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## Introduction

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Until a quarter of a century ago, a combination of legal rules made it very difficult for the evidence of a young child to be heard in a criminal court in England and Wales—and where it was heard, to be acted on. Specifically, the *competency requirement* made it impossible for young children to give oral testimony, and the *hearsay rule* usually made it impossible for their evidence to be delivered to the court by any other means—for example, by an adult’s account of what the child had said to them, or even by an audio or videotape of the child actually saying it. Where children were old and mature enough to satisfy the competency requirement, and could come to court to testify as live witnesses, a collection of sub-rules which can be collectively called *the adversarial package* then made it difficult for them to communicate their evidence when they got there. The contents of this ‘adversarial package’ included the rule that required witnesses to tell the whole of their tale in court, right from the beginning, without incorporating or referring back to statements they had previously made; the rule that required prosecution witnesses to give their evidence in the physical presence of the defendant; and the rule that witnesses are ‘examined adversarially’—meaning that, having first been questioned by someone who wants them to say one thing, they are then cross-examined by another person who wants to make them say the opposite. Finally, in those cases where the child had managed to testify orally, and in the course of it say anything that was coherent, the *corroboration requirement* required the judge in jury trials to warn the jury, in effect, not to believe it (and in summary trials, required the magistrates, at least in theory, to issue a similar warning to themselves).

During the 1980s this state of affairs was increasingly criticised. Police officers, social workers, paediatricians, child psychiatrists, psychologists, judges, academic lawyers and even a number of practising lawyers raised their voices to say that rules needed to be changed. Prominent public figures pressing for reform included Professor Glanville Williams and Baroness Lucy Faithfull, both regrettably now dead, and Esther Rantzen, happily still very much alive. Organisations concerned with children’s welfare also took an active part—led, of course, by the National Society for the Prevention of Cruelty to Children (NSPCC). This combined pressure produced important legislative changes. Some initial ones were introduced by the Criminal Justice Act of 1988, and further more important ones by the

Criminal Justice Act of 1991, a piece of legislation which implemented some (though unfortunately not all) of the recommendations of the Pigot Committee in 1989. Eight years later came the report called *Speaking up for Justice*,<sup>1</sup> which recommended further reforms to the law of evidence, this time for the benefit of vulnerable witnesses generally. This led to further important reforms in the Youth Justice and Criminal Evidence Act 1999.

As one who was involved in the movement for reform myself,<sup>2</sup> a backward glance over the developments of the last 25 years fills me with mixed feelings. One part of me is astonished at how much has been achieved, but another part is disappointed at how regularly the complaints that were made 25 years ago about the way child witnesses are treated by the criminal courts are still heard today. Much of the criticism centres around the fact that child witnesses, like adult witnesses, are still required to come to court to undergo a live cross-examination, and about the way they are treated when they get there. This book of essays is the product of a conference, held in Cambridge in April 2011, which was intended to confront this issue: in particular, by hearing presentations from speakers in other jurisdictions in which the evidence of child witnesses is tested without the live in-court cross-examination which English law still routinely requires. The papers they gave are the basis of chapters three to eight.

The rest of this introductory chapter sets the scene by reviewing those changes that have been made in England and Wales over the last 25 years in respect of the evidence of children, by explaining how it is that we still subject them to live cross-examination, and by explaining the practical consequences of this. In order to end this introductory chapter at a point which leads on to the issue of cross-examination, the topics are not discussed in the sequence listed in the first paragraph above, and are instead treated as follows: (i) corroboration; (ii) hearsay; (iii) competency; and (iv) the ‘adversarial package’.

## Corroboration

In its unreformed state, English law sought to limit the impact of children’s evidence by a three-pronged approach. By statute, there was a total ban on convictions based on the evidence of a child who gave evidence unsworn. This was supplemented by a judicial duty to warn juries that it was ‘dangerous’ to convict on the uncorroborated evidence of a child, whether giving unsworn evidence or evidence on oath. And where (as often) the child was the complainant in a sex case, this duty was reinforced by a further judicial duty to warn juries that it was ‘dangerous’ to convict on the uncorroborated evidence of a sexual complainant.

<sup>1</sup> *Speaking up for Justice, Report of the Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System* (London, Home Office, 1998).

<sup>2</sup> JR Spencer and R Flin, *The Evidence of Children—the Law and the Psychology* (London, Blackstone Press, 1st edn 1989, 2nd edn 1993).

(As previously mentioned, at summary trials, where there are no juries, a magistrate or bench of magistrates were required to ‘warn themselves’—in other words, legally required to proceed with caution.)

The statutory ban on convictions based on the unsworn evidence of a child derived from section 38 of the Children and Young Persons Act 1933, the provision which made it possible for children insufficiently mature to understand the nature of an oath to give their evidence unsworn, a provision which reenacted an earlier and similar provision dating from the end of the nineteenth century.<sup>3</sup> Having set out the terms on which children were permitted to give evidence unsworn, this went on to say:

Provided that where evidence admitted by virtue of this section is given on behalf of the prosecution the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating him.

The teeth of the provision were sharpened by a judicial gloss to the effect that the corroboration had to consist of something other than further unsworn evidence from different children: so one unsworn child witness could not corroborate another.<sup>4</sup> The effect of this, of course, was particularly bad for justice, because it meant that a person could indecently assault a series of young children, or a collection of them each in the presence of the others, and do so with impunity if they were all too young to take the oath.

The two supplementary ‘judicial duties to warn’ were created by the judges. At the beginning of the twentieth century the judges, worried about innocent men being falsely accused of sex offences, invented a rule requiring judges to warn juries of the danger of convicting on the uncorroborated word of a sexual complainant. The early cases involved complainants who were young,<sup>5</sup> and in the course of the following decades those cases spawned two separate rules: (i) judges must warn juries of the danger of believing the evidence of children, whatever the nature of the case and (ii) judges must warn juries of the danger of believing sexual complainants, whether young or old.

Over the years these rules sprouted a luxurious growth of legal technicalities. This included detailed rules about what types of evidence were capable, in law, of amounting to ‘corroboration’, detailed requirements about the precise words a ‘corroboration warning’ must contain, and a particularly obtuse rule requiring judges to warn juries about the danger of acting on uncorroborated evidence not only in cases where the evidence of the complainant stood alone, but even where it was amply supported by corroboration. Needless to say, the resulting body of law was a fertile ground for defence lawyers seeking possible grounds of appeal in cases where, despite these impediments to conviction, a conviction had occurred.

<sup>3</sup> Criminal Law Amendment Act 1884, s 4.

<sup>4</sup> *DPP v Hester* [1973] AC 296.

<sup>5</sup> *Graham* (1910) 4 Cr App R 218; *Brown* (1910) 6 Cr App R 24.

In 1987, when a Criminal Justice Bill was before Parliament, a group of peers moved an amendment to alter the corroboration rule in cases involving children. The government responded by ordering a review of recent psychological research bearing on the reliability of children's evidence,<sup>6</sup> on the basis of which it introduced a clause which later became section 34 of the Criminal Justice Act 1988. This repealed the statutory provision forbidding courts to convict on the uncorroborated evidence of unsworn children, abolished the judge-made requirement for judicial warnings against believing children's evidence, and, for good measure, also made it clear that the evidence of one child giving unsworn evidence could corroborate that of another.

The effect of this provision was initially limited, because judges were still obliged to warn juries of the danger of believing sexual complainants—including, of course, those who happened to be children. Three years later, in 1991, the Law Commission recommended that the remaining corroboration requirements should be abolished. Pressure for further reform in this area grew when Lord Taylor, the Lord Chief Justice, publicly criticised this area of the law as 'arcane, technical and difficult to convey'.<sup>7</sup> And finally, after three more years had passed, Parliament abolished the duty to warn of the danger of believing complainants in sex cases by enacting section 32 of the Criminal Justice and Public Order Act 1994.

The impact of the abolition of the corroboration rules relating to children's evidence has been significant. When taken together with the reform of the competency rules described in the next section, the abolition has made it possible for persons who abuse young children to be convicted in situations where previously they would undoubtedly have got away with their misdeeds. A conviction in a case like *Barker*<sup>8</sup> for example—a case discussed in detail below—would have been out of the question.

(Interestingly, Scots law, unlike English law, has a general requirement of 'corroborated proof'. Apart from a few minor exceptions established by statute, no accused person may be convicted of any offence on one single piece of evidence, however credible. There must always be two pieces of evidence that point towards his guilt. Needless to say, a side-effect of this rule is to add to the difficulties prosecuting people for sexual offences against children—and indeed sexual offences generally. Yet at the time when public pressure led to the abolition of the more limited corroboration rules in England and Wales there was little discontent about the broader rule in Scotland. The position has now changed, however, and its possible abolition is under public discussion.<sup>9</sup>)

<sup>6</sup> C Hedderman, *Children's Evidence: The Need for Corroboration*, Home Office Research and Planning Unit Paper 41 (London, Home Office, 1987).

<sup>7</sup> *Cheema* [1994] 1 WLR 147. This case concerned accomplice evidence—another category of evidence for which a corroboration warning was required.

<sup>8</sup> *Barker* [2010] EWCA Crim 4, [2011] *Crim LR* 233.

<sup>9</sup> At the time of writing it is one of the topics under examination by Lord Carloway, who is conducting an official review of aspects of criminal procedure in Scotland: [www.scotland.gov.uk/About/CarlowayReview](http://www.scotland.gov.uk/About/CarlowayReview). And see F Crowe, 'A Case for the Abolition of Corroboration in Criminal Cases?' 2011 *Scottish Law Times* (News) 179.

## The Hearsay Rule<sup>10</sup>

In essence, the hearsay rule provides that a disputed fact may not be established by calling X, who did not see or hear it, to tell that court that he or she heard Y, who did, describe it; either Y must be called as a live witness, or the fact must be established by other means; and if no other means are available, then in law the fact cannot be proved. So stated, the rule is obviously wide—but in fact it is even more restrictive than it first appears, because in principle it renders inadmissible much more than ‘hearsay’ in the colloquial sense, which is where X repeats what he claims to have heard, by word of mouth, from Y. Thus it also renders inadmissible attempts by Y to communicate directly with the court, if done by means other than using words uttered orally in the witness box. So, for example, the law regards as hearsay, and hence inadmissible, a letter that Y had written in which the matter is described, and even an audio- or videotape of Y actually describing it.

A particular application of the hearsay rule in its classic form is that, where a young child will not or cannot give oral evidence about what happened, the court is not permitted to hear what he or she said about the incident to anyone else—a parent, doctor, social worker or police officer, for example. This restrictive rule was sometimes defended as necessary to protect persons from accusations that are false; but paradoxically, in the leading case the accused, a white man who was prosecuted for assaulting a little girl of three, was prohibited from calling evidence that, just after the incident, the child had described her attacker as black.<sup>11</sup>

Over the years the hearsay rule was increasingly criticised. In response to this, the government referred it in 1994 to the Law Commission, which in due course produced a discussion paper, and then in 1997 a Report<sup>12</sup> containing proposals for reform. The Law Commission’s proposals were accepted by the government and, six years later, they were enacted—with certain fairly minor changes—in Chapter 2 of Part 11 of the Criminal Justice Act 2003.

Under the reformed law, the hearsay rule is essentially retained for the purpose of criminal proceedings,<sup>13</sup> but made subject to a statutory list of exceptions, which are more general and wider than the limited range of exceptions that were applicable before. One of these, set out in section 116 of the Act, potentially operates where the original maker of the statement is ‘unavailable’ for any of a list of specified reasons. These are death; where the person in question is ‘unfit to be a witness because of his bodily or mental condition’; where he is outside the UK and it is ‘not reasonably practicable to secure his attendance’; where he cannot be found, though efforts have been made to find him; and lastly, where he does

<sup>10</sup> For an account of the reformed law, see JR Spencer, *Hearsay Evidence in Criminal Proceedings* (Oxford, Hart Publishing, 2008).

<sup>11</sup> *Sparks v R* [1964] AC 964.

<sup>12</sup> *Evidence in Criminal Proceedings: Hearsay and Related Topics* (Law Com No 245, 1997).

<sup>13</sup> Though not for civil proceedings, in respect of which it was completely abolished by the Civil Evidence Act 1995.

not give evidence ‘through fear’. In the first four of these five cases the hearsay evidence is automatically admissible, unless it is prosecution evidence and the court rules that admitting it would render the proceedings ‘unfair’.<sup>14</sup> In the last case—unavailability through fear—the hearsay evidence is admissible only where, having weighed up a list of factors,<sup>15</sup> the court gives leave.

The list of specific exceptions set out in the Act was supplemented by a general ‘inclusionary discretion’ under which the court may admit a piece of hearsay evidence that falls outside the explicit exceptions where the court ‘is satisfied that it is in the interests of justice for it to be admissible’. This ‘safety-valve provision’, as it is sometimes called, is set out in section 114(1)(d) of the 2003 Act. In deciding to admit hearsay evidence under this provision, the court must ‘have regard to’ the list of nine factors set out in section 112(2) and, for good measure, ‘any others it considers relevant’.

Though worded in language that looks extremely cautious, this reform of the hearsay rule was potentially important for child abuse cases, especially those involving children who were very young. In 2009 this was dramatically demonstrated by the case of *J (S)*.<sup>16</sup> The defendant, ‘Sid’, was accused of a grave sexual assault on his partner’s baby daughter, who was aged two-and-a-half at the time. While she lay in bed, someone entered the room and penetrated her vagina, causing extensive cuts and bruises which required internal stitches under a general anaesthetic to repair. At the time this happened, the only people who had ready access to the room were the mother and the defendant (who at the time was drunk); though it was possible, but unlikely, that a random intruder could have entered and assaulted the child. In the days after the incident several people asked her what had happened and she told them that the person who had hurt her was Sid. The trial judge ruled this evidence admissible under the ‘inclusionary discretion’ contained in section 114(1)(d), and the Court of Appeal upheld the resulting conviction. Giving judgment, Lord Justice Hooper said ‘We have no doubt that the judge was right to rule the evidence in.’

## Competency

Originally, child witnesses, like adult ones, could only give evidence on oath; and in order to take the oath the court would have to be satisfied that that they ‘understood the nature of an oath’. Originally, ‘understanding the nature of an oath’ meant saying that you believed you would burn in hell for ever if you lied; and where children tendered as witnesses appeared not to understand this, judges

<sup>14</sup> In which case the court will exclude it under its general power to exclude prosecution evidence, conferred by s 78 of the Police and Criminal Evidence Act 1984.

<sup>15</sup> Set out in s 116(4).

<sup>16</sup> *J (S)* [2009] EWCA Crim 1869.

would sometimes adjourn the proceedings for the child to receive religious instruction—a practice which, astonishingly, lingered on until, in 1976, the Court of Appeal decided that nowadays the test was satisfied where the witness ‘has a sufficient appreciation of the solemnity of the occasion, and the added responsibility to tell the truth, which is involved in taking an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct’.<sup>17</sup> Meanwhile much earlier, in 1885 Parliament, responding to pressure from the NSPCC, had enacted a provision enabling children who were too immature to ‘understand the nature of an oath’ to give their evidence unsworn: a provision which was re-enacted at intervals, eventually to become section 38 of the Children and Young Persons Act 1933. However, this provision also contained a competency requirement, albeit an attenuated one. To allow a child to give unsworn evidence, the court had to be satisfied that he or she ‘is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth’.

In 1958, this provision was given a restrictive judicial gloss in *Wallwork*,<sup>18</sup> a case in which a father appealed against his conviction for incest with his daughter, a little girl of five. At trial the prosecution had tried to call her as a witness but, predictably enough, had been unable to persuade her to communicate. Commenting on the unsuccessful attempt to use her as a witness, Lord Goddard CJ said:

The court deprecates the calling of a child of this age as a witness ... The jury could not attach any value to the evidence of a child of five: it is ridiculous to suppose that they could ... in any circumstances to call a little child of the age of five seems to us to be most undesirable, and I hope it will not occur again.

These remarks were taken on board by the legal profession, making lawyers very diffident about even attempting to call young children as witnesses.

During the 1980s the rules on competency, like the rules on corroboration, were increasingly attacked. Against them critics made the following four simple points. First, the practical effect of the competency requirement—particularly when taken together with the hearsay rule—was to confer impunity on many child abusers, particularly those who chose victims who were very young. Secondly, little children were usually able to provide reliable information about events they had experienced well before they had the mental and verbal capability required to articulate the difference between truth and falsehood and to explain why it is important to tell the truth, as the rules about competency required. Thirdly, the ability to satisfy the competency requirement was in reality no guarantee that, having done so, the child’s evidence would actually be truthful. And fourthly, and more fundamentally, the immaturity of a witness and his or her ability to understand (and explain) the difference between truth and falsehood was something

<sup>17</sup> *Hayes* (1976) 64 Cr App R 194; for a late example of the earlier practice being followed, see *Fawcett*, *The Times*, 20 November 1976.

<sup>18</sup> *Wallwork* (1958) 42 Cr App R 153.

which, in principle, ought to go to the weight the court is prepared to place upon the evidence, not whether it will listen to it or not.

In 1989 these arguments convinced the Pigot Committee, which recommended that all children who are capable of communicating intelligibly should be competent to give evidence, and that all witnesses under the age of 14 should do so unsworn.<sup>19</sup> A few months later, the Court of Appeal disavowed the decision in *Wallwork*, insofar as it purported to impose a minimum age for giving evidence.<sup>20</sup> Then just after this, the government accepted the Pigot Committee's recommendation and introduced legislation<sup>21</sup> designed to abolish the existing competency requirement. Unfortunately the resulting provision was ineptly and obscurely drafted,<sup>22</sup> but the courts, with some difficulty, managed to find that it had produced the desired effect.<sup>23</sup>

Then in 1999 Parliament put the matter beyond doubt by enacting new and clearer provisions in part 2 of the Youth Justice and Criminal Evidence Act. The key provision is section 53, of which the relevant parts are as follows:

- (1) At every stage in criminal proceedings all persons are (whatever their age) competent to give evidence.
- (2) Subsection (1) has effect subject to subsection (3)...
- (3) A person is not competent to give evidence in criminal proceedings if it appears to the court that he is not a person who is able to—
  - (a) understand questions put to him as a witness and
  - (b) give answers to them which can be understood.

This basic rule is elaborated in the four sections that follow, one of which—section 55(2)—provides that all children under the age of 14 shall give evidence unsworn.

In *Barker*,<sup>24</sup> the Court of Appeal—following what had already been said in several previous cases<sup>25</sup>—held that this provision means exactly what it says. It is not, they said, to be read subject to any gloss to the effect that the witness must understand the special importance of telling the truth in court, or that he or she must be able to understand each and every question put. And it added that

[39] ... whenever the competency question is addressed, what is required is not the exercise of a discretion by the making of a judgement, that is whether the witness fulfils the statutory criteria. In short, it is not open to the judge to create or impose some additional but non-statutory criteria based on the approach of earlier generations to the evidence of small children.

The approach of earlier generations, said the court, was based on 'accreted suspicions and misunderstandings about children, and their capacity to understand

<sup>19</sup> Pigot Report, reprinted as chapter 10 below, §5.14 and §5.15, and recommendations 17 and 18.

<sup>20</sup> *Z* [1990] 2 QB 335.

<sup>21</sup> Criminal Justice Act 1991, s 52.

<sup>22</sup> The unhappy tale is set out in Spencer and Flin (n 2), 62–63.

<sup>23</sup> *Hampshire* [1996] QB 1; *DPP v M* [1997] 2 Cr App R 70.

<sup>24</sup> *Barker* [2010] EWCA Crim 4, [2011] *Crim LR* 233.

<sup>25</sup> *MacPherson* [2005] EWCA Crim 3605, [2006] 1 Cr App R 30; *Powell* [2006] EWCA Crim 3, [2006] 1 Cr App R 31.



the nature and purpose of an oath and to give truthful and accurate information at trial', which have now been swept away.

In this case, the defendant had been accused of the anal rape of a little girl, virtually the only evidence of its commission being what she had told various people about it afterwards. After making several unprompted disclosures, she was video-interviewed by a woman police officer and a social worker with a view to criminal proceedings, when she was aged three-and-a-half. A year later, when the case finally came to trial, the tape of the interview was played as her evidence-in-chief, after which she underwent a live cross-examination, conducted through a live video link. On this evidence a jury at the Old Bailey convicted.

On appeal, the defence sought to persuade the Court of Appeal that the child was not competent as a witness—without success, as we have seen. One of the fall-back arguments was, in effect, 'But if she was competent, surely a conviction cannot be safe if it is founded on such evidence as this?' In the days when the law forbade courts to convict on the unsworn evidence of children unless corroborated, this argument would necessarily have succeeded. But as we have seen, the corroboration requirement has been abolished. Thus the defendant's fall-back argument also failed, and his conviction was affirmed.

## The 'Adversarial Package'

By the 'adversarial package' I mean, as previously mentioned, a combination of the following traditional rules. First, that witnesses must tell their tale in open court, in the physical presence of the defendant; secondly, that the whole of their tale must be told under these conditions: they must tell the whole of their story in open court, from the beginning to the end, and must do so without incorporating or referring back to statements they have previously made; and thirdly, having so given their account, they must then submit to an adversarial cross-examination by someone whose agenda is to persuade the court that their account is incomplete, or that they are lying or mistaken.

Giving evidence under these conditions can be a distressing experience even for an adult. For children, particularly young ones, these conditions often used to make it impossible for them to deliver their evidence at all. From the report in *Wallwork*, discussed above, we learn that when the little girl was called upon to give her evidence she was tongue-tied and unable to speak. And here from the same epoch is an even more dramatic account:

In a recent case when an accused exercised his right to question a small girl she appeared to realise his presence in the court for the first time, and dived screaming under the clerk's desk where she remained for the rest of the proceedings.<sup>26</sup>

<sup>26</sup> Magistrates' Association, *Memorandum on criminal procedure and child victims of sexual offences* (1962).

Since the 1980s, the first two of these elements have been modified to make allowances for children and indeed other vulnerable witnesses. But as we shall see, much less has been done to modify the third element—adversarial cross-examination.

### ‘Open Court’

Modifications to the first element—‘open court’—began many years ago. The explicit power of judges and magistrates to clear the court when children give evidence in sex cases dates back to 1908<sup>27</sup> and allowing child witnesses to be shielded from the defendant’s gaze by screens or by permitting them to testify from out of the courtroom via a live TV link are developments of the 1980s.<sup>28</sup> Today, however, the relevant law is to be found in the ‘special measures’ provisions of the Youth Justice and Criminal Evidence Act of 1999. Section 23 allows the court to direct that persons under 18, and certain other vulnerable witnesses, be screened from the gaze of the accused when giving evidence, and section 24 allows the court to direct that such persons be allowed to give evidence by means of a ‘live link’, meaning a live television link or other link enabling the witness to communicate with the persons asking questions, and to be seen by persons in the courtroom. Section 25 enables the court to be cleared of the general public when children and other vulnerable witnesses are giving evidence. And as a further measure to prevent contact between the accused and children and other vulnerable witnesses, sections 34–40 prohibit accused persons who are conducting their own defence from cross-examining such witnesses in person. (Where the accused is unrepresented, the court appoints a lawyer to conduct the cross-examination.)

### No Evidential Use of Previous Statements

The rule requiring witnesses to give the entirety of their evidence orally and without any reference to their previous statements was effectively gutted as regards child witnesses in 1991, when an Act of Parliament allowed the live evidence-in-chief of a child witness to be replaced by a videotape of a previous interview.<sup>29</sup> This provision was designed for what were then called ‘Memorandum interviews’, and are now called ‘ABE<sup>30</sup> interviews’: interviews conducted by the police and social services following the guidance contained in official documents published

<sup>27</sup> Children Act 1908, s 114; it was then replicated in the Children and Young Persons Act 1933, s 37.

<sup>28</sup> The live TV link was introduced by s 32 of the Criminal Justice Act 1988. Screens were introduced at the initiative of the judges: see Spencer and Flin (n 2), 99–100.

<sup>29</sup> Criminal Justice Act 1988, s 32A, inserted into that Act by s 54 of the Criminal Justice Act 1991.

<sup>30</sup> ‘ABE’ stands for ‘Achieving Best Evidence’—see the next note.

by the government.<sup>31</sup> Where one of these video-interviews has been conducted, this will now nearly always be played at trial, so relieving the child of the need to rehearse the whole unhappy story from the beginning in the courtroom. In practice, this makes it possible for the court to hear evidence from very young children which it would never have been able to hear before, even had they been deemed competent witnesses. (It was by this means, of course, that the court heard the evidence-in-chief of the little girl in *Barker*.)

However, the third element in the ‘adversarial package’—submission to an adversarial cross-examination—continues to cause grave difficulties for child witness. In essence, the problems it creates are two. One arises from the time at which this cross-examination currently takes place, and the other from the manner in which it is often done.

### Cross-examination: The ‘Timing Issue’

As regards the ‘timing issue’, the problem is that, as the law currently stands, the cross-examination must be conducted by the viva voce examination of the witness, live, at the defendant’s eventual trial; and this is so, however young and however vulnerable the child may be, however distressing the evidence, and no matter how long after the initial video-interview the trial takes place.

This state of affairs has three grave disadvantages, each of which is accentuated in a case like *Barker*, where the child is very young.

The first disadvantage is that justice fails when trials are abandoned before the issue of guilt or innocence can be determined on the basis of the evidence. Though it proved possible—surprisingly enough—to persuade the small girl in *Barker* to communicate with defence counsel under these conditions, meaningful communication often proves impossible, particularly with little children. Sometimes they cannot be persuaded to say anything intelligible, even though they managed to communicate intelligibly during the video-interview that has now taken the place of their live evidence-in-chief. Sometimes they are able to communicate intelligibly, but cannot be cross-examined to any useful purpose because by the time of trial they have forgotten all about the incident. And sometimes they cannot be cross-examined because they are scared out of their wits and unable to communicate at all: like a little girl in a case I once watched at Snaresbrook Crown Court, who got up from her chair as soon as the cross-examination started and just ran away.

Where the attempt to cross-examine the child fails, and (as often) the child’s evidence is central to the prosecution case and there is little other evidence, the judge will usually be obliged to stop the case, because it is considered to be a

<sup>31</sup> The first document was the *Memorandum of Good Practice on Video Recorded Interviews with Child Witnesses for Criminal Proceedings*, published by the Home Office and the Department of Health in 1992. This was later replaced by a document entitled *Achieving Best Evidence in Criminal Proceedings; Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures*, published by the Ministry of Justice, with input from other Departments; current version, 2011.

fundamental rule of criminal procedure that a defendant must not be convicted on the word of an accuser whose evidence he has not been able to challenge by putting questions.<sup>32</sup> The result will then be that the defendant is acquitted: and not because the evidence leaves the tribunal of fact in doubt about his guilt, but simply because the evidence, though available, cannot be tested as the law requires. He will be acquitted because justice has failed, in other words, rather than because justice has weighed the evidence and found it wanting. That this particular problem is currently a real one is demonstrated by the fact that it is a central feature in a number of unhappy cases that have reached the law reports.<sup>33</sup>

The second disadvantage of holding a cross-examination at this stage in the proceedings is that it is particularly burdensome for the child. The cross-examination of a child (or any other) complainant in a sex case will inevitably be a painful experience; but to hold it at the eventual trial is bound to add to the stress and pain. It means that, if the incident really happened, the child is forced to relive it at a time when she or he ought to be forgetting about it and getting on with life. It also means that the child has to undergo the stressful experience of coming to court, and probably waiting around, in a strange and hostile environment, getting increasingly tired and increasingly nervous.

This is vividly and painfully illustrated by what happened in the *Barker* case.<sup>34</sup> When the little girl had to be cross-examined she was brought to court for the beginning of the sitting on a Monday morning—a trip that required her carers to get her up at 6 am—only to find that the court was not ready for her. Having spent the whole of that day waiting around the Old Bailey she was then sent home unheard. With great difficulty she was persuaded to come back the next morning, only for the same thing to happen again. When the cross-examination finally took place in the afternoon of that day, she was exhausted and at the end of her tether, to the point where she was barely able to engage with the process of cross-examination at all.<sup>35</sup> Surely it is monstrous for the legal system to inflict an ordeal like this on a child of four if it is possible to avoid it.

The third disadvantage of a live cross-examination at the trial is that, where a little child can be induced to engage with the cross-examiner, any exchange is likely to be rudimentary, and to provide little real probing or testing of the child's evidence-in-chief. And whereas the two disadvantages previously examined operate to the benefit of the guilty, this one works to the detriment of the innocent.

Back in 1989, the Pigot Committee produced a scheme under which the whole of a child's evidence—cross-examination and all—would be taken ahead of trial. When the suspected offence came to light the child would first be interviewed by trained examiners, this interview being video-recorded. If this interview

<sup>32</sup> This point is elaborated in ch 9 below.

<sup>33</sup> *MacPherson* [2005] EWCA 3605, [2006] 1 Cr App R 30; *Powell* [2006] EWCA Crim 3, [2006] 1 Cr App R 31; *M* [2008] EWCA Crim 2751; *Malicki* [2009] EWCA Crim 365.

<sup>34</sup> This information comes by word of mouth from the police officers in the case who accompanied her.

<sup>35</sup> Information from the police officers involved in the case.

confirmed the commission of an offence the tape would be shown to the defence, who could then request a further interview at which they could put their questions to the child, in the presence of a judge. At the eventual trial, should there be one, the first video-interview would replace the child's live evidence-in-chief, the second video-interview would replace the child's live cross-examination, and the child would drop out of the proceedings. About the merits of this scheme, however, opinion was divided; and instead of the full Pigot scheme, the government of the day decided in 1990 to put forward the legislation that gave us the 'half-Pigot' scheme that is in force in England and Wales today: with all the disadvantages that have just been described.<sup>36</sup>

Pressure for the 'full Pigot' continued, and in response to this, Parliament—going further than the government had originally intended—inserted a section of the Youth Justice and Criminal Evidence Act 1999 that added pre-trial cross-examination to the list of 'special measures' provided for vulnerable witnesses by part II of that Act. This provision is section 28, the text of which is set out as an appendix to this chapter. But predictably, the government of the day, which had not wanted it, then did not implement it,<sup>37</sup> and to date, its successors have followed its example. For the best part of a decade the government—meaning in reality the relevant parts of the Civil Service—adhered to the position that it was out of the question even to hold an experiment.<sup>38</sup>

The main argument<sup>39</sup> that has been used against implementing pre-trial cross-examination is related to the issue of *disclosure*. The defence, it is said, would not be able to cross-examine the child effectively unless and until it had received full disclosure of all the evidence the prosecution had collected, including any 'unused material'. Under the statutory regime for disclosure,<sup>40</sup> this is likely to take place long after the initial video-interview, and perhaps only a relatively short time before the trial. A pre-trial cross-examination held at this late stage, it is said, would carry most of the disadvantages of a cross-examination at the trial—and as such it would add a further complication to cases with young witnesses without yielding any real benefits in return.

This may be a valid objection to conducting a pre-trial cross-examination in certain cases, but it is not a convincing reason for refusing to change the law to make it possible in all of them. Although there are cases where the issues are

<sup>36</sup> See n 29 above.

<sup>37</sup> Technically, the status of s 28 is that it is in force, but only for the limited purpose of making Rules and Regulations governing its operation, should it ever be properly in force. For an explanation of the labyrinthine process of implementation see JR Spencer, 'Special Measures and Unusual Muddles' (2008) 6 *Archbold News* 7–9.

<sup>38</sup> The story is told by Laura Hoyano, 'Coroners and Justice Act 2009: (3) Special Measures Directions Take Two: Entrenching Unequal Access to Justice?' [2010] *Crim LR* 345, 348–49.

<sup>39</sup> At one time a further objection was that a pre-trial cross-examination would oblige the defendant to reveal the nature of his defence ahead of trial, thereby infringing his right of silence. But this argument was forgotten once the Criminal Procedure and Investigations Act 1996 imposed a statutory duty on the defendants to disclose the nature of their defence in cases that are to be tried on indictment.

<sup>40</sup> Under the Criminal Procedure and Investigations Act 1996.

complex and the unused material voluminous, there are many others where there is no unused material to disclose, the issues in dispute are simple, and the questions the defence need to put to the child are obvious from the outset. Indeed, this was the situation in a number of cases in the law reports where the attempt to cross-examine a young child witness at the trial failed, the judge allowed the case to continue and the Court of Appeal then felt obliged to quash the resulting conviction.<sup>41</sup> In such cases, surely, an early pre-trial cross-examination could be done without any injustice to the defence: and indeed, to the benefit of the defendant, if he is innocent. So having pre-trial cross-examination available as an option, surely, would be an improvement, even if it were not a panacea. The fact that a reform will not solve every problem is not a sensible reason to reject a reform that would solve at least some of them. Furthermore, this (and other) objections to the implementation of section 28 are weakened by the knowledge that versions of the ‘full Pigot’ scheme have been introduced in a number of other countries. These include not only countries in continental Europe, but certain others in the common law world as well, headed by Western Australia—as readers will discover when reading the later chapters of this book.

A further argument for implementing section 28 is that a system of pre-trial cross-examination appears to be required in order to comply with European Union law. In 2001, the EU adopted a Framework Decision on the Rights of Victims,<sup>42</sup> which required all EU Member States to put in place various protections for the victims of crime—including, for vulnerable ones, mechanisms to enable their evidence to be given without having to appear in open court. According to Article 8(4):

Each Member State shall ensure that, where there is a need to protect victims—particularly those most vulnerable—from the effects of giving evidence in open court, victims may, by decision taken in open court, be entitled to testify in a manner which will enable this objective to be achieved, by any appropriate means compatible with its basic legal principles.

A Mrs Pupino, a teacher at an infant school in Italy, was accused of acts of cruelty to the children in her care. As Italian criminal procedure then stood, for the children’s evidence to be received in this type of case it was necessary for them to attend court and give evidence orally. In 2005, the Court of Justice of the European Communities held this state of affairs to be inconsistent with the obligations imposed by the Framework Decision.<sup>43</sup>

In the spring of 2012, as this book goes to press, there are now signs that—a mere 12 years after it was enacted—section 28 of the Youth Justice and Criminal

<sup>41</sup> Powell, and Malicki (n 33).

<sup>42</sup> Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings OJ L 82, 22 March 2001.

<sup>43</sup> Case C-105/03 *Criminal Proceedings Against Pupino* [2005] ECR I-5285; [2006] QB 83; noted (2005) 64 *Cambridge Law Journal* 569.

Evidence Act may eventually be implemented. In 2008 the Ministry of Justice<sup>44</sup> set up a working group to consider the practical issues of implementing the provision, and serious consultations are now taking place. It seems possible that an experiment, at least, will result.

### Cross-examination—The ‘Style Issue’

For child witnesses, the ‘style issue’ in connection with adversarial cross-examination is a combination of two things. First, where the party which has called the child (in practice, usually the prosecution) claims that he or she has told the truth, the cross-examiner will suggest to the child that she or he is lying or mistaken. Even adults who are mature enough to understand the reason why the suggestion must be made do not relish the experience of being publicly called liars, especially when they have told the truth; and for children who do not understand the reason the experience can be devastating.<sup>45</sup> Secondly, during cross-examination, a lawyer is allowed (and indeed encouraged) to put suggestive questions. Where a witness is suggestible, or inclined to be compliant with authority figures, suggestive questions are likely to produce answers that conform to the suggestion, whether or not they represent the truth. And obviously, child witnesses, particularly young ones, are more likely to be both suggestible and compliant than adults.

All this of this, of course, is part and parcel of an adversarial examination, the basic idea of which is that the witness is examined by a person who has an agenda, which is to get the witness to tell a story that fits with the theory of the case that the questioner already has in mind; and it is to be contrasted with the notion of an ‘inquisitorial examination’, where the witness is questioned by a person operating from a neutral standpoint, whose aim is to get the witness to tell the truth, however comfortable or uncomfortable it may be. Both methods have their advantages and their disadvantages: even the ‘inquisitorial method’, which tends to miscarry when the supposedly neutral questioner has an unconscious agenda of which she or he is unaware—with damaging results where the examiner is also the person who has to make the final decision in the case. But in the context of child witnesses, particularly those who are very young or highly vulnerable, the advantages of the inquisitorial method are widely thought to prevail over the disadvantages. And so it was that, in 1989, a majority of the Pigot Committee recommended that ‘the court should have discretion to order exceptionally that questions advocates wish to put to a child should be relayed through a person approved by the court who enjoys the child’s confidence’.<sup>46</sup>

<sup>44</sup> Which was created in 2007, and took over responsibility for reforms in criminal procedure from the Home Office.

<sup>45</sup> J Quas, G Goodman, S Ghetti, K Alexander, R Edelstein, A Redlich, I Cordon and DPH Jones, ‘Childhood Sexual Assault Victims: Long-term Outcomes After Testifying in Criminal Court’, *Monographs of the Society for Research in Child Development* 70, serial no 280, vii–145 (2005).

<sup>46</sup> Recommendation 6; see pp 254–255 below.

A similar recommendation was made nine years later in the official report *Speaking up for Justice*,<sup>47</sup> and shortly afterwards this led to the enactment of section 29 of the Youth Justice and Criminal Evidence Act 1989, which makes it possible for the court to order 'any examination of the witness (however and wherever conducted) to be conducted through an interpreter or other person approved by the court for the purposes of this section ('an intermediary')'. Readers will find the full text of this provision in the appendix to this chapter.

The wording of this provision contains what is sometimes called a 'constructive ambiguity': a form of words, capable of widely different interpretations, enabling a political purpose to be advanced by enabling both sides of a debate to believe that they have won. An 'intermediary' as so defined could be a person to whom is given, by the opposing sides, a list of issues to explore with the child in the manner that person considers most likely to bring out the truth. Or it could be someone more like an interpreter, whose role is limited to helping the usual team of adversarial questioners to put their questions in language that the child can understand. When, after an eight-year delay, section 29 was eventually implemented nationally,<sup>48</sup> it was the more limited type of intermediary who emerged from pages of the official manuals that the government produced, and who now operates in the courts of England and Wales. In consequence, the intermediaries that are currently in use are not a means by which child witnesses can be questioned inquisitorially rather than adversarially. They can improve on the situation as it used to be by ensuring child witnesses understand the questions that are put to them in cross-examination. But if the questioning is inappropriate in substance as well as form, they are not usually in a position to rectify this fundamental problem.

How far, if at all, adversarial cross-examination is a satisfactory method for testing the evidence of children is a complicated issue on which there is a great deal more to be said. It is the theme to which we shall return in the final chapter of this book.

The scheme of the rest of this book is as follows. In chapter two, Joyce Plotnikoff and Richard Woolfson, researchers with enormous practical experience, describe the problems that the traditional methods of cross-examination still cause for child witnesses, even after the reforms that have been carried out to date. The case they make for change could hardly be more compelling.

In chapter three, Emily Henderson reviews attempts to deal with these problems in a number of other criminal justice systems which, like England and Wales, follow the common law adversarial tradition as regards the examination of witnesses. One recurrent problem is delay: the long period that frequently elapses between the incident in relation to which the evidence of children is required and the date on which they are expected to give evidence about it live in court. In some places attempts have been made to deal with the problem by reducing these

<sup>47</sup> Note 1 above, at para 8.47.

<sup>48</sup> Joyce Plotnikoff and Richard Woolfson, 'Making Best Use of the Intermediary Special Measure at Trial [2008] *Crim LR* 91.



delays, in others to avoid their impact by taking the evidence of children ahead of trial. She also describes attempts to reduce the distress that cross-examination can cause to children, and the confusion that it can produce. A means currently employed to this end in England and Wales is the use of intermediaries. Dr Henderson describes how different types of intermediaries are used in South Africa, Israel and parts of the United States.

Among the countries where the adversarial tradition reigns there is one which, unlike England and Wales, immediately adopted the proposal of the Pigot Committee that the cross-examination of child witnesses should take place ahead of trial. This was Western Australia. In chapter four, Hal Jackson, a retired judge from Western Australia, describes how the system works in that jurisdiction. As readers will discover, the account he gives is a story of success. The author of chapter five, Annie Cossins, is an Australian academic who has been heavily involved in law reform in relation to sexual offences, and through that, the law of evidence. The theme of her chapter is that, on the basis of the Australian experience, pre-trial cross-examination is only part of the solution to a bigger problem, which is the nature of adversarial cross-examination itself. She concludes her chapter with practical suggestions as to how its abuses might be controlled. In chapter six, Emily Henderson then describes the movement to improve the position of child witnesses in her native land, New Zealand, where the government has recently announced its intention to promote reforms which are inspired in part by current practices in continental Europe.

In continental Europe, adversarial examination is not the usual method by which the evidence of witnesses is delivered to the court. Instead, they are usually examined by the presiding judge, with prosecution and defence being allowed to put supplementary questions afterwards. In many parts of Europe it used to be common for child witnesses to be examined ahead of trial, in private, in sessions during which the defence were given no opportunity to put their questions. If good for children, who were spared cross-examination, this system was obviously bad for defendants. It was also incompatible with Article 6(3)(d) of the European Convention on Human Rights, which—inspired by the traditions of the common law<sup>49</sup>—guarantees the right of the defendant to ‘examine or have examined witnesses against him’. In the light of all this, a number of continental countries have reformed their criminal procedure to give the defence a chance to put questions to child witnesses where this was previously impossible. The scheme adopted is for the child witness to be examined ahead of trial, as heretofore, but for the defence to be given an opportunity to have their questions put to the child during that examination. The result is something rather similar to what the Pigot Committee proposed—though reached by a journey that started from the opposite end of the road. In chapters seven and eight we learn how the examination of child witnesses

<sup>49</sup> As indeed is much of the rest of the Convention: a fact that is frequently forgotten in public discussion. On this see Jack Straw, ‘Human Rights in the Twenty-First Century’ (2007–08) *Cambridge Yearbook of European Legal Studies*, ch 16.

is now conducted in two countries which have followed the road this way to reach the Pigot destination: Austria, described for us by Verena Murschetz, of the Criminal Law Department at the Leopold Franzens University, Innsbruck, and Norway, described for us by Trond Myklebust, of the Norwegian Police University College.

In chapter nine John Spencer, one of the editors of this book, attempts to draw the threads of the previous discussion together. And the final chapter sets out the text of the Pigot Report—so making available to readers an important document which, though for many years an inspiration for reform, has for many years also been out of print.

# Appendix

## Youth Justice and Criminal Evidence Act 1999 (c.23)

28.— Video recorded cross-examination or re-examination.

- (1) Where a special measures direction provides for a video recording to be admitted under section 27 as evidence in chief of the witness, the direction may also provide—
  - (a) for any cross-examination of the witness, and any re-examination, to be recorded by means of a video recording; and
  - (b) for such a recording to be admitted, so far as it relates to any such cross-examination or re-examination, as evidence of the witness under cross-examination or on re-examination, as the case may be.
- (2) Such a recording must be made in the presence of such persons as Criminal Procedure Rules or the direction may provide and in the absence of the accused, but in circumstances in which—
  - (a) the judge or justices (or both) and legal representatives acting in the proceedings are able to see and hear the examination of the witness and to communicate with the persons in whose presence the recording is being made, and
  - (b) the accused is able to see and hear any such examination and to communicate with any legal representative acting for him.
- (3) Where two or more legal representatives are acting for a party to the proceedings, subsection (2)(a) and (b) are to be regarded as satisfied in relation to those representatives if at all material times they are satisfied in relation to at least one of them.
- (4) Where a special measures direction provides for a recording to be admitted under this section, the court may nevertheless subsequently direct that it is not to be so admitted if any requirement of subsection (2) or Criminal Procedure Rules or the direction has not been complied with to the satisfaction of the court.
- (5) Where in pursuance of subsection (1) a recording has been made of any examination of the witness, the witness may not be subsequently cross-examined or re-examined in respect of any evidence given by the witness in the proceedings (whether in any recording admissible under section 27 or this section or otherwise than in such a recording) unless the court gives a further special measures direction making such provision as is mentioned in subsection (1)(a) and (b) in relation to any subsequent cross-examination, and re-examination, of the witness.
- (6) The court may only give such a further direction if it appears to the court—
  - (a) that the proposed cross-examination is sought by a party to the proceedings as a result of that party having become aware, since the time when the original recording was made in pursuance of subsection (1), of a matter which that party could not with reasonable diligence have ascertained by then, or
  - (b) that for any other reason it is in the interests of justice to give the further direction.
- (7) Nothing in this section shall be read as applying in relation to any cross-examination of the witness by the accused in person (in a case where the accused is to be able to conduct any such cross-examination).

**29.— Examination of witness through intermediary.**

- (1) A special measures direction may provide for any examination of the witness (however and wherever conducted) to be conducted through an interpreter or other person approved by the court for the purposes of this section ('an intermediary').
- (2) The function of an intermediary is to communicate—
  - (a) to the witness, questions put to the witness, and
  - (b) to any person asking such questions, the answers given by the witness in reply to them,and to explain such questions or answers so far as necessary to enable them to be understood by the witness or person in question.
- (3) Any examination of the witness in pursuance of subsection (1) must take place in the presence of such persons as Criminal Procedure Rules or the direction may provide, but in circumstances in which—
  - (a) the judge or justices (or both) and legal representatives acting in the proceedings are able to see and hear the examination of the witness and to communicate with the intermediary, and
  - (b) (except in the case of a video recorded examination) the jury (if there is one) are able to see and hear the examination of the witness.
- (4) Where two or more legal representatives are acting for a party to the proceedings, subsection (3)(a) is to be regarded as satisfied in relation to those representatives if at all material times it is satisfied in relation to at least one of them.
- (5) A person may not act as an intermediary in a particular case except after making a declaration, in such form as may be prescribed by Criminal Procedure Rules, that he will faithfully perform his function as intermediary.
- (6) Subsection (1) does not apply to an interview of the witness which is recorded by means of a video recording with a view to its admission as evidence in chief of the witness; but a special measures direction may provide for such a recording to be admitted under section 27 if the interview was conducted through an intermediary and—
  - (a) that person complied with subsection (5) before the interview began, and
  - (b) the court's approval for the purposes of this section is given before the direction is given.
- (7) Section 1 of the Perjury Act 1911 (perjury) shall apply in relation to a person acting as an intermediary as it applies in relation to a person lawfully sworn as an interpreter in a judicial proceeding; and for this purpose, where a person acts as an intermediary in any proceeding which is not a judicial proceeding for the purposes of that section, that proceeding shall be taken to be part of the judicial proceeding in which the witness's evidence is given.