacked the necessary skills, courts were left to rely on their own assumptions and knowledge when evaluating children's capacities and credibility.

Conclusions: Children with learning difficulties or other handicaps were expected to provide the same sort of reports as other children. To minimize the risk that judgments may be based on inaccurate assumptions courts need to require more thorough assessments of children's limitations and their implications. Assessments by competent mental health professionals could inform and strengthen legal decision-making. A standardized procedure that included

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psycho-diagnostic instruments would allow courts to understand better the abilities, capacities, and behavior of specific handicapped children.

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Keywords: Learning difficulties; Child victims; Assessments; Credibility; Psycho-diagnostic instruments

Introduction

Although handicapped children are at increased risk of abuse (Sedlack & Broadhurst, 1996), few cases involving intellectually disabled children are taken to court (Green, 2001; Gudjonsson, Murphy, & Clare, 2000; Williams, 1995), and few researchers have examined the way legal systems respond to possible victims of crime who are intellectually or communicatively handicapped (Agnew & Powell, 2004; Milne, 1999). Forensic research on victims with learning difficulties or other handicaps is complicated by the facts that (1) groups of handicapped children are quite heterogeneous even when they share diagnostic labels and (2) there is limited cross-contextual and international consensus about how to classify, define, and label developmental disabilities (Leonard & Wen, 2002; Milne, 1999). The legal system is an evaluative context in which professionals represent, interpret, and understand facts in order to reach judicious decisions (Cederborg, 1999; Holstein, 1993), yet no researchers have examined the ways in which children with learning difficulties or other handicaps are perceived and treated in the legal system. We thus undertook an inductive, qualitative study of 39 Swedish court files with a focus on the ways in which the children's handicaps and their presumed consequences were described and taken into account when evaluating the children's credibility.

Method

Prosecutors from all 39 Swedish districts were asked by letter and phone to send as much information as possible about cases processed during the last 5 years in which disabled children were allegedly victimized. 'Disability' was not systematically recorded, so case selection depended on the prosecutors' and police officers' memories, and the sample was thus selective rather than representative. In total, we obtained files involving 69 handicapped children, but our focus was on the 39 cases involving (involving 14 male and 25 female children) that were taken to trial, 7 between 1994 and 1999, and 32 between 2000 and 2004. Thirty-one trials led to convictions, and 8 to acquittals in the District court. Seventeen verdicts were subsequently appealed by either the defense or prosecution, and 7 decisions were reversed by the Appeals Court. The children averaged 11 years 8 months when first allegedly victimized and 12 years 7 months when first interviewed. Personal details and references to places that may permit identification are not mentioned here to ensure that none of the victims can be recognized.

As shown in Table 1 sexual abuse (involving sexualized touching, attempted sexual intercourse, or completed sexual intercourse) was the most frequently alleged crime (33 of the 39 cases).

The present study was reviewed and approved by the employee of Linköping University, Sweden, with responsibility for monitoring the research being conducted by University staff members. This official ensured that the study was designed and implemented in accordance with the Helsinki declaration (1975) regarding research on humans. The documents were given to the first author by the prosecutors and police officers involved in accordance with the provisions of Sweden's Official Secrets Act.

Table 1
Summary of the children's experiences and handicaps in 39 cases

Diagnosis	Type of crime			Relation to perpetrator/s		
	Sexual abuse	Physical abuse	Threat	Immediate family	Familiar	Unfamiliar
Developmental disorder	17	1		7	6	5
Developmental disorder/Autistic features	5	2		1	3	3
Autism/Asperger syndrome	2	1			1	2
DAMP/ADHD ^a	4	1	1	1	3	2
Personality disorder	1			1		
Deafness	4				4	
Total	33	5	1	10	17 (4 in one case)	12

^a DAMP = Deficits in Attention, Motor control and Perception (Gillberg, 1996). This diagnosis is used in Sweden for children who might be classified as ADHD or ADD in the U.S.A. or U.K.

The court files were exhaustively examined for references to the alleged victims' handicaps, competencies, and credibility. We paid special attention to the ways in which the courts' referenced the alleged victim's behavior and testimony when discussing their credibility. Using these abstracted details we searched inductively for similarities and differences among the courts (Holstein & Gubrium, 1995; Kvale, 1996).

Results

There were three broad reasons for concerns about the appropriateness of the courts' reactions to these alleged victims. First, in 22 of the 39 cases, the judges argued that credible accounts should have the same clear characteristics that previous decisions had sought in credible accounts by alleged victims who did not have learning disabilities or handicaps. Second, Courts received expert guidance that might help them better understand the characteristics of specific witnesses with handicaps in only 21 of the 39 cases. Third, miscommunication between courts and potential sources of expert information about the types of information that would be most helpful diminished the value of the available expert testimony. As explained below, the net result was that the courts often made decisions largely in ignorance of the capabilities, behavior, and limitations of vulnerable witnesses.

Legal understanding of credibility is based on criteria of questionable validity

Forensic professionals in Sweden have long relied upon the conceptual frameworks of Statement Reality Analysis (SRA) and Criterion-Based Content Analysis (CBCA) when evaluating children's truthfulness and credibility (Raskin & Esplin, 1991; Trankell, 1972; Undeutsch, 1982, 1989). The basic premise of both SRA and CBCA is that accounts of actual experiences differ in quality and content from statements about events that were not experienced, which means that truthful and fabricated statements should differ in content and quality and that people who have actually experienced events should produce statements characterized by such factors as richness of detail, contextual embedding, superfluous and unusual details, subjective experiences, and reproduction of speech. CBCA scores indeed distinguish between plausible and implausible accounts, although the precision is too poor to justify application in forensic

contexts (Lamb et al., 1997; Ruby & Brigham, 1998). Nevertheless, Trankell's (1972) work seems to have influenced the Swedish legal system, with the Swedish Supreme Court suggesting that credible accounts should, for example, be coherent, clear and detailed (Supreme Court Judge 1993-11-24, DB 688) and should not contain information that is difficult to explain or gives rise to doubt that the alleged events really occurred unless there is other evidence that speaks to the child's credibility (Sutorius & Kaldal, 2003).

The validity of the Criteria-Based Content Analysis and Statement Reality Analysis techniques have never been tested with children who have learning difficulties or other handicaps, yet 22 of the 39 decisions studied included statements about the presence or absence of CBCA and SRA criteria in the alleged victims' reports.

In one case involving a girl with a chronological age of 10 years and 11 months and a moderate developmental disorder, the District Court observed:

“The information Mona gave about what her father allegedly did to her was very brief and without detail. In the videotaped interviews she did not give a coherent or spontaneous report, but instead provided information mainly in the form of brief answers to the police officer's questions. Mona did not give any information about the timing of the events except that it was during the day Taken together the District Court finds reason to doubt that Mona was describing a real event.”

In making this decision about Mona's credibility, the District Court did not mention Mona's mental age or the developmental delay that may have affected her ability to provide a coherent and detailed report. Instead, it made references to the Swedish Supreme Court's recommendations about how to understand what makes a report credible as well as to the concepts introduced by Undeutsch (1982, 1989).

In another case, a child with the chronological age of 7 years 10 months was said to have a mild developmental disorder. She was the suspected sexual abuse victim of an immediate family member and was interviewed three times. When the judge in the District Court summarized the court's judgment, he questioned the girl's statement, noting among other things:

“the information by itself should be probable and internally coherent, the report should not include elements that give reason to doubt the information provided or contradict other available information. . . . The information provided by the injured party . . . is internally contradictory and contains details that cannot be credible or reliable.”

The judge thus evaluated credibility with respect to general characteristics as well as specific content taken from the CBCA and SRA literature. The fact that these criteria should not be used in forensic contexts and that the court knew this girl had the mental age of a 5-year-old was not considered relevant when assessing her ability to report experiences.

Insufficient availability of expert assessments

When child victims are involved in the Swedish legal system, it is quite common for their competence as witnesses to be assessed by the court. Experts are expected to assist the court by providing relevant expert knowledge (Diesen & Sutorius, 1999), but 18 of the 39 cases involved no expert assistance understanding mental handicaps that are likely to affect the children's abilities as witnesses. When experts were involved, written statements were provided by medical (8), psychological (5), or both medical and psychological

(8) experts. In only two cases did physicians and in three cases psychologists/psychotherapists testify in person.

Incomplete psychological assessments

Eleven of the 13 cases in which psychologists provided assessments involved reports previously written for other purposes (educational or social welfare) not adapted and formulated for the legal system. In one additional case, both two assessments prepared for the legal system and one written for other reasons were included.

In one case involving a 15-year-old, the police officer was dissatisfied with a general written description about the type of handicap the child had and thus made the following specific request of a psychologist:

“You have, according to (a physician’s name), tested and evaluated Per. We want you to certify in writing what the testing of Per showed. We want you to describe what Per’s handicap implies for him. How is it manifested, why is he in a special school, and so on? We just want to know what your investigation showed about Per, not about the handicap in general.”

The police officer did not receive answers to these important questions that would have helped her adapt the interview to the child’s specific needs, as recommended by most experts (Westcott & Cross, 1996), however. Instead, the case file only included a copy of an assessment the psychologist had performed 2 years earlier for other purposes.

In the case of a girl who was 5 years old when a friend of her mother was believed to have raped her and 10 years 3 months old when interviewed, the court had access to an assessment written by a psychologist when the girl was 6.2 years old and was tested for other purposes. In this assessment, the psychologist referred to tests showing that Lena had below-average intelligence, with a developmental delay of 1 to 2 years.

“Lena’s test scores were below average for her age (1 *SD*). Her performance in the different sections of the tests was somewhat uneven, though not in a systematic way. Lena seems to have more difficulties with the verbal tasks; among other things she misses many basic concepts. Lena needs and has the right to receive special education.”

This assessment was not focused on the child’s capabilities as a witness since it was written as a recommendation to the school system. Thus, the legal system was given hints about possible difficulties understanding basic concepts and about Lena’s developmental delays but was not told whether or not her developmental status had improved or deteriorated by the time she entered the legal system as a 10-year-old.

The authorities also suspected that a sister had been sexually abused by the same man when she was 6 years old. She was interviewed when she was 11.6 years old. The psychological test results referred to in the court file were obtained when she was 7.4 years of age. Like those of her sister, these test results were also written for other (educational) purposes and, consequently, not formulated in relation to the legal system’s specific needs. The assessment showed that the girl’s competence, 4 years earlier, was clearly below average and that her anxiety at that time might have influenced her abilities to understand intellectual tasks. In the District Court hearing, a physician testified and the court did not contest the children’s capacities to provide testimony. Instead, it emphasized, in part, those similarities between the girls’ reports about what had happened spoke to their credibility. The suspect was convicted in the District Court, but the Appeals Court concluded that the reports were contradictory and that the assessments did

not consider the girls' behavior in relation to other circumstances, including their living conditions. The Appeals Court criticized the investigation of the case, expressed its need for updated and comprehensive assessments of the children, and questioned the District Court's interpretation:

“It is disconcerting that the girls' accounts were not always consistent with one another or with other evidence. As a result, the reports alone cannot be the basis for concluding whether or not sexual intercourse occurred or that (the suspect's name) was the one who had intercourse with the girls Whether the girls' acting out can be related to sexual intercourse or if this can be a result of other circumstances, such as the general circumstances under which the children were living and what they might have experienced were not, however, closely illuminated in the case by a psychological assessment or something like that. According to this Appeals Court, no obvious judgment can therefore be reached about the children's behaviour The Appeals Court conclusively finds that the investigation is associated in certain respects with such uncertainty about what actually happened that (the suspect's name) cannot be found guilty . . .

Insufficient information from medical assessments

Medical explanations of specific handicaps can be of great value when assessing disabilities, but in six of the eight cases in which only physicians were involved, a diagnosis was provided but the effects of the handicaps were not explained, thereby precluding understanding of the children's capacities and limitations. In one case, for example, a child described as having developmental disabilities with autistic features was allegedly abused physically by a relative when she was 6 years and 11 months old. This child's psychological condition would certainly have affected her ability to describe what had happened, but the diagnosis was not explained and no expert testified in person. In the course of acquitting the suspect, the District court opined:

“It can be concluded from the police interview that its character is not coherent and is poorly structured. Sara is not able to answer questions and she is avoidant when the interviewer comes close to the topic of the interview, which is the alleged physical abuse. It is obvious that she has difficulty understanding the questions asked and it is only when she is repeatedly and more or less leadingly questioned that she first tells that the suspect hit her when she was in the bath and that was when she got her bruises on her bottom. This makes her report unreliable”

Of course, an expert could have educated the court with respect to what could have been expected from Sara. In addition, if the handicap had been explained to the police officer, he might have been able to structure the interview in accordance with the child's needs.

The four deaf children in this study were all suspected victims of sexual abuse, but no certifications or explanations of their special needs were available either to the police officers or to the courts. It might have been obvious that they needed an interpreter when being interviewed, but in one of these cases the District Court criticized the awkward communication between the interpreter and the victim, noting that the interpreter incorrectly reported what the victim said. The quality of the interview was said to be contaminated because of this and so, the court noted, this child's report could not be used to bolster the prosecutor's case. The suspect was acquitted.

In another case, the alleged victim's chronological age was 23.4 years when she was sexually exploited by her employer. She was interviewed 3 months later. The court was given a certificate, written 6 years

earlier by a doctor noting that “Anna has a mild developmental disorder which is the same as mental illness.” This doctor was also a witness in court. According to the District Court file:

“Witnesses have stated that Anna is suffering from a mild mental developmental disorder. It has also been said that, with a careful interpretation, her mental age could be estimated as that of a normal 12-year old. It is clear that Anna does not have the ability to recognize the consequences of her activities . . . there is an association between Anna’s disorder and the fact that she participated in sexual intercourse with (the employer’s name). Under these circumstances, having sexual intercourse with a developmentally disordered person has to be seen as inappropriate exploitation.”

The suspect was convicted in the District Court but acquitted in the Appeals Court, even though the same evidence was provided. Referring to the physician’s statement, the Appeals Court wrote that:

“Anna has a mild developmental disorder, which means that it takes longer for her to learn new things. A developmentally disordered person often has feelings of inferiority and a strong belief in authorities. Anna is naive. She (the physician) concluded that Anna had the emotional status of a 12–13 year old. She could not say anything about Anna’s intellectual level . . .”

The appellate judge further argued that:

“What is shown in the videotaped interview is not a sufficient basis for judging Anna’s mental condition The only existing certification of her mental condition is 6 years old and was written by a physician (the doctor’s name and address) who identified her mild developmental disorder but did not provide unambiguous information about Anna’s mental status In its integrative judgment, the Appeals Court finds Anna’s developmental disorder not proven as the prosecutor claims, and that it qualifies as a mental disorder according to chapter 6 paragraph 3, of the criminal penalty code. Because of this, the conviction of sexual exploitation is overturned.”

In this case, the Appeals Court was critical of the physician’s certification because it was too old and did not include information about the girl’s mental status. The contradictory conclusions reached by the different courts suggest that lack of knowledge created uncertainty and fostered misunderstanding.

Impossible requests and indistinct answers

Another problem with expert assessments is that there may be discrepancies between the types of information requested by the legal system and the type of information that experts can provide. Forensic psychologists cannot assess credibility reliably (Lamb et al., 1997), for example, although three of the five requests to psychologists requested such assessments. Four of these cases involved children diagnosed with developmental disorders and one with developmental disorder combined with autistic features. In this latter case, two psychologists (one chosen by the District Court and one by the prosecutor) were asked whether or not it was reasonable to believe that the girl had been sexually exploited by a familiar man during a 3-year period when she was between 8 and 11 years of age. The girl was 11 years and 11 months old when interviewed by the witness psychologist appointed by the District Court. This psychologist offered conclusions about the child’s handicap but she did not specify how these conclusions were reached, noting only that she used “some complementary child psychiatric tests,” interviewed the child and the foster mother once, and reviewed the previous written material about the girl and the case. The

psychologist concluded that: “Much of the information suggests that Casey’s reports about the visits with the man contain a great deal of truth.”

The psychologist retained by the prosecutor updated an assessment she had made 2 years earlier but did not reveal what kind of tests she had used on either occasion. After interviewing the girl and the foster mother twice and studying the three police interviews, she concluded:

“... that Casey’s mental and verbal difficulties influenced the events and the opportunities for others to intervene, but that in itself does not diminish her credibility In my opinion Casey’s reports about her sexual exposure are reasonable.”

The two psychologists thus addressed the questions requested by the legal system but their conclusions were challenged by the District Court:

“When the court judges credibility in an injured party or witness the court must make its own assessment on the basis of a complete investigation. As a result, the court cannot uncritically start from what is said by psychological experts.”

The contradiction between the requested assignments and this criticism is obvious. In the Appeals Court hearing, the prosecutor offered test results obtained by a third psychologist who had recently tested the girl’s competence while investigating her needs for special services from the community. The girl was 12.4 years old when tested by this third psychologist. This psychologist clearly described her methods and the purposes of the tests she used to evaluate the child’s competence. Her assessment did not include any comments about truthfulness, perhaps because the psychologist was not appointed by the legal system. In addition, the Appeals Court evaluated the child’s credibility very differently than the District Court did. It associated descriptions of the child’s competence with possible consequences and the fact that the girl had reported unusual details about her abuse. The Appeals Court thus wrote:

“It has been shown that the injured party is a girl who was at risk of being sexually exploited because of her deviant mental disposition, her mental retardation, her attraction to unknown men and lack of care... the report given by the injured party includes such details about the course of the abusive events that her report could only describe actual experiences.”

In this case, the District Court was unable to evaluate the experts’ reasoning, but could have facilitated the process by formulating clear and distinct questions for the psychologists. A question about the child’s capacities as an eyewitness could, for example, have elicited information about the handicap in general as well as about the specific child.

Discussion

This study is based on data from one country and the cases sampled may not have been representative, which limits the generalizability of the findings. The findings suggest, however, that children with learning difficulties and other mental handicaps may be misunderstood when legal proceedings do not take their special needs and capacities into accounts when investigating and adjudicating their cases. Children with mental and physical handicaps are more vulnerable to all forms of abuse than non disabled children without such handicaps (Westcott & Jones, 1999), and this study made clear that, at least in Sweden, children with learning difficulties or other handicaps are often expected by courts to provide the same sort of reports as children without such difficulties in order to be deemed credible. The legal system relies

in part on a variety of theories and expectations about human behavior (Golding, 1992), but courts do not have the capacity to assess and understand the competencies of children with diverse handicaps. By requesting assessments by competent psychologists or physicians, courts can gain insights into children's abilities and limitations that inform and strengthen their decision-making. To minimize the risk that judgments will be based on ignorance and uncertainty, in fact, courts need to require more thorough assessments of children's abilities and of the implications of their handicaps.

Unfortunately, such assessments were seldom requested, perhaps because mental health experts are not widely viewed as sources of useful information and disagree among themselves about forensic evaluation strategies (Gumpert, 2001). The lower courts may also have misinterpreted the Swedish Supreme Court's (*Elia v. Elia*, July, 1992) opinion that courts should make decisions independent of psychological experts, although testimony from psychologists with clinical expertise can be considered if they focus on background information and possible source of errors and help explain why children may have difficulty explaining their experiences (Sutorius & Kaldal, 2003).

Two of the Appeals Court decisions we reviewed complained that insufficient information was available to the Courts when up-to-date forensic assessments were not included in the case records. Strikingly, however, none of the District Courts acknowledged that formal assessment might have enhanced their understanding of the children's handicaps.

When courts and prosecutors appoint experts, they must be aware that simple questions about children's credibility or truthfulness cannot be answered scientifically. Courts have to make decisions about credibility but cannot rely on assumptions about the characteristics of credible statements, especially when unusually vulnerable children are involved. It is also important that experts clearly understand the law so that the validity of their work cannot be questioned. The courts and prosecutors have to specify what they want to know, and the experts have to explain their reasoning, its basis, and their conclusions.

Overall, this study has potentially important implications for professionals concerned that children with learning difficulties or other handicaps be effectively and fairly treated when they are allegedly victimized. First, if a standardized procedure including psycho-diagnostic instruments could be used whenever children with learning difficulties or other handicaps are involved, courts would be able to understand each specific child's abilities, capacities, and behavior better. Second, if the police officers had access to such assessments before their interviews, they could adapt their interview techniques to the needs of individual children. Handicapped children, even when they have similar diagnoses, comprise a heterogeneous group. If the legal system does not take their unique characteristics into account, it will be much harder to achieve justice for them. Finally, not enough is known about the eyewitness capacities of children with various handicaps to inform the legal handling of these cases. There is thus an urgent need for further research on the accuracy of reports provided by children with different handicaps.

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Résumé

Objectif : Comprendre comment le système judiciaire suédois perçoit et s'occupe des enfants maltraités souffrant d'un handicap mental.

Méthode : Vingt-deux districts judiciaires suédois ont fourni 39 dossiers complets venant de cours de district (y compris 17 cas de la cour d'appel), portant sur des enfants soupçonnés d'avoir été maltraités ou négligés ou menacés, et qui souffraient de difficultés d'apprentissage et d'autres handicaps. Ces enfants

(25 filles et 14 garçons) avaient un âge moyen de 11,8 ans lors de leur premier incident. Les agressions sexuelles constituent le crime le plus fréquent (33 cas). Les procédés-verbaux de la cour, les dossiers judiciaires et les évaluations des handicaps et de leurs conséquences par les experts ont servi à juger de la capacité de la cour à évaluer la crédibilité des témoignages des enfants.

Résultats : On exigeait que les rapports des enfants sur les mauvais traitements subis reflètent les caractéristiques qu'avancent les disciples du Statement Reality Analysis et du Criterion Based Content Analysis à savoir la crédibilité des enfants en tant que témoins. Les rapports des experts étaient rarement disponibles ou utiles. Comme plusieurs rapports étaient mal rédigés ou préparés par des experts non chevronnés, la cour était laissée à ses propres moyens pour évaluer les compétences et la crédibilité des enfants.

Conclusions : On s'attendait à ce que les enfants qui ont des difficultés d'apprentissage ou autres handicaps soient capables de fournir le même calibre de renseignements que d'autres enfants. Afin de diminuer le risque de se retrouver avec des jugements axés sur de fausses prémisses, les cours devraient exiger des évaluations plus ponctuelles et mieux capables de prendre en considération les handicaps des enfants et leurs conséquences. Des évaluations menées par des intervenants en santé mentale compétents aurait l'avantage d'étayer le processus légal. Une procédure normalisée qui comprend des mesures de diagnostics psychologiques permettrait à la cour de mieux saisir les compétences et les comportements typiques de certains handicaps.

Resumen

Spanish-language abstracts not available at time of publication.