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UNIVERSITY OF DURHAM

DEPARTMENT OF LAW

MASTER OF JURISPRUDENCE

CHILD VICTIMS IN THE CROWN COURT

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of the Middle Temple

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17 JAN 2001

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Preface

This thesis intends to critically examine how a child victim of abuse is dealt with during a Crown Court trial. In trials for child abuse the victim would normally be the main prosecution witness, and so undoubtedly would be called to give evidence. However there has been substantial research conducted which has proved that the child abuse causes the victim significant physical and psychological damage, and this has led to a call for special protection to be given to victims during court proceedings.

Through analysing the main processes in a Crown Court trial, this thesis will demonstrate that the criminal justice system has already provided special measures to help child victims of abuse, but that these measures do not offer enough protection. The thesis will critically examine recent legislative amendments, together with proposals from established academics designed to improve the situation, to test whether they would be helpful to a child victim, and whether they are feasible alternatives. Where the conclusion is reached that either existing measures or new proposals would not help the child, the thesis will propose possible alternative schemes.

When talking about a Crown Court trial, the right of the defendant to due process must also be given prominent attention. Throughout this thesis, it will be demonstrated that quite often new measures designed to help a child victim may interfere with the defendant's rights. Where this happens, an analysis of human rights laws will take place to examine whether the measure remains viable, or whether as a result of the fundamental right to a fair trial, the rights of the defendant must come first. This tension between the right of the defendant and the right and needs of the child victim can be seen throughout the thesis, and it necessarily limits the final solutions to the problems child victims face.

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Chapter 1

Introduction

This thesis will examine the position of child victims of abuse during a trial for child abuse. There has always been concern at the treatment of children in an adult court, and the Pigot report¹ was the first serious attempt to tackle this problem. However, the Pigot report was never fully implemented and since that time, considerable pressure from bodies such as the N.S.P.C.C. and from academics and those within the criminal justice system, has led to calls for better protection to be offered.

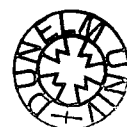
In 1998 the government set up a new working group to examine, inter alia, the position of child victims of abuse who are called as witnesses. Their report² has proposed major changes in the law, some of which have been enacted in the Youth Justice and Criminal Evidence Act 1999. However the legislation, and indeed the report, was limited to one sphere of the process: that of the testimony of the child.

Although the testimony of witnesses is probably the main process in the trial, there are other processes which can have considerable impact on a child victim. To some degree these aspects have been ignored both by the official governmental law reform bodies, and indeed by academics. Whereas there is considerable literature devoted to the testifying processes, little or no research has been dedicated specifically to ancillary matters.

This thesis intends to critically examine the treatment of a child victim in a Crown

¹ Home Office (1989) Report of the Advisory Group on Video Evidence HMSO London. Hereafter referred to as the *Pigot* report.

² Home Office (1998) Speaking up for Justice: Report of the Interdepartmental Working Group on Vulnerable and Intimidated Witnesses. Home Office. London



Court trial. It has been necessary to limit the scope of this thesis from the criminal justice system as a whole, to the Crown Court. However it is submitted that this is a prudent limitation as the majority of cases of child abuse will be heard at Crown Court level. This is due to the fact that some child abuse offences are triable only on indictment³ and even those which are triable either way⁴ would normally be so serious that they would be tried on indictment.⁵ However other limitations have also needed to be applied. Post-trial matters such as sentencing and post-conviction protection will not be examined in this thesis. The main justification for this is that the thesis is to examine the trial and matters following a verdict or a plea of guilt, are not in essence part of the "trial." Although it is fair to say that the child victim could be affected by these issues, the main aspects for concern in relation to child victims is the pre-verdict matters.

It will be necessary to take one step back from what is normally considered to be the start of the trial. The thesis will begin by examining the decision to prosecute. Although it could be considered that this is not part of the trial, it remains a vitally important aspect as decisions reached at this stage govern whether there will be a trial or not. This thesis will examine whether the child victim, or his parents, have, or should have, a say on the decision to prosecute. This will involve examining issues such as victims rights and its interface with the rights of society.)

The thesis will then turn to the issue of pre-trial delay. One of the main problems

³ For example rape (section 1, Sexual Offences Act 1956) and unlawful sexual intercourse with a girl under 13. (Section 5, Sexual Offences Act 1956)

⁴ For example, assault occasioning actual or grievous bodily harm (sections 47 and 20, Offences Against the Person Act 1861), indecent assault (sections 14 and 15, Sexual Offences Act 1956) and unlawful sexual intercourse with a girl under 16. (Section 6, Sexual Offences Act 1956)

⁵ The Mode of Trial guidelines gives guidance on either-way offences, and the presence of a vulnerable victim, is usually a reason to proceed on indictment. See Murphy, P. (ed) (1997) Blackstone's Criminal Practice Blackstone Press. London. pp.1010-1012.

identified in relation to child abuse cases is the problem of delay. This thesis will examine whether there is a problem with pre-trial delay, and then examine what difficulties this may cause. The chapter will conclude by assessing what can be done to tackle pre-trial delay in order to solve the problems this may cause a child.

Although child abuse can lead to a criminal prosecution, it is likely that the local authority would bring protection proceedings under the Children Act 1989. Given that these civil proceedings would examine the same, or similar, issues to the criminal trial, could this have an impact on the child, and indeed on the criminal process? The second part of this will examine the interaction between the civil and criminal processes, to decide whether this relationship is in conflict, and if so, what the effects of this are, together with exploring any solutions to the problem.

The third – and largest – section of this thesis will examine the testimony of children. As was noted above, the testimony of witnesses is the major process in the trial, and in cases of child abuse it is likely that the child will be the main prosecution witness. This part of the thesis will begin by examining the preliminaries of testifying (competence, compellability etc.) before moving on to the actual process of taking the testimony. In each case the current system will be examined, the strengths and weaknesses identified and then a critical examination of the proposed reforms will be undertaken to conclude whether they will improve the situation.

Although this thesis focuses on child victims of abuse, whenever one is discussing the trial process it is necessary to examine the right of the defendant to due process. When discussing possible reforms in order to help the child victim, such reforms must not be incompatible with the right of the defendant to a fair trial. Throughout this thesis I

will therefore be assessing whether it is possible to make such reforms without conflicting with the right to a fair trial, or whether the needs of the individual victim and the rights of the defendant act against each other.

The Human Rights Act 1998 has helped strengthen the arguments concerning rights; not only in relation to the rights of the defendant, but the rights of individual members of society, and society as a whole. The Act will, when implemented, incorporate much of the European Convention on Human Rights into domestic law. Although this Act will not be implemented until October 2000, for the purposes of this thesis it will be taken as implemented. The justification for this is it would seem prudent to analyse the position of both the child victim and the defendant after the incorporation of such an important instrument.

The law, subject to the point concerning the Human Rights Act 1998 noted above, is correct as of the date of submission.

Chapter 2

Decision to Prosecute

One of the most important aspects of the pre-trial process is the decision to prosecute. This chapter aims to assess the criteria used to decide whether a prosecution should be brought, this will involve examining aspects such as who makes the decision, what factors are taken into account when making this decision and where these factors are set out.

WHO MAKES THE DECISION?

In 1986 the Crown Prosecution Service came into being with the responsibility for prosecuting the majority of offences brought by the Crown. Child protection is considered to be an inter-agency concern but *Working Together*¹ notes that this does not extend to the decision to prosecute as the matter remains one solely for the CPS, although they may, if they so wish, consult other agencies involved in the child protection framework.²

However it could be questioned whether this is the most appropriate way of making the decision. It could be argued that since other aspects of child protection are conducted along inter-agency co-operation guidelines, the decision to prosecute should also be a multi-agency decision. If a multi-agency prosecutorial review was established it is likely that the child protection conference³ would be the body given responsibility for this decision. Although multi-agency prosecutorial review could

¹ *Working Together Under the Children Act 1989* (1991). HMSO. London

² *Ibid.*, at para 4.12

³ The child protection conference is a forum for professionals of different agencies to be brought together to make decisions on the child's welfare. *Working Together* (1991) pp.41-51

carry some advantages – most notably that the impact a prosecution would have on the child's life would be more readily understood⁴ – it is likely that these agencies would focus strongly on the individual child rather than public policy arguments. This could be because a case conference is a creature of inter-agency co-operation, and thus perhaps not surprisingly, many members may not be familiar with the criminal justice system. A second reason may be that the main purpose of a case conference is deciding matters relating to the civil protection system⁵ which requires a child-specific focus. However, in England and Wales, a prosecution is supposed to be the mechanism by which society can punish those who breach its rules⁶ and accordingly it is important that reference is made to public considerations. For this to be effective it is necessary that the decision is taken by reference to society rather than by focusing on the needs of a particular victim. The CPS are more likely to be able to appreciate the need to take society's interests into account, and as such it is submitted that the decision to prosecute in child abuse cases should remain with them.

CRITERIA FOR DECISION

Section 10, Prosecution of Offenders Act 1985 states that the CPS must publish a Code for Crown Prosecutors so that the public understand the criteria for the decision. The latest version of the Code was published in 1994 and Appendix A reproduces this code.

The Code establishes two tests which have to be applied to decide whether a prosecution should be brought.⁷ The first test is the evidential test⁸ and the second is

⁴ Because representatives of health, social welfare, education etc. would be present

⁵ See *Working Together* (1991) pp. 41-51 for further details on the purpose of a conference.

⁶ See Ashworth, A. Punishment and Compensation: Victims, Offenders and the State (1986) 6 O.J.L.S. 86 and see below for further arguments as to public policy

⁷ Paragraph 4 of the Code

⁸ As defined in paragraph 5

the public interest test.⁹

Evidential Test

The evidential test is largely uncontroversial. The purpose of the test is to ensure that only cases that have a reasonable chance of success are brought. Barbara Mills Q.C., the former Director of Public Prosecutions,¹⁰ states that this is not a mathematical test but an objective one:

*There must be enough evidence for the tribunal, properly directed in accordance with the law, to be more likely than not to convict the defendant of the offence alleged.*¹¹

It must be correct that only cases which stand a reasonable chance of success are brought. Rose¹² notes that formerly the police would, on occasion, prosecute on a “wing and a prayer...often the evidence was incredibly weak.”¹³ The reason Rose gives is that the police hoped that guilty pleas would be forthcoming. However, he notes that the police now accept that the costs of abortive court proceedings requires that cases should only be brought when there is a reasonable prospect of a conviction.¹⁴

The consequence for child abuse proceedings is that the CPS cannot say it will *always* prosecute persons suspected of child abuse. The Code ensures that the evidential test must always be passed.

Public Interest Test

The public interest test takes as its justification a statement by Lord Shawcross, a

⁹ As defined in paragraph 6

¹⁰ Mills, B. The Code for Crown Prosecutors (1994) 144 NLJ 899

¹¹ Ibid., at 900

¹² Rose, D. (1996) In the Name of the Law: The Collapse of Criminal Justice. Vintage. London.

¹³ Ibid., at 142

¹⁴ Ibid., at 143

former Attorney-General, who said:

*It has never been the rule in this country... I hope it never will be – that suspected criminal offences must automatically be the subject of prosecution.*¹⁵

The Code lists factors in favour of a prosecution¹⁶ and those factors which would militate against a prosecution.¹⁷ Although these factors are not unexceptionable, some have particular relevance for child abuse cases:

For

- (a) the defendant was in a position of authority or trust
- (b) the victim of the offence was vulnerable

Against

- (e) a prosecution is likely to have a very bad effect on the victim's physical or mental health, always bearing in mind the seriousness of the offence.

On that basis it is likely that for a crime of child abuse the public interest may well be satisfied. The 1992 version of the Code stated that:

*a prosecution is almost always considered to be in the public interest in the case of sexual assaults against children.*¹⁸

This has been dropped from the 1994 version¹⁹ but given factor (b) it is likely that a prosecution will almost always be considered to be in the public interest.²⁰

Use of the Code

The Code is published under the authority of statute but it does not have any direct legal effect, although the courts have, on some occasions, taken the code into

¹⁵ Paragraph 6.1 of the Code.

¹⁶ Paragraph 6.4

¹⁷ Paragraph 6.5

¹⁸ Paragraph 8 of the 1992 Code.

¹⁹ The reason for this is discussed below.

²⁰ As children, by definition, would be "vulnerable."

account.²¹ There is doubt as to how often the Code is used by the CPS. Hoyano et al.²² state:

*Most prosecutors regard the Code as a very basic document to which they saw no need to refer to on a regular or even occasional basis... The Code is a Noddy's guide to the principles on which the CPS operates.*²³

Rose agrees:

*although the Code for Crown Prosecutors is publicly available, the CPS makes most of its day-to-day operational decisions on the basis of its voluminous "manuals", which are said to contain much more detailed guidance...*²⁴

The difficulty is that these manuals are restricted.²⁵ Accordingly, it is difficult to discover which factors or considerations are taken into account by prosecutors when deciding whether to prosecute.

THE CHILD VICTIM

The Code for Crown Prosecutors does not make any express reference to child abuse cases. How does the CPS make a decision in such cases? The CPS consider themselves bound by the United Nations Convention on the Rights of a Child.²⁶

Article 3(1) of this Convention states:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be primary consideration.

²¹ In *R v D.P.P., ex parte C* (1997) 159 J.P. 227 the court held that a failure to act within the Code is capable of being judicially reviewed.

²² Hoyana et al. *A study of the Impact of the Revised Code for Crown Prosecutors* [1993] Crim. L.R. 556

²³ Ibid., at 558

²⁴ Rose (1996) p.145

²⁵ Ashworth, A. *The 'Public Interest' Element in Prosecutions* [1987] Crim L.R. 595 at 596

²⁶ See Plotnikoff, J. and Woolfson, R. (1995) *Prosecuting Child Abuse* Blackstone Press Ltd. London, p. 55 See pp.28-30 below as to the binding effect of the United Nations Convention in circumstances where an authority does not accept it is bound.

Given that the CPS consider themselves bound by the Convention this would appear to suggest that the “best interests of the child” shall be a primary consideration. Plotnikoff and Woolfson argue that this was why the commitment expressed in the 1992 Code to always prosecute suspected cases abuse was dropped.²⁷

Using the best interests of the child as the primary considerations in the decision to prosecute, however, can involve a difficult balancing of interests where the wishes of the child, the needs of the child and the requirements for effective law enforcement may pull in different directions. Cretney and Davis²⁸ summed up the difficulty when discussing domestic violence, where similar difficulties arise:

*The public interest is seen to demand the prosecution of “domestic” assault. But the interest of the victim may be much harder to discern, her wishes in the matter directly equivocal [SIC]... One cannot assume that a “successful” outcome, that is to say conviction and sentence, is in the woman’s interests.*²⁹

Similarly, Cobley³⁰ states:

*It may well be safe to assume that it is in the public interest that child abusers should be prosecuted... Yet, in many cases, once the child’s protection has been assured, there may be a conflict between the public interest in pursuing a prosecution and, the child’s best interests in having the case dealt with in a manner which causes the least stress and disruption.*³¹

As the United Nations Convention makes the interests of the child the primary and not the exclusive concern, the CPS should, as a matter of best practice, take into account the “interests of the victim”³² and Fenwick³³ argues the CPS are under a “duty” to consult the victim³⁴ to ascertain their interests and wishes. The Memorandum of Good

²⁷ See Plotnikoff & Woolfson (1995) p.55

²⁸ Cretney, A. and Davis, G. Prosecuting “Domestic” Assault [1996] Crim. L.R. 162

²⁹ Ibid., at 172

³⁰ Cobley, C. (1995) Child Abuse and the Law Cavendish Publishing Ltd. London

³¹ Ibid., at 160

³² Paragraph 6.7 of the Code

³³ Fenwick, H.M. Procedural ‘Rights’ of Victims of Crime (1997) 60 M.L.R. 317

³⁴ Ibid., at 325. The “duty” arises under the Victim’s Charter. Fenwick notes that this has an uncertain legal standing, whereby it has, at best, a quasi-legal basis, and at worst no legal standing at all. (See Ibid., at pp. 323-324)

Practice appears to confirm that both the interests and wishes of a child are a relevant consideration:

*In deciding whether... it is in the public interest that a case should be brought to trial... the Crown Prosecution Service will take into account the interests and wishes of the child.*³⁵

How does the CPS receive information on the child's best interests? Is it through direct consultation or through intermediaries? The Memorandum states that the police should provide this information³⁶ but Plotnikoff and Woolfson noted that in over 50% of cases the police failed to provide the data.³⁷ The CPS Inspectorate's report³⁸ showed that such failures now occur in over 70% of cases.³⁹ The Inspectorate rightly labelled this as "unsatisfactory".⁴⁰ Sadly no reason is given for this lack of compliance. Unless police practice is altered, it cannot be said that the CPS takes into account the wishes of the victim on any consistent basis.

Even when this information is brought to the attention of the CPS, it does not follow that if the child does not want to be involved in court proceedings the CPS will automatically drop the prosecution. No victim, including a child victim, has a veto over a prosecution. It is still necessary to balance the factors for and against a prosecution. Fortin⁴¹ argues:

*a decision not to prosecute may indicate to the abuser that, so far as the community is concerned, he did not commit the offence.*⁴²

³⁵ Memorandum, para. 2.15. The Memorandum is technically just that, a Memorandum and also has no legal standing. However, the courts have been willing to attach great significance to the Memorandum and as such this may have greater standing than the Victim's Charter.

³⁶ Ibid.

³⁷ Plotnikoff and Woolfson (1995) p.39

³⁸ *Thematic Review 1/98 The Inspectorate's Report on Cases Involving Child Witnesses* (1998) CPS. London.

³⁹ Ibid., at para 7.18

⁴⁰ Ibid., at 7.23

⁴¹ Fortin, J. (1998) *Children's Rights and the Developing Law*. Butterworths. London.

⁴² Ibid., at 424

Yet Cobley – although acknowledging society’s interests – states that there can be disadvantages in going ahead with a prosecution:

*If the abuser is acquitted, the child inevitably feels that he or she was not believed or that he or she was responsible... Even if the abuser is convicted, the child may feel responsible for the break-up of the family...*⁴³

Given these difficulties exist, it is submitted that there is no easy solution to the problem of when to prosecute. Sir William Utting⁴⁴ criticised the decrease in the number of prosecutions and stated this was failing children.⁴⁵ His report suggests that the CPS should prosecute in more cases. However this does not help the individual victim. It will be seen that testifying in court can be a harmful experience to children⁴⁶ but this is not to say a veto should exist. It is important that the child’s interests are taken into consideration but if necessary the public interest should be able to “trump” them and allow a prosecution to proceed.⁴⁷

PROSECUTORIAL REVIEW AND THE E.C.H.R.

It was noted in the previous section that the victim has no control over prosecution decisions. Would the implementation of the E.C.H.R. make any difference? It is beyond doubt that the CPS will be bound to act in accordance with the convention⁴⁸ and so if an argument could be made out whereby a prosecution decision would infringe a victim’s rights under the Convention, it is likely that the CPS would have to alter their approach to the case.

⁴³ Cobley (1995) p. 161

⁴⁴ Utting, Sir William (1996) People Like Us HMSO. London

⁴⁵ Ibid., at paras 20.3, 20.10

⁴⁶ See chapter 7 below

⁴⁷ See also the arguments relating to the compellability of children outlined below (pp.79-90) which have similar principles.

⁴⁸ See s.6(1), Human Rights Act 1998 and see R v Director of Public Prosecutions, ex parte Kebilene and others [1999] 3 W.L.R. 175, DC; [1999] 3 W.L.R. 972, HL

Harris et al.⁴⁹ believe that Article 8 could be used to force a state to use criminal sanctions to protect an individual's private or family life.⁵⁰ To support this theory they rely on the decision of the European Court of Human Rights in X and Y v Netherlands.⁵¹ Y was a 16 year old mentally handicapped girl who lived in a privately-owned home for mentally handicapped persons. The day after Y's sixteenth birthday, the son-in-law of the governess of the home forced Y to attend his room, undress and have sexual intercourse with him. Y suffered serious psychological consequences as a result of this act and X, Y's father complained to the police. The public prosecutor decided not to prosecute the offender unless he committed a similar offence within two years. X appealed to the Court of Appeal against this decision. The Court rejected the appeal stating that it was impossible to institute proceedings because a complaint was required from the actual victim: exceptions to this were where the complainant is under 16 or under guardianship. A person could only be placed under guardianship where they had reached the age of majority.⁵² There existed, therefore, a procedural gap in the legislation whereby no person could act on behalf of a person aged 16 or over but below the age of majority and who was incapable of submitting a complaint.

X, acting on behalf of himself and Y, appealed to the European Court of Human Rights alleging, inter alia, that this procedural gap was contrary to Article 8 of the European Convention. The European Court agreed stating:

*This is a case where fundamental values and essential objects of private life are at stake. Effective deterrence is indispensable in this area and it can be achieved only by criminal law provisions...*⁵³

⁴⁹ Harris et al. (1995) Law of the E.C.H.R. Butterworths. London.

⁵⁰ Ibid., pp. 321-324

⁵¹ (1995) 8 E.H.R.R. 235

⁵² In the Netherlands this age is 21. See Ibid. at 238.

⁵³ Ibid., at 241

It should be noted at the outset that this was clearly a very serious and obvious breach of human rights: there was a complete gap in the legislation which prevented proceedings being instituted on behalf of mentally-incapable persons between the ages of 16 and 21. However, it is submitted that *X and Y* could potentially be of wider significance. The European Court is stating that everyone has the right to be protected from abuse, and that this right should have criminal protection. Where this right is neglected then there will be a breach of Article 8.

The question that this raises is does the ratio of *X and Y* apply only to those cases where there is an obvious and serious breach (such as that which occurred in *X and Y* itself) or can there be a more general application? If it is possible to make out an argument that the State has, by applying its rules and regulations, failed to respect the right to be protected from undue harm, then this may amount to a breach of Article 8.

It should be noted at the outset that in the absence of a legislative gap of the manner found in *X and Y* it would be relatively rare for such a challenge to be brought, but it is argued here that it would not be impossible. If one relates this to the English prosecutorial review, it could be argued that the decision could be used to challenge a decision not to prosecute.⁵⁴ The key words in the ratio of *X and Y* were, it is submitted, “effective deterrence.” If it could be argued that a decision not to prosecute⁵⁵ fails to achieve effective deterrence, then this could amount to a breach of Article 8.

⁵⁴ n.b. Any possible argument would apply only where the decision not to prosecute was made on the public interest test. Where the prosecution was halted because of a lack of evidence, then the decision is unimpeachable.

⁵⁵ For example, if the CPS invoked the public interest criteria and decided to abandon a prosecution because the ages of the victim and offender were similar, or for non-sexual offences because of the impact it would have on other children of the family, or the offender himself.

Deterrence in this context has two meanings: individual deterrence – i.e. deterring the subject from harming the victim, or indeed anyone else again, and general deterrence – i.e. discouraging others to commit the offence. The concept of deterrence is quite important when dealing with child abuse as there could be a risk either that the victim could be abused again or that the offender will then go on to abuse another child. It should be remembered that the majority of the protection protocols put in place to safeguard society from abusers (e.g. sex offenders register⁵⁶, Schedule I,⁵⁷ Protection of Children Act 1999 etc.) all rely on a conviction. The European Court placed great emphasis on this point by noting that although the principal concern must be the victim, the “*need for protection [exists] erga omnes*”⁵⁸

Assuming, therefore, that it is possible – in exceptional circumstances – to make out an argument whereby a failure to exercise a discretion is found to be a failure to provide effective deterrence, then it may be possible that *prima facie* this amounts to a breach of Article 8 as defined by the ratio in *X and Y*. If that is so, then the next task is to decide whether the CPS would be required to reconsider its decision. One of the arguments put forward by the Dutch government was that the child was still protected because she had the right to pursue civil remedies. The Court, however, rejected this argument and agreed with the submission of the girl’s counsel that:

*the absence of any criminal investigation made it harder to furnish evidence [to prove] a wrongful act, fault, damage and a casual link between the act and damage.*⁵⁹

This would be true in English law too: a civil court is bound to accept a criminal

⁵⁶ Set up under the premises of the Sexual Offenders Act 1997

⁵⁷ Schedule I, Children and Young Persons Act 1933. For a discussion on the use of Schedule I see Gillespie, A.A. Reforming Schedule I [1998] Fam. Law 690.

⁵⁸ *X and Y*, op.cit., at 241

⁵⁹ *Ibid.*, at 240

conviction as evidence of the facts⁶⁰ and so a conviction makes the task of the victim – as plaintiff – considerably easier. The European Court also doubted whether a civil injunction would be able to provide “effective deterrence” especially when they are usually drafted to protect an individual rather than society.⁶¹

However, assuming that the courts accept that civil proceedings would not offer adequate protection, the CPS has one last argument. In English law there remains the possibility of a private prosecution. The CPS could argue that the criminal law provisions exist and that just because they will not prosecute does not mean the victim is not protected because the victim could instigate a private prosecution.

Although it is technically possible to still bring a public prosecution there are numerous difficulties in the way of doing so⁶² and Fenwick argues that most victims would find them “*too costly and burdensome*”⁶³ and the Court of Appeal has said of the process:

*...only the most sardonic could regard the launching of a private prosecution (a process which, incidentally, is becoming regarded with increasing disfavour in this country) as being equally convenient, beneficial and appropriate [as judicial review].*⁶⁴

As apparent from the last sentence in that quote, that case concerned judicial review. It is well-known that where there is an alternative to judicial review, the courts will not exercise their discretionary powers.⁶⁵ It is submitted that this is a position analogous to the arguments put forward by the Dutch government in *X and Y*: that

⁶⁰ Civil Evidence Act 1968, s.11(1)

⁶¹ *X and Y*, op.cit., at 241

⁶² See Saunders, E. Private Prosecutions and the Victims of Violent Crime (1995) 145 N.L.J. 1423

⁶³ Fenwick (1997) p.326

⁶⁴ R v Metropolitan Police Commissioner, ex parte Blackburn [1968] 1 All E.R. 763 at 777 per Edmund Davies L.J.

⁶⁵ Leyland, P. et al. (1994) Textbook on Administrative Law Blackstone Press. London. pp.304-305

where a suitable alternative exists whereby “effective deterrence” is provided, Article 8(1) will not apply. However the comments of Edmund Davies L.J. cast doubt over whether such a procedure could be said to be effective. One difficulty with private prosecutions are their cost⁶⁶ and this is particularly salient with child victims where it will be very unlikely that a child would have sufficient resources to launch such an action. Given that the European Court held that civil remedies were not sufficiently effective partly because of the inconvenience factor involved⁶⁷ it is submitted that a similar approach would be taken in respect of private prosecutions.

If it is possible, therefore, to formulate an argument that a refusal to prosecute is capable of being a breach of the right to respect for private and family life, then this may mean that the CPS would be forced to prosecute. If this is the case then it would mean a considerable departure from the current position whereby the “demands” of a victim count for very little. In child abuse cases the additional complication would be who should the CPS consult with? In the majority of cases the child will not be mature enough to make this decision and so presumably the parent or guardian would need to be consulted. The difficulty with asking the parent or guardian is that their view may not necessarily be in the “best interests of the child.” This could potentially cause a conflict between Article 3(1), United Nations Convention on the Rights of the Child and Article 8 of the E.C.H.R. This conflict would be exacerbated somewhat by the fact that the United Nations Convention has not been incorporated into English law in the same way as the European Convention has, although this does not necessarily mean that it is not binding.⁶⁸

⁶⁶ See Saunders (1995) p.146

⁶⁷ See *X and Y*, op.cit., at 239-241

⁶⁸ See pp. 28-30 below.

Chapter 3

Delay

We now turn to the issue of pre-trial delay. The Pigot Committee said of this:

*the most substantial [difficulty] faced by children... is the extraordinary and, in our view, quite unacceptable delay which they must often endure before cases come to court.*¹

The purpose of this chapter is to assess how effective the criminal justice system is at reducing unnecessary delay for child abuse cases.

The problem of delay is not new. Plotnikoff and Woolfson report that over 30 years ago, the Magistrates' Association was concerned at the length of time it took for a child abuse case to reach court.² Since that time delays have increased, and successive government have attempted to speed up child abuse cases, eventually settling on the notice of transfer procedure.

Notice of Transfer Procedure

The notice of transfer procedure was created by s.53(1), Criminal Justice Act 1991, and allows the CPS to issue a notice of transfer to the magistrates which has the effect of transferring the case to the Crown Court, bypassing normal committal proceedings.³ Wasik and Taylor⁴ argue that the main reason for the introduction of the

¹ Ibid., at para. 1.20

² Plotnikoff & Woolfson (1995) p.5

³ Currently the only types of cases this scheme may be used for is serious fraud cases and offences against children.(see s.4, Criminal Justice Act 1988 and s.53, Criminal Justice Act 1991) It had been intended to extend this scheme to all criminal matters triable on indictment, but the scheme was aborted after a very short time. It is not the place of this thesis to discuss the merits of this decision but it should be noted that the scheme still exists for matters of child abuse.

⁴ Wasik, M. and Taylor, R.D. (1994) Blackstone's Guide to the Criminal Justice Act 1991 (2nd Ed) Blackstone Press. London.

scheme was to reduce delay.⁵ We must now assess whether the procedure has been able to achieve a reduction in delay.

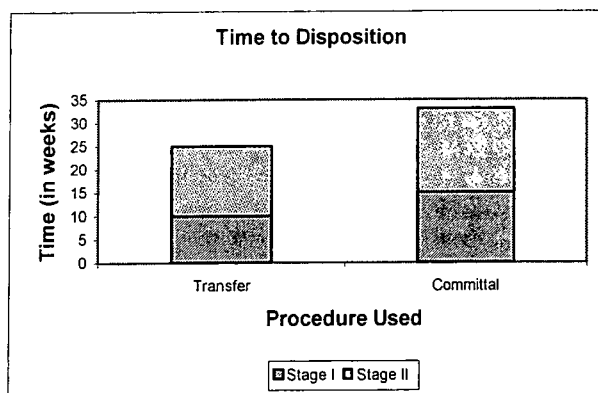


Figure 3.1

Figure 3.1, above, shows the average total time of disposition for cases transferred to the Crown Court and those committed to the Crown Court.⁶ It can be seen that those transferred to the Crown Court are disposed of significantly quicker. If one looks at the individual stages represented on the chart⁷ it can be seen that the greatest discrepancy between the two procedures relates to stage I proceedings the stage for which the notice of transfer procedure were designed to tackle. Plotnikoff and Woolfson reported that their research showed some cases where the notice of transfer procedure involved more delay than committal proceedings.⁸ It would appear from the more recent data recorded by the CPS Inspectorate – upon which Figures 3.1 to 3.4 are based – that the findings of Plotnikoff and Woolfson are no longer valid. The CPS Inspectorate examined 6 individual CPS branches (named A to F) and figures 3.2 to 3.4 shown overleaf break down the CPS figures into these

⁵ Ibid., at 143

⁶ It should be noted that the study uses a like-for-like comparison model so that the cases committed are child abuse cases that could have used the notice of transfer scheme.

⁷ Stage I relates to the period between charge and either transfer or committal, and stage II relates to the period from entry into the Crown Court to final disposition.

⁸ Plotnikoff & Woolfson (1995) p.48

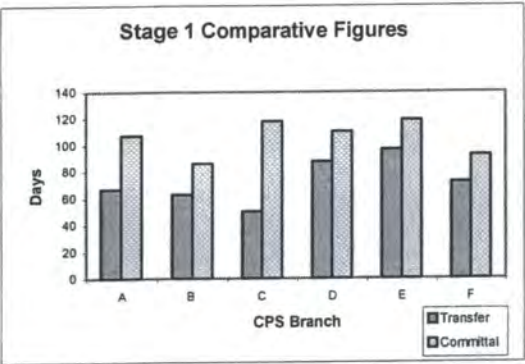


Figure 3.2

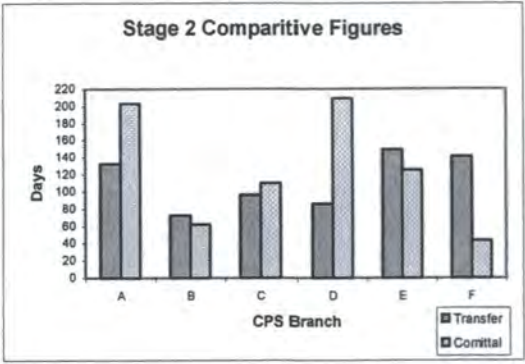


Figure 3.3

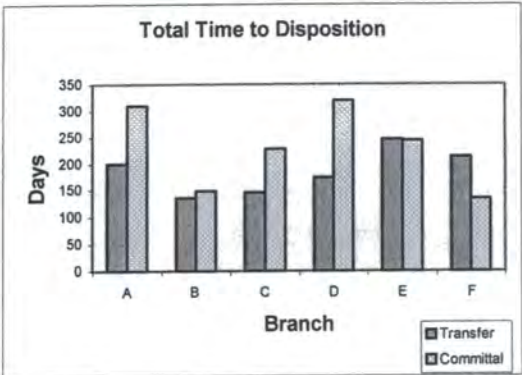


Figure 3.4

individual branches. In this way it is possible to conduct a more detailed analysis of the trends shown.

If one examines figure 3.4 first, this gives the total time of disposition for each of the six branches. It can be seen that in two of the branches (E and F) the notice of transfer procedure took longer than committal proceedings. In a third branch (B) the difference between the two procedures was insignificant. This would seem to indicate that Plotnikoff and Woolfson’s research may remain credible. However, if we look at the figures for each individual stage of a trial, a different picture can be seen. Figure 3.2 shows the comparative figures for stage I proceedings, i.e. the period between charge and either transfer or committal. It can be seen that in all six branches the notice of transfer procedure was significantly quicker than committals. Given that this

is the stage for which the transfer procedure was designed to tackle, it would appear that it is effective. However the question then needs to be asked why this success is not reflected in the general figures? The answer lies in Stage II (transfer or committal to final disposition). Figure 3.3 shows the figures in relation Stage II and it can be seen that in three of the branches (B, E and F) notice of transfer proceedings took longer to dispose of than had they proceeded under committals. No reason was given as to why stage II proceedings take longer, the CPS Inspectorate does, however, note this discrepancy:

[the data] shows that in many instances, corresponding improvements in the length of time between transfer and disposal have yet to materialise.⁹

This would seem to indicate that there was an expectation that stage II proceedings would be somewhat quicker. That this has not happened is very disappointing: there is little or no point in speeding up the time it takes a case to reach the Crown Court, if the delay is then re-introduced at the next stage. A prime example of this is branch F where notice of transfer proceedings led to cases reaching the Crown Court quicker than had they been dealt with under the committal system, yet because of delay once at the Crown Court, the total effect was that there was no advantage in electing for notice of transfer. It is unacceptable for delay to be re-introduced in this way: notice of transfer procedures could reduce delay, but for this to happen, it is necessary to keep a tight grip on what happens to the case once it reaches the Crown Court.

Reform of Transfer

The notice of transfer procedure can only be used for offences against children or serious fraud cases. However, recent legislation may be of further assistance in the

⁹ Thematic Review 1/98, para. 8.11

quest to reduce delay. The Crime and Disorder Act 1998 has introduced a new scheme for reducing delay. Under section 51, when a defendant is presented to the Magistrates' Court for an indictable-only offence, the case should be sent directly to the Crown Court, i.e. bypassing notice of transfer or committal proceedings. Where the defendant is also facing either-way or summary offences which the Magistrates' Court believe "to be related to the indictable offence" then these charges are sent directly to the Crown Court too.¹⁰ When implemented, this scheme should reduce pre-trial delay, but this will require the courts to keep track of cases to ensure that delay is not re-introduced at Crown Court level.

Pre-Trial Hearings

One proposed solution to the problem of delay was pre-trial hearings. The first measure to be introduced was the plea and directions hearing.¹¹ Plea and Directions hearings apply to all Crown Court trials except for serious fraud cases.¹² A questionnaire was created to help courts deal with all the matters covered by the hearing¹³ and this is reproduced at Appendix B.

The first matter to be dealt with at the pre-trial hearing is plea.¹⁴ After plea has been taken then the judge may make a ruling as to the admissibility of evidence or a matter

¹⁰ Crime and Disorder Act 1998, s.51(1)(b) when read in conjunction with sub-section (11)

¹¹ Introduced by Practice Direction: Crown Court (Plea and Directions Hearing) [1995] 1 WLR 1318

¹² Ibid.

¹³ Ibid., at 1321

¹⁴ In an attempt to reduce delay, there is now in existence a scheme known as "plea before venue" (Introduced by s.49, Criminal Procedures and Investigation Act 1996) For the purposes of either-way offences, this scheme would mean the defendant would have to indicate at the committal hearing which way he intends to plead. If he intends to plead guilty then the Magistrates would then go on to sentence him. Alternatively, if he intends to plead not guilty then the mode of trial decision is taken and the actual plea is not recorded until the defendant has reached the Crown Court. See Bavidge, G. and Kerrigan, K. Plea before Venue (1998) 148 NLJ 62 and Home Office Circular 45/1997 Plea before venue. Also note that if a notice of transfer procedure is served then the plea before venue scheme would not apply as the Magistrates' hearing would be bypassed.

of law in connection to the case.¹⁵ The questionnaire expressly states that applications for special measures should be made at the hearing. Deciding these issues pre-trial should help prevent delays at the time of the trial. Plotnikoff & Woolfson, however, argue that the hearings did not work:

*judges at pre-trial hearings are often reluctant to make decisions which bind the trial judge...*¹⁶

The Practice Direction governing plea and direction hearings states that the trial judge should normally conduct the hearing¹⁷ but that where the case is to be heard by a High Court judge other provisions may be made. McConville and Bridges¹⁸ note that under the scheme, trial counsel were expected to appear at the hearing¹⁹ but agree with Professor Zander – a then member of the Royal Commission – that this would be unlikely to succeed.²⁰ Spencer argues that the procedure has not been as effective as it could be, and blames a tendency to “slip back into the old ways” as the reason.²¹ This would seem to be confirmed by policy statements made by the Home Office which show that delay continues.

Listing

The problem of delay is shown most acutely by the listing process. As is well-known, there are three ways of listing a trial; fixed (where a specific date is given), warned (where the parties are given a 7-14 day period and 24 hours notice of trial) and floaters (Where the parties are not given a specific court or judge and the trial it is not

¹⁵ Section 40(1), Criminal Procedure and Investigations Act 1996

¹⁶ Plotnikoff & Woolfson (1995) p. 88

¹⁷ Practice Direction, op.cit., at 1319: para 7

¹⁸ McConville, M. and Bridges, L. Keeping faith with their own convictions: the Royal Commission on Criminal Justice in McConville and Bridges (1994) Criminal Justice In Crisis Edward Algar Publishing. Aldershot.

¹⁹ Ibid., p.20

²⁰ Ibid.

²¹ Spencer and Flin (1993) p.32

reached on a particular day, relisting occurs). It should be obvious that a floater is the least desirable method of listing a case and a fixed date is to be preferred. Plotnikoff and Woolfson note:

*CPS clerks sometimes voiced frustration that their requests to the Crown Court for fixtures, or their observation that cases were "unsuitable for the warned list" were ignored...*²²

The implications of this could be quite serious. Morgan and Williams²³ argue that forcing a child to attend court, wait for hours and then not be called because the case is put back can cause considerable stress.²⁴ This is an important point and a reason for suggesting that child abuse cases should be given only a fixed listing. With warned listings, the parties and those involved are given a date when the trial should begin. However, if the preceding trial goes beyond its estimated length, this, inevitably, further delays the trial.

Where a case has been transferred to the Crown Court it is suggested that it should be assigned a fixed listing. At the pre-trial review, counsel for the defence and prosecution should be asked to give an estimate as to how long the case will take. The listing officer should take that into account and give a fixed date listing. For this to be effective, it requires judges to be strict when ruling on requests for adjournments, although there is evidence to suggest that judges already take such an approach.²⁵ If it is feasible to introduce such a scheme, its introduction would be of great benefit for abused children.

²² Plotnikoff & Woolfson (1995) p.73

²³ Morgan, J. and Williams, J. Child Witnesses and the Legal Process (1992) 6 JSWFL 484

²⁴ Ibid., at p.487

²⁵ Hoon (Hoon, G. Reshaping the Criminal Courts in Crawford, A. and Walker, C. (Eds) (1998) The Renewal of Criminal Justice. Centre for Criminal Justice Studies. Leeds) states that 1 in 3 Crown Court cases are adjourned (p.3) whereas the CPS Inspectorate reports that for child abuse cases the figure is 1 in 5

EFFECT OF DELAY

While delay remains a problem within the criminal justice system, there will be adverse effects upon children. Morgan and Williams reasonably assume that it must increase the child's "*anxiety and apprehension*."²⁶ Spencer & Flin speculate that there may be a link between delay and the quality of the child's testimony,²⁷ with increased stress²⁸ which may make them appear less convincing witnesses.²⁹ These problems by themselves demonstrate the importance of reducing delay. There is, however, yet another concern, a matter of crucial importance for abused children.

Therapy

Therapy is a controversial subject. We will not consider the various forms of therapy or decide on its merits. Our concern is that therapy required by a child may well be delayed until *after* the trial. Why is this necessary? The Memorandum of Good Practice gives the following guidance:

*Once the video recorded statement is complete, it should be possible for appropriate counselling and therapy to take place.*³⁰

Lyon and de Cruz³¹ take issue with this however:

*Case-law suggests that a child's evidence will be excluded altogether if therapy takes place after the interview.*³²

Plotnikoff and Woolfson argue that there is no reason why therapy should not take place before trial, although they note that prosecuting authorities are nervous about

²⁶ Ibid., at 491

²⁷ Spencer & Flin (1993) pp. 299-301

²⁸ Ibid., pp 363-367

²⁹ Ibid., at pp. 373-374

³⁰ Ibid., at para. 3.44

³¹ Lyon, C. and de Cruz, P. (1993) Child Abuse (2nd Ed) Family Law. Bristol

³² Ibid., at p.305

permitting it.³³ Fortin, moreover, notes that:

*CPS lawyers continue to argue that therapy undermines a child's ability to provide uncontaminated evidence when and if cross-examined at the trial itself.*³⁴

and continues by stating that this attitude is preventing children from receiving “urgently needed” therapeutic treatment.³⁵

The CPS have recently issued a new draft good practice guidance on therapy³⁶ which recognises the problem but suggests that the question of therapy is not one for the CPS but for those involved with the child (i.e. social services and/or the family).³⁷ The guidance states that if the therapy might prejudice the case then the CPS should consider dropping the proceedings.³⁸ This does not address the issue of delaying therapy but merely advises consideration be given to whether an effective prosecution remains possible if therapy occurs. If CPS lawyers actively discourage therapy it is difficult to see how an effective balance between the needs of the child and the public interest in effective prosecution can be resolved.³⁹ The CPS, in consultation with other agencies, should decide which cases do require immediate therapy, and allow therapy to proceed, even if this risks prejudicing the trial.

A RIGHT TO THERAPY

If the CPS actively discourage access to therapy the question arises whether a child could assert a right to timely therapeutic treatment. Before turning to this question, it

³³ Plotnikoff & Woolfson (1995) p.50

³⁴ Fortin (1998) p.421

³⁵ Ibid.

³⁶ CPS (1999) Pre-trial therapy and child witnesses: current good practice guidance CPS. London

³⁷ Ibid., para. 4.2

³⁸ Ibid., para. 4.4

³⁹ Thematic Review 1/98, para. 7.26

should be noted that recent legislative amendments have provided for pre-trial cross-examination.⁴⁰ This allows a child to receive therapy pre-trial as soon as the cross-examination has been completed. The problem, however, is that considerable doubt exists as to the effectiveness of the scheme, and how often it will be used,⁴¹ and so the problem of deferred therapy may well continue for some considerable time. Accordingly, resolving whether there is a right to immediate therapy remains a live issue.

Whether to take a child for therapy is a matter of parental responsibility and for this reason it is necessary to examine the position of children in the care of their parents, and then those children in the care of the local authority.

Children in Care of Parents

Where the child is under the care of his or her parents then it is the responsibility of the parents to take the child for therapy. Where the therapy is to be given by the N.H.S., or some private body, then it is unlikely that the CPS or anyone else could prevent that therapy from taking place. The CPS might ask the parents not to give the child any therapy, because of likely prejudice to any prosecution, but if the parents choose to insist on therapy it is highly unlikely that the CPS could prevent therapy from taking place.

A possible complication would be if the therapy is to be provided by a therapist employed by the local authority. If the CPS ask the local authority not to make the therapist available until after the trial, then it is possible that they may agree to this

⁴⁰ Youth Justice and Criminal Evidence Act 1999, s.21(6)

⁴¹ See chapter 7 for further details on this.

request. In this situation it is likely that any challenge would have to be brought against the local authority.⁴²

Child in Care of Local Authority

The more controversial situation is where the child is under the care of a local authority, either through an interim care order⁴³ or a final care order.⁴⁴ In these circumstances the local authority has parental responsibility for the child⁴⁵ and as such they could – if the CPS make a request – decide to defer the therapy. Any challenge brought against this decision would be made against the local authority.

Local authorities have a general duty to “*safeguard and promote*” the welfare of children in their care.⁴⁶ It could be argued that in order to safeguard the welfare of the child, or at the very least to promote their welfare, it would be necessary to provide therapy when needed. How far does this duty go?

Although there is a duty to safeguard and promote the welfare of the child, there is nothing in s.22 which states that the welfare of the child should be the paramount consideration of the local authority.⁴⁷ Indeed, when making a decision about a child in care, the local authority must ascertain the wishes and feelings of, *inter alia*, the child, the child’s parents and “*any other person whose wishes and feelings the authority consider to be relevant.*”⁴⁸ It is highly likely that when the local authority decide on the issue of therapy, they would consider the wishes and feelings of the CPS to be

⁴² Probably based on an argument alleging that the decision contravenes the E.C.H.R. See pp. 30-34 below.

⁴³ Children Act 1989, s.38

⁴⁴ Ibid., ss.31,33

⁴⁵ Ibid., ss.33(3)(a) when read in conjunction with s.31(11)

⁴⁶ Ibid., s.22(3)

⁴⁷ c.f. the court’s paramount principle under s.1(1)

⁴⁸ s.22(4)

relevant. The question then becomes what weight should be given to the respective persons consulted? Sub-section (4) does not rank any preference, and although sub-section (5) states that the local authority should have due regard to the wishes of the child (subject to age and understanding)⁴⁹ it also states that due regard be had to the wishes and feelings of the other persons named in sub-section (4).⁵⁰ It would seem that so long as the local authority actually consults the relevant persons⁵¹ it is for it to decide if and when the child should receive therapy.

However, this may conflict with the United Nations Convention on the Rights of the Child. Article 3(1) of this Convention states that the “best interests of the child” shall be the “primary consideration.” It was noted in the previous chapter that the CPS consider themselves bound by the Convention⁵² but it should be noted that the Convention has not been incorporated into English law in the same way that, for example, the E.C.H.R. has. What happens if the local authority do not consider themselves bound by the Convention? In R v Director of Public Prosecutions, ex parte Kebilene and others⁵³ an argument was raised that could be of assistance here.

One of the arguments put forward in *Kebilene* was that the applicants had a legitimate expectation that they were entitled to certain rights. They argued that this expectation arose from the ratification of international treaties and statements by ministers. To strengthen their argument the applicants used the dicta from an Australian case:

...ratification of a convention is a positive statement by the Executive Government of this country to the world and to [its] people that the Executive Government and its agencies will act in accordance with the Convention. That

⁴⁹ s.22(5)(a)

⁵⁰ s.22(5)(b)

⁵¹ In R v Devon County Council, ex parte O [1997] 3 F.C.R. 411 it was confirmed that the consultation required by ss.22(4) and (5) is mandatory.

⁵² See p.8 above.

⁵³ [1999] 3 W.L.R. 175, DC

*positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity of the Convention.*⁵⁴

The Divisional Court implicitly approved of this quotation although in the specific case of *Kebilene* they noted that no legitimate expectation could arise in relation to the E.C.H.R. because ratification:

*took place nearly half a century ago [and when it] was generally assumed at the time that ratification would have no practical effect on British law or practice...*⁵⁵

However the same problems may not exist with the United Nations Convention. That Convention was ratified in 1991 and it has always been the intention of the government to be bound by it.⁵⁶ This may therefore mean that an applicant could have a legitimate expectation to the rights expressed in the Convention, specifically that under Article 3(1). Normally it is pre-requisite to a legitimate expectation claim, that the applicant knows of the circumstances which gives rise to the expectation⁵⁷ but in *Teoh*, implicitly approved in *Kebilene* it was said:

*It is not necessary that a person seeking to set up such a legitimate expectation should be aware of the Convention or should personally entertain the expectation; it is enough that the expectation is reasonable in the sense that there are adequate materials to support it.*⁵⁸

Adequate materials do support such a legitimate expectation: not least because the government has produced two reports to the United Nations in which they agreed they

⁵⁴ *Minister for the Immigration and Ethnic Affairs v Teoh* (1995) 128 A.L.R. 353 at 365 per Mason C.J.

⁵⁵ *ex parte Kebilene*, op.cit., at 184 per Lord Bingham of Cornhill L.C.J.

⁵⁶ See DoH (1994) *The UK's First Report of the U.N. Committee on the Rights of the Child* HMSO. London, para. 1.3. However, upon ratification, the United Kingdom entered reservations in respect of young offenders, immigration and employment regulations. See Fortin (1998) p.37

⁵⁷ See Leyland, P. et al.(1994) *Administrative Law*. Blackstone Press. London., pp.202-207

⁵⁸ *Minister for Immigration v Teoh*, op.cit., in *Kebilene*, op.cit. p.184. Note, *Kebilene* was successfully appealed to the House of Lords by the D.P.P. ([1999] 3 W.L.R. 972) Their Lordships, however, were silent as to legitimate expectation and accordingly it remains a live issue.

were bound.⁵⁹ Assuming, therefore, that local authorities are directly bound by the Convention, this would mean that for any decision on whether or not to defer therapy, the best interests of the child should be the primary consideration.

However, that would not necessarily ensure that therapy could continue immediately. The United Nations Convention talks of the “primary consideration” and not the “paramount consideration.” This may mean that a rebuttable presumption is created, so that therapy (which would be in the best interests of the child) would continue unless there were good reasons for it not to. The CPS – who it will be remembered would be entitled to make representations over this decision – could argue that the need to protect society by prosecuting, and convicting, a child abuser may be of greater significance in particular circumstances than the child’s best interests. If the local authority accept this then, arguably, they would not be acting unreasonably because although the child’s best interests were their *primary* consideration – i.e. their main consideration – other considerations were more pressing. Had the United Nations Convention talked of the *paramount* consideration⁶⁰ then a different result may have arisen because paramount suggests a different order of priority than primary.

Does this mean that the child would be required to accept a deferral of therapy? It may be possible for a child to argue that such a deferral is contrary to Article 8 of the E.C.H.R. It should be stated at the outset that Article 8 does not expressly mention either medical treatment or therapeutic treatment. However, this does not necessarily mean that claims to treatment cannot be sustained because article 8 encompasses a

⁵⁹ DoH (1994), op.cit., and DoH (1999) Convention on the Rights of the Child: Second Report to the U.N. Committee on the Rights of the Child by the United Kingdom HMSO. London

⁶⁰ i.e. In terms analogous to s.1(1)

variety of rights that make up the “right to respect for private and family life.”⁶¹ The European Court has suggested that Article 8 concerns the “*physical and moral integrity of the person*.”⁶² In Stubbings and others v U.K.⁶³ the Court, although rejecting an application by the applicants, commented that cases of child abuse quite clearly fall within the remit of Article 8.⁶⁴ For an argument under Article 8 to be sustained in relation to therapy, the applicant must show that therapy is a matter of “physical or moral” integrity. This has been made somewhat easier by the European Court who, on at least one occasion, has interpreted “physical and moral integrity” to mean “physical and psychological integrity”⁶⁵ and also stated:

*Article 8...is primarily intended to ensure the development...of the personality of each individual in relations with other human beings.*⁶⁶

This is perhaps the key to an argument relating to therapy. Arguably if a child requires immediate therapy but does not receive it, he or she may well suffer psychological harm, and this harm, if not addressed, may lead to permanent psychological damage and developmental harm which may prevent the victim from making adequate social and, possibly even, sexual relationships.⁶⁷ If such an argument could be sustained – and it should be noted that the European Court will not hear theoretical violations of treaty rights:⁶⁸ the applicant must demonstrate a need for therapy – then the question arises as to how the complaint can be brought before the courts?

Fortin⁶⁹ notes that most children have little understanding about the law and

⁶¹ See the comments of the European Court of Human Rights in Niemietz v Germany (1993) 16 E.H.R.R. 97, particularly at 111.

⁶² X and Y v Netherlands (1995) 8 E.H.R.R. 235 at 306

⁶³ (1997) 23 E.H.R.R. 213

⁶⁴ *Ibid.*, at 235

⁶⁵ Botta v Italy (1998) 26 E.H.R.R. 241 at 257

⁶⁶ *Ibid.*

⁶⁷ See, for example, Lyon and de Cruz (1993) pp.12-16 for the psychological effects of child abuse.

⁶⁸ See Golder v U.K. A 18 para 28 (1975)

⁶⁹ Fortin, J. The HRA's impact on litigation involving children and their families [1999] C.F.L.Q. 237

“rights”⁷⁰ although she concedes that if an adult⁷¹ aids them in discovering their rights then they could have a powerful case in establishing a human rights question.⁷² Could these same adults bring an action on behalf of the child, if the child cannot understand the concepts himself?⁷³ Section 7 of the Human Rights Act 1998 states that a person has *locus standi*, inter alia, “if he is (or would be) a victim of the unlawful act.” Coppel⁷⁴ notes that this is the same as the *locus standi* required for an action in the Strasbourg courts.⁷⁵ However, an adult bringing an action on behalf of a child would not be a victim within the meaning of s.7. Where children are concerned though, the Court recognises that a minor needs a representative⁷⁶ and so that person would, presumably, be given *locus standi* for the purposes of the application and the case could proceed to court.

However, proving a *prima facie* breach of Article 8 is not enough as the right to respect for private and family life is not an unfettered right: Article 8(2) permits the right established in Article 8(1) to be abrogated under certain circumstances, namely that any interference must be “*in accordance with the law and necessary in a democratic society...*” Thus the first stage is to decide whether the interference is in accordance with the law.

⁷⁰ Ibid., at 240

⁷¹ Examples would be family members, those with parental responsibility for the child, guardian ad litem, local authority visitors etc.

⁷² Fortin (1999) p.241

⁷³ Note that there is no definitive age at which a child can be said to be capable of understanding concepts. The courts look at each case individually and decide whether they are of sufficient “age and understanding.” See Gillick v West Norfolk and Wisbech Area Health Authority [1986] A.C. 112

⁷⁴ Coppel, J. (1999) The Human Rights Act 1998: Enforcing the European Convention in the Domestic Courts. John Wiley & Sons. Chichester.

⁷⁵ Ibid., p.12: note that *locus standi* is set out under Article 34 of the Convention.

⁷⁶ In Campbell and Cosans v United Kingdom (1982) 4 E.H.R.R. 293 the European Court permitted a claim brought by a child’s parents on behalf of the child, and in SD, DP and T v United Kingdom (1996) 22 E.H.R.R. C.D. 148 a claim was permitted by a solicitor who was also the *guardian ad litem* of the child.

For something to be in accordance with the law it requires something more than the absence of illegality⁷⁷ – it requires an identifiable person or body to be responsible for the decision and for them to follow defined criteria. It may be thought that there is, at present, no identifiable criteria as there is no statute governing the decision, nor is any criteria contained in the CPS draft guidance. However, the process of decision-making must also be considered. The local authority may decide to convene a case conference⁷⁸. If a case conference is convened, and a decision made to defer therapy, then this may be considered an identifiable body applying defined criteria because of the procedures governing the conduct of case conferences.

The second part of Article 8(2) requires the interference to be necessary in a democratic society. Article 8(2) gives a number of examples of what may be necessary, and one of these is “*for the prevention of disorder or crime.*” This is likely to be the one which the authorities rely on since their justification for deferring therapy is that it is necessary to obtain a conviction, i.e. to help prevent crime. To decide on this issue it is necessary to examine whether the interference is proportional to the need to protect society.

In Soering v United Kingdom⁷⁹ the European Court defined proportionality as the:

*search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.*⁸⁰

This is, arguably, the most important part of this Article 8 question. This is where the interests of society must be balanced against the rights of the individual victim.

⁷⁷ See Malone v United Kingdom A 82 para 79 (1984)

⁷⁸ See p.4, Fn 3 for further details on the case conference.

⁷⁹ A 161, para 89 (1989)

⁸⁰ Ibid.

Society obviously has important interests in this decision: if therapy was not deferred then the prosecution would almost certainly collapse. It was noted in the previous chapter that crimes of sex or violence are considered to be crimes against society along with crimes against the individual.⁸¹ Where the crime is one of child abuse then society's interests are even more pressing. If the case conference concludes that the alleged abuser is a danger to society, and should the prosecution not go ahead other vulnerable children may be harmed, they may well decide that the interests of society outweigh the individual interests of the victim. It is unlikely that this decision would be considered to be a breach of the E.C.H.R. because in such circumstances a fair balance may well mean that society's interests must come first. However, if there is not this clear and present danger posed by an individual; i.e. there is no clear evidence that the abuser would offend again, then the balance may well come down in favour of the child, and the decision to defer therapy would be over-ruled.⁸² The balancing exercise must relate to the individual: balancing the needs of the individual child victim against the benefits to society of prosecuting the individual defendant.⁸³

It is therefore not possible to conclude in general terms whether a child victim of abuse could force a local authority to provide him with immediate therapy. It may be possible to bring an action with the aim of doing so, but each case will have to be considered on its own facts.

⁸¹ See pp.5, 10-11 above.

⁸² The actual process for doing so would be for the child, via his next friend to bring an action alleging that the local authority has acted illegally by breaching their duty to act in accordance with the E.C.H.R. imposed on them by s.6(1), Human Rights Act 1998.

⁸³ Although it should be noted that the principle of deterrence is also an important factor in the balancing exercise. (See X and Y v Netherlands (1995) 8 E.H.R.R. 235 at 241)

The issue of the interaction between civil and criminal proceedings, and its impact on effective responses to child abuse, is a very important concept. There are two principal factors involved in this interaction; the timing of the two trials, and the sharing of evidence. It will be necessary to consider these two factors separately but it should be noted that they are closely related, entailing a substantial amount of cross-referencing. The final section of chapter 5 brings the two areas together, highlighting some of the problems that the interaction creates.

Chapter 4

Disclosure of Material

Where civil proceedings take place before the criminal proceedings (and in most cases they will¹) it is possible that the material used in the civil proceedings² may be of relevance to the criminal proceedings. We must examine how those involved in the criminal proceedings can gain access to these documents.

The starting point is that documents in civil proceedings are confidential. No-one other than a party, the legal representative of a party, the *guardian ad litem*, the legal aid board, or a welfare officer may be given access to the documents without the leave of the appropriate judge.³ Where a person who is not a party to the case wishes access

¹ See Chapter 5 below

² Note, in this context "civil proceedings" mean protection proceedings instigated under s.31, Children Act 1989

³ Family proceedings Rules 1991 (S.I. 1991/1247), rule 4.23 and Family Proceedings Court (Children Act 1989) Rules 1991 (S.I. 1991/1395), rule 23. Note, in this thesis a reference to rule 4.23 should be taken as also referring to rule 23.

to the documents then they must apply for leave to be joined as a party to the proceedings.⁴ Where a party (which would include a recently joined party) wishes to disclose the documents for another purpose (e.g. in criminal proceedings the defendant may wish to give the documents to the lawyers dealing with his defence, or the police may wish to disclose the documents to the CPS) then leave must be sought from the court under rule 4.23.⁵

It is necessary when examining this issue to draw a distinction between general evidence and incriminating confessions or admissions.

GENERAL EVIDENCE

The ambit of rule 4.23 needs to be discussed initially: the rule only concerns documents filed with the court. Black et al.⁶ states:

*no...duty [of confidentiality] applies to documents which are only in their preparatory stages to being filed...it is to be hoped that no one will take advantage of this lacuna by disclosing documents which are clearly intended to be confidential at all times.*⁷

Confidential to whom though? An early approach suggested that there should be total confidentiality. In Cleveland County Council v F⁸ Hale J. followed an earlier ruling of Ward J. in Oxfordshire County Council v P⁹ deciding that rule 4.23 should cover statements made to social workers, although she limited it to cases where proceedings had already been commenced.¹⁰ However both the *Oxfordshire* and the *Cleveland*

⁴ Family Proceedings Rules 1991, rule 4.7(2) and Family Proceedings Court (Children Act 1989) Rules 1991, rule 7(4)

⁵ See the comments of Booth J., in Re K and others (Minors)(Disclosure of Privileged Material) [1994] 3 All E.R. 230 at 232

⁶ Black QC, J. et al. (1998) A Practical Approach to Family Law 5th Ed. Blackstone Press. London

⁷ Ibid., at pp. 409-410

⁸ [1995] 2 All E.R. 236

⁹ [1995] 1 F.L.R. 552

¹⁰ See [1995] 2 All E.R. 236 at 239

cases were effectively over-ruled by the Court of Appeal in Re G (A Minor)(Social Worker: Disclosure)¹¹ where Butler-Sloss L.J. said she thought that Ward and Hale JJ. were in error when deciding the previous cases.¹² Ward and Hale JJ. had believed that expanding the protection to documents before they were filed was necessary to keep the names of the children confidential¹³ and because it was in line with the rulings made under the previous regime of wardship.¹⁴ However Butler-Sloss L.J., when rejecting this approach, argued that the regime under the Children Act is different, and that barriers to inter-agency co-operation should not be set up.¹⁵ In Re W (Disclosure to Police)¹⁶ this change of emphasis was explained more clearly. Butler-Sloss L.J., again giving judgment, held that documents not held by the court were outside the remit of rule 4.23¹⁷ The comments Black et al. make relating to confidentiality¹⁸ tie in with the rulings made by Ward and Hale JJ. but Butler-Sloss L.J. addressed this issue head-on and stated that confidentiality remains:

*The effect of disclosure to the police by social services is for two agencies, each bound at that stage by confidentiality, to share information and disclose documents to each other in the spirit of Working Together.*¹⁹

Working Together introduced the concept of inter-agency co-operation into child protection investigations. The Children Act is based on such co-operation and it is obviously sensible for the courts not to place any unnecessary barriers in the way of such co-operation.

Thus, information not filed with the court may be disclosed without recourse to the

¹¹ [1996] 2 All E.R. 65

¹² Ibid., at 73

¹³ See *Cleveland County Council v F*, op.cit., at 239

¹⁴ See Ibid., at 240

¹⁵ *Re G*, op.cit., at 73

¹⁶ [1998] 2 F.L.R. 135

¹⁷ See Ibid., at 139

¹⁸ Supra, Fn 7

¹⁹ Ibid., at 142

court, but where documents are filed with the court, then the leave of a judge must be obtained. What criteria does the judge use though? In Re EC (Disclosure of Material)²⁰ Swinton Thomas L.J. set out, in clear terms, the criteria for the discretion.

They are:

- (1) The welfare and interests of the child or children concerned in the care proceedings. If the child is likely to be adversely affected by the order in any serious way, this will be a very important factor.
- (2) The welfare and interests of other children generally.
- (3) The maintenance of confidentiality in children cases
- (4) The importance of encouraging frankness in children's cases
- (5) The public interest in the administration of justice. Barriers should not be erected between one branch of the judiciary and another because this may be inimical to the overall interests of justice.
- (6) The public interest in the prosecution of serious crime and the punishment of offenders, including the public interest in convicting those who have been guilty of violent or sexual offences against children. There is a strong public interest in convicting those who have been guilty of violent or sexual offences against children. There is a strong public interest in making available material to the police which is relevant to a criminal trial. In many cases this is likely to be a very important factor.
- (7) The gravity of the alleged offence and the relevance of the evidence to it. If the evidence has little or no bearing on the investigation or the trial, this will mitigate [SIC] against a disclosure order.
- (8) The desirability of co-operation between various agencies concerned with the welfare of children, including the social services departments, the police service, medical practitioners, health visitors, schools etc. This is particularly important in cases concerning children.

....

- (10) Any other material disclosure which has already taken place.²¹

Many of these factors are relatively straight-forward. The points concerning welfare

²⁰ [1996] 2 F.L.R. 725

²¹ Ibid., at 733

need some expansion. It should be noted that the welfare of the child is not paramount in the exercise of this discretion²² because it is not a matter concerning the upbringing of children. That said, however, the comments of Swinton Thomas L.J., above, show that it clearly remains important. His Lordship then argued that a prosecution could actually further the child's interests:

*if the father is guilty of the unlawful killing of a child then EC's best interests... are served by him being prosecuted and punished...*²³

This suggestion that a prosecution will automatically be in a child's best interests was rejected by Stuart White J. in Oxfordshire County Council v L and F²⁴:

*It is said that in future [the child] would benefit from being able to be told that the individual who caused his injuries had been prosecuted. I have been shown no psychiatric or other evidence to support this submission.*²⁵

It is submitted that it is more likely that the approach taken by Stuart White J is more appropriate and realistic than that of Swinton Thomas L.J.: there is no evidence which suggests a child will benefit from a prosecution, indeed there is evidence to suggest that given the trauma which arises from testifying in criminal proceedings²⁶ it could even be harmful to a child's welfare.²⁷ In addition, there is evidence to suggest that a prosecution may be a no-win situation for a child. Cobley notes that if the abuser is convicted the child may well feel guilty at breaking up the family²⁸ and yet Fortin argues that if the abuser is acquitted the child may feel that he or she was not believed which could radically increase their stress.²⁹ Given that this evidence exists, it is

²² See the comments of Bracewell J. giving judgment in the Family Division hearing of Re L (Police Investigation: Privilege) [1995] 1 F.L.R. 999 at 1007

²³ *Re EC*, op. cit., at 733

²⁴ [1997] 1 F.L.R. 235

²⁵ *Ibid.*, at 244

²⁶ See chapter 7 below.

²⁷ See also Fortin (1998) pp. 428-431

²⁸ Cobley (1995) p.161

²⁹ Fortin (1998) p.433

difficult to see how it can be argued that a prosecution will automatically be in the interests of the child.

Perhaps the most important factors are those which are based upon a presumption of not interfering with the criminal process³⁰ and that which relates to co-operation between agencies.³¹

CONFESSIONS AND ADMISSIONS

Although rule 4.23 does not make any express reference to confessions or admissions, section 98 of the Children Act 1989 needs to be read in conjunction with the rule.

Scope of Section 98

Section 98, Children Act 1989 states:

- (1) In any proceedings in which a court is hearing an application for an order under Part IV or V, no person shall be excused from—
 - (a) giving evidence on any matter; or
 - (b) answering any question put to him in the course of his giving evidence,on the ground that doing so might incriminate him or his spouse of an offence.
- (2) A statement or admission made in such proceedings shall not be admissible in evidence against the person making it or his spouse in proceedings for an offence other than perjury.

This section relates to the privilege against self-incrimination. Section 98(1) abolishes the privilege for Part IV or V matters. Part IV covers care and supervision orders,

³⁰ Factors 5 to 7: and see the comments of Sir Stephen Brown P. in Re D(Minors)(Wardship: Disclosure) [1994] 1 F.L.R. 346

³¹ Factor 8. The ethos of inter-agency co-operation was put into effect after the Cleveland crisis (Report of the Cleveland Inquiry (1989) p.248). The production of *Working Together* (Home Office, 1991) significantly furthered this principle.

including interim orders. Part V covers the protection of children, including emergency protection orders, child assessment orders and police protection. Section 98(2) should, theoretically, protect a person from the admissions and statements that are made when giving evidence required under s.98(1) by limiting their admissibility to offences of perjury. Bainham³² argues that the intention behind s.98 was to ensure a court hears all relevant evidence in respect of the child.³³ He continues by stating that s.98(2) is the “trade-off” to s.98(1): that the privilege should only be removed on condition that the evidence is used only for the offence of perjury.³⁴

However case law has developed a different attitude towards s.98. In Re EC (Disclosure of Material)³⁵ the Court of Appeal decided that s.98 only protected a person in court proceedings, and that where the police sought the information for investigative purposes, s.98(2) was no bar to disclosure. In the Journal of Criminal Law, an anonymous case note on Re C (A Minor)³⁶ makes the point that this can have a major effect on a prosecution. In *Re C* the police had decided that there was insufficient evidence to bring a prosecution, and yet after the civil proceedings – and as a result of a successful application for disclosure – the police were able to think again about bringing a prosecution. However the author notes that although s.98(2) permits such disclosure, there may be further protection under the Police and Criminal Evidence Act 1984:

*the [criminal] trial judge in those proceedings may also hold that any further admissions made (to the police) following their receipt of the original confession (which they cannot use as evidence), may be excluded by the trial judge in the exercise of his discretion...*³⁷

³² Bainham, A. (1993) Children – The Modern Law. Family Law. Bristol

³³ Ibid., at 467

³⁴ Ibid.

³⁵ [1996] 2 F.L.R. 725

³⁶ (1997) 6 J.C.L. 294

³⁷ Ibid., at 295

McEwan³⁸ arrives at a similar conclusion by noting that:

*The interviewing officer surely would be tempted to remind them that they have already admitted the event and might well do so again. Whether or not a criminal trial judge would allow a later admission made in such circumstances to be used as evidence is a matter of speculation.*³⁹

Thus, although the police – and ultimately the CPS – may gain access to the information, their use of it is limited. They cannot adduce the evidence at trial as this is prohibited under s.98(2), neither can they ask the same questions during an interview as the judge may well rule this inadmissible.⁴⁰

Does it make any difference if a party wishes to use the evidence for credibility rather than proving facts? In Re K and others (Minors)(Disclosure of Privileged Material)⁴¹ the father of three children – who had been charged with the abuse of them – applied to the civil court for the disclosure of a transcript of the mother’s evidence taken in the civil proceedings. The father wished to use this evidence to show that the mother – who was also the main prosecution witness – had made significantly inconsistent statements. Booth J. rejected the mother’s assertions that s.98(2) protected her, and held that disclosure could take place because attacking credibility was not using statements “against” a person.⁴² The problem is even more profound when the parents are co-defendants and they use a “cut-throat” defence. Such a dilemma was presented in Re L (Care: Confidentiality)⁴³ where two parents accepted that care orders were needed in respect of their children because of neglect. Criminal proceedings were also pending and because of this they declined to give evidence in the civil proceedings as

³⁸ McEwan, J. Privilege and the Children Act 1989 – Confusion Compounded? [1995] C.F.L.Q. 236

³⁹ *Ibid.*, at 242

⁴⁰ Under s.78, Police and Criminal Evidence Act 1984. And see Farrar Q.C., D. and Langdale, R. Re EC and Criminal Trials [1997] Fam. Law 480

⁴¹ [1994] 3 All E.R. 230

⁴² *Ibid.*, at 235

⁴³ [1999] 1 F.L.R. 165

s.98(2) would not protect them against cross-examination by the Crown or each other. Johnson J. considered making an injunction preventing any party using any information in the case outside of the care proceedings.⁴⁴ However his Lordship decided:

*a co-defendant [may be] able to show that there was a substantial risk of injustice without modification of the prohibition. Indeed such an injunction, and possibly s.98(2) itself, might fall foul of Article 6 of the European Convention on Human Rights.*⁴⁵

Johnson J. did not explain his hypothesis concerning the European Convention but his reference to a “substantial risk of injustice” would appear to suggest that it is linked to the fair trial aspect of Article 6. It is beyond doubt that the “fair trial” concept is an important part of Article 6. Harris et al. note that:

*In cases not involving a breach of a specific [Article 6] right, the Court may none the less find a breach of the right to a fair hearing on a “trial as a whole basis.”*⁴⁶

It could perhaps be argued that the injunction and/or s.98(2) when read in that context, could breach this concept, which may prove that the fears of Johnson J. are well founded. However could a human rights argument be directed towards s.98 generally?

Section 98(1) effectively abolishes the privilege of self-incrimination and it has been seen from the above that s.98(2) does not necessarily provide any absolute safeguards concerning the use of incriminating statements. Does the European Convention provide for a privilege against self-incrimination? and if so, would this mean that s.98 in its entirety could be deemed a breach?

⁴⁴ Ibid., at 168

⁴⁵ Ibid.

⁴⁶ Harris et al. (1995) p.203

In Funke v France⁴⁷ the applicant had been convicted of an offence of not co-operating with an inquiry. No charges were brought as a result of the inquiry but under French law a person had to give full co-operation. The European Court of Human Rights held that where disclosures are made through a compulsory inquiry, and these disclosures formed a significant part of the prosecution case, this breached the right to a fair trial under Article 6. This was followed by the Court in Saunders v U.K.⁴⁸ where the applicant was forced to co-operate with an inquiry and the disclosure made as a result of this inquiry formed a significant part of the prosecution case. This was similarly deemed a breach of Article 6.

Another relevant case may be K v Austria⁴⁹ where the applicant was fined for refusing to give evidence in a trial on the basis that his evidence may incriminate himself in his forthcoming criminal trial. The Commission held that there had not been a breach of Article 6 because the fine imposed on him did not arise from a criminal charge within the meaning of Article 6. This ratio was not applied by the Court in *Saunders* but it could be argued that the circumstances of *K v Austria* are directly applicable to s.98 cases: in that they relate to a refusal to give testimony rather than a refusal to co-operate in an investigation. It may, however, be possible to distinguish *K v Austria* because in that case the applicant was a mere witness, and not the subject of proceedings. With the Children Act 1989, the parents are arguably the subject of both the care proceedings and the criminal trial.⁵⁰

⁴⁷ (1993) 16 E.H.R.R. 297

⁴⁸ (1997) 23 E.H.R.R. 313

⁴⁹ A 255-B (1993)

⁵⁰ Of course technically it is the child who is the subject of care proceedings but given that the standard of parental care given to the child will usually be questioned during the proceedings (see s.31(2)(b), Children Act 1989) it could legitimately be argued that it is the parents who are the "subjects" of such proceedings.

Even by distinguishing *K v Austria*, it will not be possible to argue that s.98 by itself amounts to a breach of the privilege against self-incrimination because although s.98(1) forces a parent to testify, unlike in *Saunders*, this testimony cannot be adduced directly. In *Saunders* any answers that were given to the investigators could, if they proved useful to the prosecution, be adduced directly in court. Section 98(2), however, would prevent the material from being directly adduced at trial. Accordingly it would seem that section 98 does not by itself amount to a breach of Article 6, although that is not to say that on the facts of individual cases, a different result may occur.

Discretion to Disclose

Given that it has been shown that s.98 is not automatically a breach of the privilege against self-incrimination, it will be necessary to examine the judge's discretion to disclose evidence in care proceedings.

It will be remembered that the criteria for the discretion was established in *Re EC (Disclosure of Material)*⁵¹ Swinton Thomas L.J. gave a list of factors to be considered and one of these relates solely to section 98 cases:

- (9) In a case to which s.98(2) applies, the terms of the section itself, namely that the witness was not excused from answering incriminating questions, and that any statement of admission would not be admissible against him in criminal proceedings. Fairness to the person who has incriminated himself and any others affected by the incriminating statement and any danger of oppression would also be relevant considerations.⁵²

In other words, the court must consider that it may be unjust to permit the statement to

⁵¹ [1996] 2 F.L.R. 725

⁵² *Ibid.*, at 733

be disclosed since had section 98 not applied, the person could have refused to answer questions on the basis that it would have incriminated him.⁵³ Farrer and Longdale note that it would be rare for the courts to refuse to order disclosure on the basis of unfairness, and as such the only protection available would be section 78, Police and Criminal Evidence Act 1984.⁵⁴ Ormerod⁵⁵ agrees that it would be rare for a court to refuse disclosure:

*There is no doubt that the Family Division is anxious not to trespass upon the jurisdiction of the Criminal Division.*⁵⁶

This concept has been repeatedly given judicial backing, perhaps most forcefully by Butler-Sloss L.J. in Re W (Disclosure to Police)⁵⁷:

*[F]amily judges ought not to frustrate the investigation of potential crimes... without good reason.*⁵⁸

It would seem therefore that in all but exceptional cases, the family courts adopt a subservient position and grant disclosure to the police. After disclosure the police and the criminal courts will then decide what the information could be used for. The actual admission cannot be adduced in court as evidence of the facts, and neither could it be used directly to gain a fresh admission⁵⁹ but McEwan argues that the police would make indirect use of it:

*The method of investigation very likely will include questioning by the police of those parents in order to obtain fresh admissions which would be admissible in a criminal trial.*⁶⁰

⁵³ See Murphy, P. (1995) Murphy on Evidence (5th Ed) Blackstone Press. London. pp. 386-391 for further details on the freedom from self-incrimination.

⁵⁴ Farrer & Langdale (1997) p. 480

⁵⁵ Ormerod, D. Confidentiality in Children Cases [1995] C.F.L.Q. 1

⁵⁶ Ibid., at 11

⁵⁷ [1998] 2 F.L.R. 135

⁵⁸ Ibid., at 145

⁵⁹ As this would almost certainly be liable to a ruling under section 78, Police and Criminal Evidence Act 1984

⁶⁰ McEwan (1995) p.242

Thus it is likely that the police would, in the majority of cases, seek disclosure if they believe it would be of benefit to their investigation. Hayward Smith⁶¹ argues that given this is the situation, lawyers cannot advise their clients to testify freely in civil proceedings without incriminating themselves.⁶² He then poses the question whether restricting co-operation is “in the best interests of the child?” The answer must arguably be “no” since it is in the best interests of the child that the facts that led to either the significant harm, or the risk of significant harm, which triggered the care proceedings should be discussed frankly. Parliament must have intended such frankness when s.98(2) was drafted, but the courts interpretation has led to this being frustrated.

BENEFIT TO THE DEFENCE

The majority of applications for the disclosure of documents from the civil proceedings are likely to be made by the prosecution because they believe it will aid their case. However this does not mean that the defence can not apply for disclosure as in many cases they will. There are, it is submitted, two aspects of disclosure to examine here; section 98 and public interest immunity.

Section 98, Children Act 1989

It may appear peculiar that the defence may wish to use documents to which section 98 applies but there are circumstances when they will. Such a situation developed in Re K and others (Minors)(Disclosure of Material).⁶³ The facts of this case were

⁶¹ Hayward Smith Q.C., R Should confessions of child abuse be encouraged in Children Act proceedings? (1998) 11 P.C.L.B. 73

⁶² Ibid., at 74

⁶³ [1994] 3 All E.R. 230

discussed in an earlier section of this chapter⁶⁴ but it is worth repeating that a father – who was being prosecuted for the abuse of his daughter – sought disclosure of the statements of the mother, and a transcript of her evidence because he believed that it would help him. Booth J. permitted disclosure saying:

*In this case the statements on which the father seeks to rely do not incriminate him but, on the contrary, assist him in his defence to the charges already made against him... I therefore consider that it is likely that the statements will be admissible in criminal proceedings.*⁶⁵

This point concerning admissibility highlights an additional advantage such disclosure has for the defence. It was seen from the above that one problem when the police seek disclosure is that they may fall foul of section 78, Police and Criminal Evidence Act 1984 but this does not apply to the defence,⁶⁶ and as such it is more likely to be admissible in evidence at trial.⁶⁷

Public Interest Immunity

We have considered the situation where the defence seeks access to documents held by the court. However it is possible that the defence may wish to gain access to documents held by the local authority and others which have not been filed with the court. It was noted earlier that where the prosecution wished to gain access to these types of documents, rule 4.23 does not prevent the sharing of evidence under the principles of inter-agency co-operation.⁶⁸ Where it is the defence who wish access to these documents and not the prosecution, however, it is unlikely that the public body will voluntarily give access to the files and so the defence must apply for access.

⁶⁴ See supra, Fn 41 and associated main body text.

⁶⁵ *Re K and others*, op.cit., at 235

⁶⁶ As section 78 relates to the evidence brought by the prosecution: see sub-section (1)

⁶⁷ Especially where, as in *Re K*, the evidence is to be used to attack the credibility of the witness.

⁶⁸ See pp. 36-37 above

An application to gain access to documents is normally made by witness summons.⁶⁹

The summons is sent to an officer of the relevant body and it must normally be complied with. If, however, a public body decides that a document is so confidential that it should not be disclosed then they may apply for public interest immunity.

Before briefly analysing the principles of public interest immunity it will be necessary to take one step back. Before the defence can gain disclosure of a document – or indeed obtain an order for disclosure – they must prove that a document is relevant to their case. Local authorities will have a significant number of papers that may appear relevant but the question is who decides relevance? There are effectively only four options:

- (1) the prosecution
- (2) the defence
- (3) the court (i.e. the judge)
- (4) the local authority

Options (1) and (2) can be rejected easily: the defence would not be happy having the prosecution decide relevance as this could lead to the appearance of bias.⁷⁰ There is little point in letting the defence decide relevance because this would mean they were given access to all the documents thus rendering any arguments concerning public interest immunity moot. This leaves either the judge or the local authority. In R v Whittle⁷¹ the Court of Appeal held that either the local authority or the judge should

⁶⁹ See Seabrooke, S and Sprack, J. (1999) Criminal Evidence & Procedure: The Essential Procedure (2nd Ed) Blackstone Press. London. pp.259-61 for further details on this process.

⁷⁰ However cf. s.3, Criminal Procedure and Investigations Act 1996 which obliges the prosecutor to disclose all material which in *his opinion* might undermine the prosecution case; and s.7 which obliges the prosecution to disclose relevant material which might be expected to assist the defence.

⁷¹ [1996] Crim. L.R. 904

decide on relevance. The Court held that where there are a large number of documents it would not be possible for the judge to decide relevance⁷² so independent counsel could be appointed by the local authority to decide the matter. The independent counsel could decide which documents are relevant and the local authority could then decide which, if any, of the documents the authority believe should be the subject of public interest immunity.

Public interest immunity has been permitted in child abuse cases for a considerable amount of time – arguably since the doctrine was first formed. The House of Lords in D v N.S.P.C.C.⁷³ held that the N.S.P.C.C. had immunity over the names of those people who reported suspected child abuse to them. May⁷⁴ argues that D v N.S.P.C.C. set a trend and that public interest immunity eventually spread to cover social services files and hospital records, including therapeutic interviews.⁷⁵ What then is the procedure for deciding on public interest immunity? May reports that when the matter is to be decided the possessor of the documents may be represented before the court so that they may explain their reasons for seeking immunity.⁷⁶ Obviously the defence will be represented as they wish access to the documents, and it has been held that the prosecution should also be represented.⁷⁷ In Governor of Brixton Prison, ex parte Osman⁷⁸ the Court of Appeal held that to decide whether immunity should be granted it is necessary to undertake a balancing exercise:

[A] judge is balancing on the one hand the desirability of preserving the public interest in the absence of disclosure against, on the other hand, the

⁷² Due to the large number of judge-hours this would take, which could have an impact on trial times etc.

⁷³ [1978] A.C. 171

⁷⁴ May, R. (1999) Criminal Evidence (4th Ed) Sweet & Maxwell. London.

⁷⁵ Ibid., at 14-16 to 14-17

⁷⁶ Ibid., at 14-18

⁷⁷ See R v K(DT)(Evidence) [1993] 2 F.L.R. 181 at 183

⁷⁸ [1991] 1 W.L.R. 281

*interests of justice...*⁷⁹

What is the public interest in child cases? Niblett⁸⁰ states that:

*the welfare of the child is paramount...in cases where the future well-being of the child is to be determined in care or wardship proceedings...*⁸¹

he continues by arguing:

*there are, however, real conflicts which arise in criminal proceedings when this public interest is balanced against the principle of the defendant having a fair trial.*⁸²

Given the seriousness of offences against children, the balancing exercise is not an easy task to perform. In *ex parte Osman* this point was addressed:

*Where the interests of justice arise in a criminal case touching and concerning liberty or conceivably on occasion life, the weight to be attached to the interests of justice is plainly very great indeed.*⁸³

This was supported by the then Lord Chief Justice, Lord Taylor, who gave judgment in *R v Keane*⁸⁴ and stated that if the material could help prove innocence or prevent a miscarriage of justice, then the balance must come down in favour of disclosure.⁸⁵ In order to decide whether the material is capable of doing this the judge must examine the documents himself.⁸⁶

Given that much of the material a local authority possesses could potentially be used to attack the credibility of a child, it is likely that the material would be useful and so should be disclosed. Niblett argues that this could have a profound impact on the trial:

An order for disclosure will place a heavy responsibility on the Crown to

⁷⁹ Ibid., at 288 per Mann L.J.

⁸⁰ Niblett, J. (1997) *Disclosure in Criminal Proceedings*. Blackstone Press. London.

⁸¹ Ibid., at 152

⁸² Ibid.

⁸³ *ex parte Osman*, op.cit., at 288

⁸⁴ (1994) 99 Cr. App. R. 1

⁸⁵ Ibid., at p.6

⁸⁶ See *R v K(DT)(Evidence)* [1993] 2 F.L.R. 181 at 185

*decide whether the public interest is both served by continuing the prosecution or by abandoning the case and saving the child from an ordeal which is perhaps just as great as the abuse alleged.*⁸⁷

This is an appropriate conclusion to be drawn: the prosecution should always decide whether the case should continue. If the defence gain access to a document which could significantly damage the child's credibility, the prosecution should think very carefully before letting the case proceed as this could mean that the child's cross-examination could be very intense. The prosecution should only continue where it is in the public interest to do so and where there is a reasonable prospect of conviction. If this prospect reduces then, it is submitted, that the prosecution should reconsider their decision to proceed by referring back to the prosecution tests.⁸⁸ If necessary, the prosecution may have to be halted either because the evidential test is no longer satisfied⁸⁹, or because the prosecution decide that it is not in the public interest for the child witness to be subjected to such pressures. This, however, could be better for the child's welfare in the long-term.

⁸⁷ Niblett (1997) p. 152

⁸⁸ See chapter 2 above

⁸⁹ As the disclosed material may alter this balance

Chapter 5

Timing of Civil Proceedings

One of the major aspects of the civil/criminal interaction is the timing of the two systems. Where both civil and criminal trials are pending the timing becomes essential. In non-Children Act matters, the delays inherent in the civil system would normally result in the criminal matter being heard first. The outcome of the criminal proceedings would have a critical impact on the civil proceedings because of the different standards of proof: where the allegations are the same a conviction would virtually guarantee success in the civil proceedings yet an acquittal would not lead to dismissal of any civil action on proceedings.

However, with protection proceedings the situation is not as straight forward. Although the courts are bound to accept a criminal conviction as evidence of the facts,¹ the main question is not the facts but whether the parents are suitable to look after the child. The conviction, by itself, would not necessarily have an impact on this, although a sentence could.² Another marked difference is delay. Under normal civil proceedings there is a considerable delay before the matter is heard³ but under the Children Act 1989 delay has to be avoided because it is prejudicial to the welfare of the child.⁴ This means that the civil case should proceed relatively quickly, and it is possible that it could be heard before the criminal proceedings.

The question then becomes should the protection proceedings be delayed until after

¹ Civil Evidence Act 1968, s.11(1)

² For example, the civil courts decide that the child could remain with the parents, but the criminal courts decide to imprison them, thus ensuring that the child would have to be removed.

³ This is likely to continue even though the Woolf reforms have been put into effect, principally because of the sheer number of civil cases.

⁴ See Children Act 1989, s.1(2)

the criminal proceedings? The arguments for delaying them would be that it would help with regard to the statutory presumption, it could also help a judge decide whether to remove a child from the parents because the civil judge would have the knowledge of what the sentence would be, and finally it could be argued that it would mean the parents would not need to prejudice their defence. It was seen from the previous chapter that section 98 of the Children Act 1989 does not give adequate protection from self-incrimination, and as such the parents would, if the civil proceedings took place first, probably have to disclose their defence. However, none of these reasons necessarily relate to the child's welfare. Section 1(2), Children Act 1989 states that delay is prejudicial to the welfare of the child, and section 1(1) states that the welfare of the child has to be the paramount consideration for the courts.⁵ Thus, on a basic analysis, it would appear that s.1 should "trump" the other considerations, and that civil matters should take place first. Of course, a more detailed analysis is required to reach a more definitive answer.

The issue of timing has been the subject of discussion for some time. Home Office Circular 88/1972 states that where there are concurrent civil and criminal proceedings, the Crown Court should be advised of the situation so that the listing of the criminal trial can be expedited. The circular does not expressly state that the criminal trial should be heard before the civil trial, but, it is submitted that is the implication. Deferring the civil trial was approved of in Re S (Care Order: Criminal Proceedings).⁶ Here, the parents of S were charged with the murder of S's sister. The local authority instigated care proceedings in respect of S, and obtained an interim care order. The

⁵ Section 1(1) would apply here because this is a matter relating to the upbringing of the child. Any application relating to the timing would be made under the premises of a pending application under section 31, Children Act 1989

⁶ [1995] 1 F.L.R. 151

hearing for the final order was fixed before the Crown Court trial and the parents sought an adjournment arguing that it would be unfair for the proceedings to proceed before the resolution of the criminal proceedings. The judge at first instance refused to grant an adjournment and the parents appealed to the Court of Appeal. The Court allowed the appeal saying:

*In a case as serious as this it would seem to me often it would be preferable for the criminal trial to come first and the care proceedings to come second.*⁷

The judge presiding over the criminal trial had remarked that he would prefer an adjournment of the care proceedings.⁸ His preference seemed to prioritise the concerns of the defence as to whether a fair trial was possible, over the statutory duty to avoid delay prejudicial to the welfare of the child.⁹ Butler-Sloss L.J. addressed this:

*I see no advantage whatever in this particular case to the child, whose welfare is paramount, as to whether the bit of paper that keeps him in care is a full care order or an interim care order; really the wording is academic.*¹⁰

In other words, Butler-Sloss L.J. is stating that because the child has been removed from the parents, and that such a removal is clearly appropriate, it makes no difference that the child is there under a “temporary” order. There are significant differences between a care order and an interim care order but it is not the place of this thesis to detail them,¹¹ and so the question is whether her Ladyship is arguing that *in general* there is no difference over a short period of time¹² or whether her comments relate *solely* to the facts of this case. If it is the former then this would

⁷ Ibid., at 153 per Butler-Sloss L.J.

⁸ Ibid., at 151, although note this was not an issue over which he had any direct control.

⁹ Even though as an application to adjourn care proceedings must be a Part IV matter so the welfare of the child should be the court’s *paramount* consideration. (see s.1(1), Children Act 1989)

¹⁰ Ibid., at 153

¹¹ See Black et al.(1998) pp.444-449, 452-456 and see Hayes, M. The Proper Role of Courts in Child Care Cases [1996] C.F.L.Q. 201 at 204-210

¹² i.e. Whilst the criminal trial proceeds

be very surprising, and a significant departure from settled child law under the Children Act 1989.¹³

Thus, *Re S* appeared to follow Home Office Circular 88/1972 by postponing the civil proceedings until *after* the criminal trial. However, months later the issue arose again in the Court of Appeal in *Re TB (Care Proceedings: Criminal Trial)*.¹⁴ In *Re TB* the criminal charges related to criminal neglect.¹⁵ Surprisingly, Butler-Sloss L.J. – who was again giving judgment – decided that she had erred in *Re S*.¹⁶ She had not, she concluded, taken account of an earlier case, *R v Exeter Juvenile Court, ex parte H and H*,¹⁷ where the President of the Family Division had held that:

*...there is no bar to the hearing of...care proceedings because criminal proceedings are pending...the mere fact that criminal proceedings are pending and may affect the party or a party who is involved in the family proceedings...cannot form a basis for an almost automatic adjournment of the care proceedings.*¹⁸

Although *ex parte H and H* was decided before the Children Act 1989 had been implemented, Butler-Sloss L.J. argued that they were bound to consider carefully what the President had said.¹⁹ After taking account of the President's comments, Butler-Sloss L.J. said:

One starts with the fact that the criminal proceedings of themselves are not a reason to adjourn proceedings. There must be some detriment to the children for not bringing on the care proceedings because delay is detrimental to children...I think we do have to hold the line that in the majority of cases, unless there are circumstances which warrant taking a different course, that

¹³ See, for example, *Hampshire County Council v S* [1993] 1 F.L.R. 559. Although the main point of contention between a full and interim care order is where the courts attempt to use interim care orders as final orders. (See *Buckinghamshire County Council v M* [1994] 2 F.L.R. 506) Butler-Sloss L.J. has not attempted to argue this, so perhaps her comments may remain valid.

¹⁴ [1995] 2 F.L.R. 801

¹⁵ Cruelty under section 1, Children and Young Persons Act 1933

¹⁶ See [1995] 2 F.L.R. 801 at 804

¹⁷ [1988] 2 F.L.R. 214

¹⁸ *Ibid.*, at 222 per Sir Stephen Brown P.

¹⁹ *Re TB*, *op.cit.*, at 804: although it should be noted that they were not bound in precedent by it because the President was sitting in the High Court (QBD) which is inferior to the Court of Appeal.

*the care proceedings should come on, even if they are to be heard before the criminal proceedings.*²⁰

This is a complete about-turn. Whereas in *Re S*, Butler-Sloss L.J. decided that it would make no difference to the child if proceedings were delayed, presumably the ruling in *Re TB* must mean it could. Indeed in *Re TB* her Ladyship said:

*There are real problems for these children in being held in limbo, as inevitably they are during a criminal trial.*²¹

It is difficult to reconcile this with her Ladyship's comments in *Re S*, where she argued there was no difference between a care order and an interim care order.²² It is likely that her Ladyship's comments in *Re S* are more likely to be true: although there are differences between the orders, there may not be any significant differences with the treatment of the child on a short-term basis whilst the criminal trial went ahead.

Hearing the civil matters before the criminal matters could have significant implications. Where the care proceedings are heard first this would, in the majority of cases, mean that the parent will need to disclose his or her defence prior to the trial. Given that s.98, Children Act 1989 offers no real protection,²³ this means that the prosecution will almost certainly be given details of the defence which could help them in the preparation and conduct of the prosecution. This point was recognised by Butler-Sloss L.J. in *Re S* where her Ladyship said:

*I can see grave disadvantages to the parents in the full care order being made at a time when they cannot really fight it.*²⁴

Her Ladyship made no mention of this in *Re TB*. The implications where there are

²⁰ Ibid., at 805-806

²¹ Ibid., at 805

²² See supra, Fn 9 and associated main body text.

²³ See pp.40-45

²⁴ *Re S.*, op.cit., p.153

more than one defendant, and the defence is cut-throat, is even more serious. In Re L (Care: Confidentiality)²⁵ Johnson J. held that section 98 offered no protection in such circumstances but said:

*...this problem only arises if the care proceedings are heard before the final criminal trial. I hope that the submissions made in the present case will not be used as a basis for seeking postponement of care proceedings until the conclusion of related criminal proceedings.*²⁶

His Lordship would appear, therefore, to suggest that he agrees with Butler-Sloss L.J.'s comments in *Re S* but that this is not enough for a postponement to be granted. However what is the impact of these cases? It now appears settled law that civil protection proceedings should take place *before* the criminal proceedings. This means that the parents will have to run the risk that they need to disclose their defence and take the consequences. Johnson J. argued that this would not matter if they told the truth²⁷ but even telling the truth can lead to an appearance of inconsistency. Also, the fact that a child needs an element of protection does not necessarily mean that a prosecution is required. There may well be instances when a parent can, and should, admit that their standard of parental care was below that which could be expected of them, and yet deny specific allegations which amounts to criminal conduct. If they disclose their defence, however, they may appear inconsistent which could undermine their defence to a criminal charge.

That said, the position as the law stands at present is true to the Children Act 1989. Whether to defer civil proceedings is a matter solely for the civil courts and as it is a Part IV matter the welfare of the child – and not the interests of those who may face ancillary charges – are paramount. However this creates an inevitable tension as the

²⁵ [1999] 1 F.L.R. 165

²⁶ *Ibid.*, at 169

²⁷ *Ibid.*

criminal courts should act on the basis that everyone must have the right to a fair trial. If the parents are to have a fair trial then they should not be required to disclose their defence in advance.²⁸ However the criminal courts cannot do anything about this position other than to make their views known and hope this may influence the civil courts in individual cases.²⁹

EFFECTIVE INTERACTION?

Does the interaction between the criminal and civil processes cause a conflict and if so can it be resolved? It was seen that one of the biggest conflicts between the two processes is in connection with the testimony given during protection proceedings. In the previous chapter it was shown that the police are able to obtain evidence from the civil proceedings, including a complete record of the testimony. This chapter showed that, notwithstanding this, the civil process inevitably goes first because of the statutory presumption that delay prejudices the welfare of the child.³⁰ The main objective of civil protection proceedings is to safeguard the welfare of the child by deciding whether the child has suffered, or been placed at risk of suffering, significant harm, and then deciding what, if any, protection measures are required. In order to complete its task, it has been said that the court adopts an inquisitorial rather than adversarial approach to trials.³¹ Parliament intended to aid this process by withdrawing the freedom from self-incrimination from those who testify during

²⁸ Note disclosure in this context means by giving evidence in the civil proceedings and not disclosure within the meaning of the Criminal Procedure and Investigations Act 1996 as the disclosure under the latter is only partial.

²⁹ And given that some civil courts have accepted that a prosecution may be in a child's best interests (see, for example, *Re EC (Disclosure of Material)* [1996] 2 F.L.R. 725 at 733) this may mean an adjournment would not be contrary to the s.1(1) principle as the argument would be that if the civil proceedings are heard first then the criminal prosecution would collapse which would be contrary to the best interests of the child.

³⁰ Section 1(5), Children Act 1989

³¹ See *Re D and M (Minors)* (1993) 8 B.M.L.R. 69

protection proceedings, but also intended that the use of incriminating evidence should be restricted. The courts have, however, interpreted s.98(2) in such a way that has diminished the protection intended. This has led some to comment that parents cannot be expected to co-operate with the civil proceedings without incriminating themselves for the purposes of subsequent criminal proceedings.³² This cannot be in the best interests of the child and increases the tension between the two systems.

How can this situation be resolved? There are two potential options: reversing the order of the proceedings – so that the civil proceedings occur first – or rule 4.23 needs to be tightened up considerably.³³

If the criminal proceedings take place first then this would cause concern to the civil courts. The principle enshrined in the Children Act 1989 that delay is prejudicial to the welfare of the child is an important factor and one that should not be set aside lightly. Thus reversing the procedure would not be acceptable to the civil courts. It would, however, appear to be acceptable to the criminal justice system as it would help ensure that the defence obtains a fair trial. If the civil proceedings were heard second, the defendant(s) would not need to disclose their defence ahead of the criminal trial. It could be argued that it carries advantages for the civil system in that matters such as sentence, repentance etc. would be decided by the time the civil courts came to make the decision on care and control. However, it has already been noted that a conviction is not necessarily a binding consideration on the civil courts³⁴ and so the usefulness of

³² Hayward Smith Q.C., R Should confessions of child abuse be encouraged in Children Act proceedings? (1998) 11 P.C.L.B. 73

³³ So that the matters heard in the civil proceedings remain confidential at all times, and that nothing may be disclosed.

³⁴ As the civil courts are assessing whether the parents are capable of retaining care and control for the child.

this is somewhat questionable. Reversing the order may not necessarily be a good thing for the criminal justice system either. When deciding whether to prosecute, it was noted above that the prosecution must take into account the interests of the child victim,³⁵ the prosecution may decide that deferring the protection proceedings would not be in the best interests of the child (because it prevents long-term planning etc.) and as such decide to “drop” the prosecution.³⁶ Any reduction in prosecutions could raise problems for the punishment of child abusers, and the deterrent factor this brings.

This leaves the second possibility: re-drafting rule 4.23. If one were to redraft rule 4.23 to prevent disclosure of any documents, this could prevent the situation whereby a parent feels it is necessary to decline to give evidence as the protection conferred by s.98 would be absolute. There would still, however, be a number of problems to iron out.

One immediate problem would be what would rule 4.23 cover? if the rule was to be re-drafted would its scope be left as it is, or would an attempt be made to widen it, possibly to the extent suggested by Ward and Hale JJ. in Cleveland County Council v F³⁷ and Oxfordshire County Council v P³⁸ i.e. by stating that documents or statements made in the *preparatory* stages are similarly covered by the section? If the rule was widened to such an extent then this would have a considerable impact on inter-agency co-operation. Not only would it prevent any direct sharing of evidence, it could harm

³⁵ See pp.8-11

³⁶ Indeed as a deferral could affect matters such as adoption, fostering, rehabilitative treatment etc. it is possible that the child victim could argue that such a deferral was a breach of Article 8 of the European Convention on Human Rights in a way analogous to the argument developed in relation to therapy. See pp.11-16 above

³⁷ [1995] 2 All E.R. 236

³⁸ [1995] 1 F.L.R. 552

dual investigations because each agency would be frustrated by the other's lack of co-operation. Inter-agency co-operation is one of the building blocks upon which the Children Act 1989 was built. Accordingly it is difficult to see how a wider scope – which would strain inter-agency co-operation – could be justified.

If the scope of the rule is left as it is, however, then the re-drafted rule could result in a parent refusing to co-operate with the social services, and only discuss matters in front of a judge during care proceedings. This could cause severe confusion and frustration within the civil system. Protection proceedings should only be brought when necessary, and when they are brought careful consideration needs to be given as to which order to apply for. If the parents have not co-operated with the social services then it is difficult to see how they could apply for a supervision order. The change would not be welcomed by the criminal justice system as it would cut off an avenue of investigation to all parties in the criminal justice system. All the cases concerning disclosure have always placed great emphasis on not erecting any barriers between the different branches of the judicature³⁹, and yet a revised rule 4.23 would do just that.

In addition, revising rule 4.23 would offer no assistance where there are more than one defendant as the civil proceedings would still be heard first and during those proceedings the parents would have to disclose their defence to each other, possibly leaving themselves open to attack at the criminal trial.

The arguments outlined above illustrate that there is no solution to the problem of tension existing between the civil and criminal systems. Tension exists now, but if any change is made it is likely that the tension will intensify.

³⁹ See for example, Re EC (Disclosure of Material) [1996] 2 F.L.R. 725 at 733

If, therefore, the tension cannot be eradicated, what can the systems do to help alleviate it? One possibility would be for them to establish a better working relationship. The tension can be at its strongest when one set of proceedings attempts to bind or interfere with the other. For the tension to be reduced, it will be necessary for the two systems to co-operate more. Where judges have knowledge of both arenas, it is possible that they will have a greater understanding of the dilemma each faces, and as such they may act more carefully. Lord Justice Thorpe⁴⁰ outlined a scheme whereby the same judge would preside over both the civil and criminal trials.⁴¹ The hope for such a trial was that this would help reduce the tension as the judge could control the timetabling of each case to obtain the optimum result. However, his Lordship noted that the senior judiciary were against the pilot⁴² and in R v A⁴³ the Court of Appeal quashed a conviction when a judge sat on both the civil and criminal trials. Waller L.J., giving judgment, described the decision of the judge to sit on both trials as “unfortunate.”⁴⁴ The decision in *R v A* must have brought to an end the pilot scheme despite the fact that its aims were worthy.

With the demise of the pilot scheme another solution must be proposed to help reduce the tension. There are two possibilities: restricting the type of judge who can hear child abuse trials to those who sit on both civil and criminal child abuse cases,⁴⁵ or

⁴⁰ Thorpe, Rt.Hon. Lord Justice Crime in the Family [1995] Fam. Law 555

⁴¹ Ibid., at 556

⁴² Ibid.

⁴³ (1998) The Times, April 13

⁴⁴ Ibid.

⁴⁵ Although given the ruling in *R v A* not on the same trial.

increasing the awareness of the judiciary. It was seen that much of the tension is created because the two trials pull in different directions, and the judiciary may make decisions that exasperate this. If the judiciary were made aware of the competing interests, and took into account the consequences for the other proceedings when making their rulings, this may well reduce the inevitable tension which exists between the two systems.

Chapter 6

Reforming the Preliminaries of Testifying

This chapter critically assesses the proposals for reforming the preliminaries of testifying in a criminal case. There are four aspects to be examined; at what age a child ceases to become a “child”, the competence of children, whether children should take the oath and the compellability of child witnesses.

AGE

When does a child cease to be a child? The age of majority in England and Wales is 18, yet a child is criminally responsible at the age of 10.¹ Pigot recommended that the age limit should differ depending on the offence:

*in our opinion... the measures should apply in respect of violent offences to all witnesses under 14. Where sexual offences are concerned we believe there are obvious different and special considerations and we think the measures should be available to witnesses under 17.*²

The government accepted this recommendation and legislation set the age limits in that way.³ However, neither Pigot nor the government ever explained *why* there should be a difference between sexual abuse and physical abuse. Testifying in court is traumatic regardless of the type of offence, and yet the disparity created by the age difference appeared to suggest that a child who is the victim of physical abuse or neglect does not experience a similar level of trauma. The interdepartmental working group on vulnerable and intimidated witnesses recognised this inconsistency:

¹ Section 34, Crime and Disorder Act 1998 abolished the principle of *doli incapax*. Prior to this, there was a rebuttable presumption that a child between the ages of 10 and 14 could not commit a crime.

² Pigot Report, para. 2.36

³ See Criminal Justice Act 1988, ss. 32, 34 and Criminal Justice Act 1991, s.53

It is difficult to see why a young person under 17 should be regarded as less vulnerable in the case of offences of violence, compared with a sexual offence. Therefore the Working Group considers that a uniform age limit should be applied to the definition of a child...this uniform limit should be 17 years.⁴

Section 16(1)(a) of the Youth Justice and Criminal Evidence Act 1999 will enact this proposal. This change is to be welcomed because it was wrong to assume that a child who has been physically or emotionally abused would be less traumatised by court proceedings than someone who is sexually abused. Those who suffer abuse are all likely to be traumatised and as such all should be entitled to special measures.

COMPETENCY

To understand the rules concerning the competency of a child, it is necessary to examine whether children are capable of giving intelligible testimony. The starting point in any discussion is R v Wallwork⁵ where Lord Goddard C.J. said of a five-year-old witness:

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 they could.⁶

This case is no longer considered authority⁷ but can a child of such a young age give testimony that would be useful to a trial?

RELIABILITY OF CHILDREN

The reason why very young children were considered to be incompetent was that they were deemed to be unreliable.⁸ Pigot noted that this was no longer true and that children were “no more likely to give inaccurate or untruthful evidence than other

⁴ Speaking up for Justice, para. 10.8

⁵ (1958) 42 Cr. App. R. 153

⁶ Ibid. at p.161

⁷ The court expressly distanced itself from Wallwork in R v Z [1990] 2 Q.B. 355

⁸ See Spencer & Flin (1993) pp. 46-50

witnesses.”⁹

We must assess the arguments surrounding the reliability of children to determine whether they are any different, as witnesses, from adults. The main aspects that need to be considered are:

- (a) whether children have a propensity to lie or invent allegations,
- (b) whether a child’s aptitude at recalling events is less than an adults,
- (c) whether children are liable to suggestions

Each of these aspects will be examined, albeit briefly, to help decide on the reliability of child witnesses.

Lying

One of the criticisms levelled at children is that they may lie. McEwan¹⁰ notes that this is a difficult question to answer:

*Whether or not children would invent stories of abuse of their own accord is [a] vexed question. The law has been influenced by an instinctive feeling that the temptation to lie might be stronger for children than adults.*¹¹

Spencer & Flin argue that children are unlikely to lie:

*One could...suggest that children are actually more truthful than adults. Certainly, the research on children’s beliefs about court implies that children may be more cautious about lying in the witness box than adult witnesses.*¹²

Spencer and Flin base this argument on their literature review of the psychology of children’s reliability.¹³ The literature they discuss does appear to show that there is

⁹ Pigot Report, para. 5.10

¹⁰ McEwan, J. (1992) Evidence and the Adversarial Process Blackstone Press. London.

¹¹ Ibid., at 120

¹² Spencer & Flin (1993) p. 329

¹³ See Ibid., pp. 284-335

now a greater understanding as to the reliability of children and that this has led to a belief that children may be reliable. That is not to say, however, that there is complete agreement in this area, as clearly there is not and controversy remains. For example, there are claims that children do not invent a false allegation of abuse¹⁴ and yet the Royal College of Psychiatrists disagree with this contention.¹⁵

The conflict is likely to continue but Birch¹⁶ makes the important point that even if children do lie, that is not a characteristic which only children possess:

*[it is pointed out] that witnesses of all ages may be prone to lying and deliberate self-delusion: an adult's superior knowledge of how he is supposed to behave in court is no guarantee of moral behaviour.*¹⁷

This is most salient and in the absence of definitive evidence to show that children are more likely to lie than adults, children's evidence should be heard.

Recalling Events

Another criticism is that children cannot recall past events and that their memories may fade with time. McEwan argues:

*Unprompted, children of under 10 recall five or six times less than adults and furnish accounts which are more fragmentary and selective than older children or adults*¹⁸

although she recognises this may not necessarily be the child's fault:

*Very young children can show impressive levels of recall about past experiences. Whether lay persons can understand their descriptions is another matter.*¹⁹

¹⁴ See McEwan, J. Child Evidence: More Proposals for Reform [1988] Crim. L.R. 813

¹⁵ *Ibid.*, at 815

¹⁶ Birch, D.J. Children's Evidence [1992] Crim L.R. 262

¹⁷ *Ibid.* at 264

¹⁸ McEwan (1988) p. 817

¹⁹ *Ibid.* at 816

What McEwan appears to suggest is that children can recall events but in their own way. An adult may not understand their recollections but they are present. Birch suggests:

*a child who can find a context is likely to be a no less accurate witness than an adult counterpart, and may well be better.*²⁰

Placing acts into a context has long been recognised as necessary. Sattar and Bull²¹ argue advocates should alter their terminology:

*For example, if a date needs to be referred to, the date should be described in terms of relevant dates to the child such as 'before Christmas', 'after your birthday'... Similarly, when referring to a specific day of the week, the child could be asked 'was it a school day?', 'what was on the television that night...'.*²²

If this is correct, then so long as advocates adapt their language this would seem to be no bar to hearing the evidence of a child. It would be unrealistic to expect a child to have to testify in an adult way and yet there is research to suggest this is exactly what is expected:

*The system of examination and cross-examination...[is] specifically designed to make it impossible for all but the remarkably robust of children to excel.*²³

In addition to this problem with their language skills, there is also concern as to how delay operates on a child's ability to recall events. Spencer & Flin believe that although there is a problem, it is not child specific:

*Both adults' and children's memories are highly sensitive to the passage of time. Although some knowledge and experiences are stored for decades, a great deal of information is lost or becomes inaccessible due to decay or interference.*²⁴

²⁰ Birch (1992) 264

²¹ Sattar, G. and Bull, R. Child Witnesses in Court: Psycho-legal Issues [1996] S.J. 4

²² Ibid. at 5

²³ Stephenson, G.M. (1992) The Psychology of Criminal Justice Blackwell Press. London. p.175

²⁴ Spencer & Flin (1993) p. 299

McEwan, however, disagrees:

*Children are quicker to forget than adults, and so the younger they are, the faster the memory fades...*²⁵

Whichever theory is correct, it could be argued that this may well become less of a problem because of the proposal for all of a child's testimony to be taken pre-trial.²⁶ However it is unlikely that in all cases this procedure will be used and so the debate will continue. Given that there is no evidence to suggest that children lie to cover "gaps" in their memory, there would appear no reason to argue that a delay before trial should prevent a child from testifying.

Suggestibility

The last main objection to the reliability of children's evidence is that children may be more suggestible than adults.

*Lawyers seem to believe that children are particularly suggestible witnesses, in the sense that their testimony can easily become distorted by leading questions or by misinformation introduced deliberately or unwittingly during an interview.*²⁷

McEwan suggests:

*Children are easier to lead over issues they regard as peripheral, where there has been a lapse of time, and where they regard the interviewer as authoritative.*²⁸

but in a later publication she stressed that this could be limited solely to peripheral matters:

more depends upon the strength of the impression created by the event than the child's age; it is much harder to get a child to accept 'planted' information

²⁵ McEwan (1992) p. 118

²⁶ See pp.124-130

²⁷ Spencer & Flin (1993) p. 303

²⁸ McEwan (1988) p. 818

*where he or she had central as opposed to peripheral involvement in it.*²⁹

This is an interesting point. In effect McEwan is stating that a child may be led on matters which they consider to be peripheral but if the matter is fundamental they would appear less likely to be led. Yet realistically any witness can be led to say something they did not want to say – some suggest that this is the very purpose of cross-examination.³⁰ Some may argue that the danger is not just from advocates asking leading questions but from people “coaching” the witness. Spencer & Flin argue that although there is clear evidence that children can be coached, it happens only rarely.³¹

Are children reliable?

It can be seen from the above that there is conflict as to whether or not a child can be reliable. It is a difficult decision to make and rather unsurprisingly academics are divided as to what it means. McEwan argues that:

*it appears that serious risk could attach to the admission of evidence from children below the ages of seven or eight, although the degree of that risk varies accordingly to the nature of the information sought.*³²

but McEwan has always called for the ending of the adversarial approach to children’s testimony³³ and perhaps her conclusions are intended to strengthen that argument.

Spencer & Flin state:

*We think it is safe to say two things. First, the reliability of children’s evidence depends crucially on how they are questioned. Secondly, if this has been done properly, there is no reason why their evidence should not be regarded as competent and evaluated by the court like that of any other witness.*³⁴

²⁹ McEwan (1992) p. 119

³⁰ See pp.123-124

³¹ Spencer & Flin (1993) p. 312

³² McEwan (1988) p. 818

³³ See McEwan (1992), particularly chapter 4, and McEwan (1988) p. 822

³⁴ Spencer & Flin (1993) p. 301

which supports a previous argument of Birch:

*the court's time would be better taken up in sifting the testimony of all witnesses in the light of what is now known [about reliability] rather than in removing young witnesses from the courtroom altogether.*³⁵

Their argument is that everyone knows the difficulties that might arise in relation to children's evidence, but that it would be wrong to stop listening to their evidence. It has been seen that even very young children can give testimony so their evidence should be heard so long as they are fit to be witnesses. Where their evidence is unreliable it is open to the court to exclude it if they so wish.³⁶

LAW OF COMPETENCE

Section 52(1), Criminal Justice Act 1991 repealed the earlier law of competence³⁷ stating:

...the power of the court in any criminal proceedings to determine that a particular person is not competent to give evidence shall apply to children of tender years as it applies to other persons.

This is rather an unhelpful statement as it gives no clue as to what the competency requirement is, other than to state that any special requirement for children is abolished. Birch argued that the position under section 52 is:

*The court no longer has a duty to inquire into the competence of child witnesses as a class, but retains the power to declare an individual child incompetent.*³⁸

The Court of Appeal in R v Hampshire³⁹ confirmed that this is the position.⁴⁰

However in that case the Court did not define what the competency requirement was

³⁵ Birch (1992) p. 265

³⁶ Exercising their discretion under s.78, Police and Criminal Evidence Act 1984

³⁷ Set out in s.38(1), Children and Young Persons Act 1933

³⁸ Birch (1992) p. 268

³⁹ [1995] 3 W.L.R. 260

⁴⁰ See Ibid., at 265

other than to say that a judge may rule a child incompetent because “*the child is very young or has difficulty in expression or understanding.*”⁴¹ The Criminal Justice and Public Order Act 1994 inserted a new sub-section into the Criminal Justice Act 1988⁴² which says:

*A child’s evidence shall be received unless it appears to the court that the child is incapable of giving intelligible testimony.*⁴³

Murphy⁴⁴ is fiercely critical of this change as he believes it waters down the concept of truthfulness:

*Subsection 2A requires the court to accept the evidence unless the child is incapable of giving ‘intelligible testimony’, which appears to be a less stringent test than ascertaining whether or not the child understands the duty to speak the truth. A child may be intelligible and, at the same time, appear to the court to lack that understanding.*⁴⁵

Murphy is concerned that there is no need to decide whether a child is capable of distinguishing between truth and fiction which was often a fundamental part of the competence assessment.⁴⁶ Childs⁴⁷ argues, however, truth and competency are separate:

*Intelligibility is, of course, not necessarily connected to truthfulness; that, one presumes, is a matter for the jury to assess for themselves when deciding what weight to give the testimony.*⁴⁸

What Childs argues is correct – whether a witness is telling the truth is clearly a matter of fact for the jury – but Murphy’s point goes further than that. It is not *whether* a child is lying which concerns competence, but whether the child is *capable*

⁴¹ Ibid., at 266 per Auld J.

⁴² Schedule 9, paragraph 33 of the 1994 Act authorised the insertion

⁴³ Section 33A(2A), Criminal Justice Act 1988 as amended.

⁴⁴ Murphy, P. (1995) Murphy on Evidence 5th Ed. Blackstone Press. London

⁴⁵ Ibid., at 429

⁴⁶ Spencer & Flin (1993) pp. 46-54

⁴⁷ Childs, M. Children’s Evidence in Criminal Cases [1996] C.F.L.Q. 81

⁴⁸ Ibid., at 84

of telling the truth, i.e. differentiating between truth and lies. In R v D⁴⁹ the Court of Appeal stated that although the test for competency was whether they could give intelligible testimony, the ability to differentiate between truth and fiction was an inherent part of that test. Pigot recommended that the competence requirement should be abolished⁵⁰ although he recommended that a judge should impress upon the child the importance of telling the truth. He suggested a model direction:

*Tell us all you can remember of what happened. Don't make anything up or leave anything out. This is very important.*⁵¹

The use of such a caution is a useful idea and has received judicial approval.⁵² However impressing upon a child the need to tell the truth is of no use if the child does not understand the difference between truth and lie. This is the flaw in the current system and it is submitted that the judge should be required to assess whether the child understands this difference.

Section 50 of the Youth Justice and Criminal Evidence Act 1999 will reform the law of competence. The relevant parts of this section are:

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

⁴⁹ [1995] C.L.Y. 909

⁵⁰ Pigot Report, Para 5.13

⁵¹ Ibid., at 5.15

⁵² R v Hampshire, op.cit., at p. 269

This section does not make any real changes to the existing rules. Sub-section (1) confirms that not only has the test for competence been abolished, but that the simple fact of age cannot stop a child from being competent. This had been stated previously by the Court of Appeal in D.P.P. v M⁵³ In that case a five-year-old girl was ruled to be incompetent by age alone. The Court of Appeal said this was not a valid ruling in law but noted age could be relevant:

*The extreme youth of the complainant was a matter which properly raised concern as to whether she was competent to give evidence. What it did not do was to demonstrate, of itself, that she was not.*⁵⁴

Sub-section (1) has ensured that this position remains. Sub-section (3), in effect, enacts the first half of R v D⁵⁵ which decided that the test of competence was whether the child could understand questions and give intelligible replies.

The section is, however, completely silent as to the need to understand the difference between truth and lie and this is a regrettable omission. Given that the warning approved of in *Hampshire*⁵⁶ would only partially cure this omission since if, the child does not understand the difference between truth and fiction,⁵⁷ a direction to tell the truth is meaningless.

OATH

Where a person does testify, he or she must usually give their evidence on oath.⁵⁸

However section 52(1), Criminal Justice Act 1991 inserted a new section into the

⁵³ [1997] 2 All E.R. 749

⁵⁴ Ibid., at 754 per Phillips L.J.

⁵⁵ op.cit.

⁵⁶ op.cit.

⁵⁷ See Supra Fn. 45 and associated main body text

⁵⁸ See Murphy (1995) p. 431

Criminal Justice Act 1988⁵⁹ which states:

- (1) A child's evidence in criminal proceedings shall be given unsworn.
- (2) A deposition of a child's unsworn evidence may be taken for the purposes of criminal proceedings as if that evidence had been given on oath.
- (3) In this section 'child' means a person under 14 years of age.

Thus the current position is that a child under the age of 14 gives evidence unsworn but a child over that age gives sworn evidence. This section was enacted to solve a difficulty which arose under previous legislation. That legislation⁶⁰ called for the judge to decide whether a child was capable of understanding the purpose of an oath.⁶¹ Presumably it was thought that there could be children who may be competent yet not fully appreciate the oath.

Section 52 of the Youth Justice and Criminal Evidence Act keeps the age limit of 14 but links it to a "*significant appreciation of the solemnity of the occasion.*"⁶² However the section continues by stating that there is a rebuttable presumption that a person who has attained the age of 14 and who is competent, has sufficient appreciation of the solemnity. This can be rebutted by a party adducing evidence showing – on the balance of probabilities – that the child does not have this appreciation.

It could be argued that this section is re-establishing a need to differentiate between truth and lie for a child to be capable of testifying. If this is the position then why not put it in the test for competence rather than the obligation to take the oath?

⁵⁹ Section 33A

⁶⁰ s.38(1), Children and Young Persons Act 1933

⁶¹ See Spencer & Flin (1993) pp. 48-51

⁶² Section 52(2)(b)

Additionally, it does not say what should happen if the person cannot differentiate between truth and lie. Presumably they cannot take the oath but this does not mean their evidence will not be heard, indeed the reverse is true because section 53 specifically permits unsworn testimony to be heard.

It is neither new nor controversial to suggest that the evidence of a child under the age of 14 should be received without the need for the witness to take the oath. However, this section goes beyond this and states that evidence of a child who is over the age of 14 and who does not understand the difference between truth and lie should still be heard. Indeed, by removing the ability to differentiate between truth and lie from the test of competence and placing it in the test for taking the oath, this creates the situation whereby the evidence of a child of any age who does not understand the difference between truth and fiction will still be heard. It could be argued that this section is merely following the proposition put forward by Childs – that competence and truth are separate, and that it is for the jury to decide whether a witness is telling the truth⁶³ – but this would be a misrepresentation. Although it would be true to say that one can never be sure that witnesses tell the truth, and that a jury is normally required to decide whether a person is telling the truth or not, this is not the same issue as deciding whether a child is capable of telling the truth. Where a child simply does not comprehend the difference between truth and lie it is difficult to see how this evidence could be considered valid. Where the witness is also the victim and accordingly much of their evidence is likely to be contested, it would be highly prejudicial to allow this evidence to be heard. Indeed, it is submitted that it would be so prejudicial that its probative value would be far diminished and if the statute fails

⁶³ See Fn 48 above

to prevent its introduction, trial judges should exercise their powers under section 78, Police and Criminal Evidence Act 1984 to rule it inadmissible.

However a more welcome change is introduced by section 53(5) of the Act. This section states that no appeal shall lie on the fact that a witness should have taken the oath but did not. This expressly overrules the earlier case of R v Sharman.⁶⁴ This case concerned the sexual abuse of a girl. At the age of 13 the victim made a videorecording for the purposes of s.32A, Criminal Justice Act 1988. At the time of trial she was 14. By the leave of the court she gave additional live examination-in-chief followed by cross-examination. She was never asked to take the oath or affirm. The defendant was convicted and appealed on the basis that the evidence was inadmissible since she should have been sworn. The Court of Appeal ordered a re-trial saying that evidence not given on oath – when it should have been – is effectively not evidence.⁶⁵ This judgment was technically correct but manifestly harsh. Unsworn evidence is treated the same as sworn evidence⁶⁶ and a direct lie is punished in a way similar to that of perjury.⁶⁷ By ordering a re-trial the court has forced the child victim to go through the trauma of testifying again. By this time a considerable gap will have arisen since the commissioning of the offence⁶⁸ which would substantially increase the pressure and trauma suffered.⁶⁹ Section 53(5) will ensure that this situation is not repeated. It is unlikely to make any significant difference to the defence because of the rule that the evidence is to be treated the same: it is a matter for the jury to decide

⁶⁴ [1998] 1 F.L.R. 785

⁶⁵ See *Ibid.* at 788

⁶⁶ s.33A, Criminal Justice Act 1988 and see section 53(3), Youth Justice and Criminal Evidence Act

⁶⁷ s.38(2), Children and Young Persons Act 1933 and see section 54, Youth Justice and Criminal Evidence Act

⁶⁸ As there would have been the original delay between charge and trial. There would then be an additional delay between conviction and appeal, and then a further delay between appeal and re-trial.

⁶⁹ See chapter 3 for the effect of delay on a child victim.

what weight to put on the evidence.

A final point should be made in relation to untruthful unsworn evidence. Section 54(2) makes it an offence for a witness to “*wilfully give false evidence*” when testifying in the absence of the oath. The offence is triable summarily only and is punishable by six months imprisonment and/or a £1,000 fine.⁷⁰ Given that the age of criminal responsibility is 10, a child under that age who wilfully lies would be subject to no penalty.

COMPELLABILITY OF A CHILD VICTIM

Separate from, although allied to, the issue of competence is compellability. Murphy sets out the general principle of compellability:

*Apart from the accused and the accused's spouse in criminal cases, the general rule [is] that all competent witnesses are compellable to give evidence.*⁷¹

Establishing the problem

When one says that a witness is compellable it means that the witness can be summoned to court to give testimony. There is the ultimate sanction of committal for contempt to back up this witness summons if the witness fails to appear.⁷² This applies equally to children although Spencer & Flin note that for certain children this is a theoretical possibility rather than one used in practice:

*...a witness is only “compellable” in the limited sense, that, once brought to court, his refusal to answer questions is punishable as a criminal offence. If the child is below the age of criminal responsibility....no sanction exists to punish his refusal.*⁷³

⁷⁰ When the witness is under 14 the maximum penalty is a £250 fine. See section 54(3)

⁷¹ Ibid., at 431

⁷² See, Criminal Procedure (Attendance of Witnesses) Act 1965, ss. 3 and 4.

⁷³ Spencer & Flin (1993) p. 72

This is a good point although its continuing relevance could be questioned because since the quote pre-dated the abolition of the presumption of *doli incapax*.⁷⁴ It can be argued that the abolition of this presumption ensured that the age of criminal responsibility was reduced to 10⁷⁵ but Walker⁷⁶ argues it is not that simple. He argues that all s.34 did was to abolish the *presumption* of *doli incapax* and it therefore follows that the substantive defence remains.⁷⁷ This, it is submitted, must be correct: the statute merely talks about abolishing the presumption of *doli incapax* and not of abolishing the defence. If the defence continues to exist then this may mean that a child victim over the age of 10 yet under the age of 14 – of which there are many⁷⁸ – may not, in certain circumstances, be convicted of the crime of contempt.

Without the presumption, the defence would have to raise some evidence that the child could not differentiate between right and wrong⁷⁹ and once that evidence has been raised, it would be for the prosecution to prove beyond all reasonable doubt that the child could, in fact, make such a distinction.⁸⁰

In all probability, however, it will be quite rare for the defence to seek to rely on *doli incapax*. This means that in the majority of situations, a child over the age of 10 will be criminally liable for a failure to testify.

⁷⁴ Abolished by s.34, Crime and Disorder Act 1998

⁷⁵ See Home Office Press Release 375/98: New Powers to Tackle Youth Crime Available from today., para.18.

⁷⁶ Walker, N. The end of an old song? (1999) 149 N.L.J. 64

⁷⁷ Ibid.

⁷⁸ The research of Plotnikoff & Woolfson showed that 64% of victims were over the age of 10 (See Plotnikoff & Woolfson (1995) p.17) and the CPS Inspectorate found that 68% were above that age. (See Thematic Review 1/98, p.49)

⁷⁹ Which is the test for this defence: see Murphy, P. (ed)(1997) Blackstone's Criminal Practice Blackstone Press. London. para. F3.32

⁸⁰ For more details on the burden of proof in relation to defences, see Dennis, I.H. (1999) The Law of Evidence Sweet & Maxwell. London. pp. 347-348.

It may be argued that no court would force a child to testify or punish a child for a failure to testify but Spencer & Flin describe a case where a 15 year-old boy was conditionally discharged after refusing to testify.⁸¹ Although it could be argued that a conditional discharge is, in effect, no punishment⁸² it is still a conviction. The child would have a criminal conviction for the rest of his life, and although the conviction would normally become automatically spent⁸³ there are occasions when even spent convictions count.⁸⁴ Can it be right for the courts to demand that a child testify and label that child a criminal if he does not? The courts have traditionally said that a child has a duty to testify:

*Children...are citizens owing duties to society as a whole (including other children) which are appropriate to their age and understanding...it is not for the wardship court...to use that jurisdiction to interfere with the performance by the criminal courts of their lawful duties.*⁸⁵

Re R concerned a ward of court but the dicta of the Master of the Rolls must apply to children generally. It could be argued that this is manifestly harsh. Children do not have all the rights that adult members of society are entitled to⁸⁶ so why should they owe the same duties? One possible answer is that they are entitled to the fundamental right of protection and as such society should be able to demand they achieve protection by testifying.

Pigot thought that compellability for children should be abolished

We have concluded that children who come within the ambit of our

⁸¹ Spencer & Flin (1993) p.72 and see Independent (1992) March, 29

⁸² See the comments of Clarkson & Keating (1998) Criminal Law: Text and Materials 4th Ed. Sweet & Maxwell. London., p.89

⁸³ Under the Rehabilitation of Offenders Act 1974, a conditional discharge is rehabilitated when it lapses or one year after being imposed, whichever is the longer. See Murphy (1997) para E21.3

⁸⁴ See the schedules to the Rehabilitation of Offenders Act 1974. For example, court proceedings, jobs involving the law, work with children etc.

⁸⁵ *Re R (Minors)(Wardship: Criminal Proceedings)* [1991] 2 All E.R. 193 at 198 per Lord Donaldson M.R.

⁸⁶ For example the right to vote

*proposals...ought never be required to appear in public as witnesses in the Crown Court, whether in open court or protected by screens or closed circuit television, unless they wish to do so.*⁸⁷

This proposal was not taken up by the government but since that time academics have called for it to be implemented:

*The current practice of suggesting to already traumatised children that it is their duty to relive their experiences in court...is totally out of keeping with the views of the Pigot committee and difficult to justify. Until...better arrangements can be made to ensure that acting as witnesses in court is less traumatic, they should not be forced to give evidence.*⁸⁸

This call was repeated by Sir William Utting⁸⁹ but the Youth Justice and Criminal Evidence Act which has reformed many aspects of the law relating to the testimony of young persons and vulnerable witnesses⁹⁰ does not contain a section implementing it. However, should compellability be abolished?

It is clear that abolishing compellability would have the effect of not forcing a child to testify. Given that children find the process stressful it could be argued that forcing the child is adding an extra degree of stress onto the child. The child victim is usually the main prosecution witness so if the child refuses to testify, the case may collapse. Indeed, if compellability were removed the CPS would, presumably, have to contact the child at an early stage to ask whether they would be prepared to testify.⁹⁰ Even if the child said yes at that stage, it would be open to him to say no at any stage. At that point counsel would need to review the decision to proceed. If compellability were to be abolished it would perhaps be necessary to redraft the Code for Crown Prosecutors to ensure that proceedings are not dragged on in the hope of obtaining a plea bargain⁹¹

⁸⁷ Pigot Report, para 2.26

⁸⁸ Fortin (1998) p. 428

⁸⁹ Utting, Sir William (1997) People Like Us Department of Health. London., para 20.17

⁹⁰ See chapter 2 for more information on the decision to prosecute.

⁹¹ i.e. Waiting to the day of trial and suggesting to the defence that the prosecution would be prepared to accept a plea of guilt to a lesser charge.

as this would not be an ethical method of obtaining a conviction.⁹²

However does the fact that it may cause stress to the child justify removing compellability. Ashworth has argued that crimes of violence and sex are not just crimes against the victim but also crimes against society.⁹³ If this is correct then should society not be justified in seeking the punishment of one who breaks their rules? In a previous publication⁹⁴ I argued that society would not demand a child is subjected to harm for the sake of vengeance.⁹⁵ However that applied to the actual sentence and not to the decision as to whether to proceed with a prosecution. It could be argued that society is willing to show compassion as to a sentence if it will help a child, but they may be more reluctant to see an offender go unpunished. Such an approach would follow the public retributive model for criminal justice:

*it is asserted that there is a public model for vengeance. It is argued that there is an instinctive demand which is active in every human being to retaliate - just as an animal strikes back with hate at those who attack it.*⁹⁶

Such an approach is becoming more popular; Clarkson & Keating argue that the Criminal Justice Act 1991 is based on this theory.⁹⁷ This does not just apply to sentencing but also to a trial. In the trial of Peter Sutcliffe - "the Yorkshire Ripper" - the judge refused to accept a manslaughter plea (acceptable to the prosecution) and demanded a trial for murder.⁹⁸ Manslaughter carries the same maximum sentence as murder⁹⁹ so Clarkson & Keating ask the question why did the judge do this?

⁹² See McConville and Mirsh Redefining and Structuring Guilt in Systematic Terms: The Royal Commission's Recommendations Regarding Guilty Pleas in McConville and Briges (1994) Criminal Justice Under Stress Edward Elgar Publishing, London. 264 at 271

⁹³ Ashworth, A. Punishment and Compensation: Victims, Offenders and the State (1986) 6 O.J.L.S. 86

⁹⁴ Gillespie, A. A. Victims and Sentencing (1998) 148 N.L.J. 1263

⁹⁵ Ibid., at 1265

⁹⁶ Clarkson & Keating (1998) p.27

⁹⁷ Ibid., at 28

⁹⁸ Ibid., at 34

⁹⁹ Namely life imprisonment

Presumably he believed that society has the right to demand a person is tried for an offence appropriate to his actions. If we apply this to child abuse trials, it could be argued that society could demand that an alleged perpetrator is tried: which would mean a child could be compelled to testify.

Hearsay

Could there be an alternative to compelling a child to testify however? McEwan¹⁰⁰ argues that section 23, Criminal Justice Act 1988 could be used:

*The answer could lie in the existing, but in this context comparatively neglected, rules for the admissibility of documentary hearsay evidence... recently entertained... in the criminal sphere.*¹⁰¹

Section 23 permits hearsay evidence to be permitted in certain circumstances. The main circumstance applicable here is where the person does not give oral evidence through fear.¹⁰² Spencer & Flin believe that “fear” would include a fear of testifying,¹⁰³ however Zuckerman¹⁰⁴ notes the section was:

*designed to discourage intimidation of prosecution witnesses by the accused or his henchmen.*¹⁰⁵

If this was the reason for implementing section 23(3) then it would appear that McEwan and Spencer & Flin’s arguments would extend the scope of this section, possibly too far. However, that is not to say that the section could not be amended to permit the videorecorded interview of a child who is too traumatised to testify in court. This could be coupled with a requirement to produce medical evidence that the

¹⁰⁰ McEwan, J. Documentary Hearsay Evidence - Refuge for the Vulnerable Witness? [1989] Crim L.R. 629

¹⁰¹ Ibid.

¹⁰² Section 23(3)

¹⁰³ Spencer & Flin (1993) p.135

¹⁰⁴ Zuckerman, A. A. S. (1992) The Principles of Criminal Evidence Clarendon Law. London

¹⁰⁵ Ibid., p.219

child would suffer significant harm if forced to testify. However would this be a suitable alternative?

The most obvious disadvantage that the use of s.23 would bring is that it would not be possible to cross-examine the child. Murphy uses this to criticise the section:

*it remains a legitimate concern in any criminal case that oral evidence, which can be tested by cross-examination before the tribunal of fact, should not be replaced by documentary evidence.*¹⁰⁶

However McEwan notes that cross-examination is not necessarily the most suitable alternative:

*it is not clear why it is impossible to get across by other means to the jury that the absent witness may have had motives for lying or be generally unreliable. The traditional view is that cross-examination is an instrument for the truth; another is that it merely demonstrates the power of a skilful cross-examiner to make an honest witness appear at best confused and at worst a liar.*¹⁰⁷

McEwan is assuming that in many cross-examinations the sole purpose is to suggest that the witness is lying. She suggests that there are more appropriate ways of making such a suggestion to the jury. Her point that the purpose of cross-examination is to confuse the witness is a good one and others have commented how the use of adult language and reference to intricate details can easily confuse a child and lead to their credibility being reduced.¹⁰⁸ However not all cross-examination follows this format: there may be legitimate reasons why cross-examination is necessary.

The fact that the information in the document is relevant, however, is not enough for it to become automatically admissible. Section 26 states that where a statement is admissible under section 23 or 24 and has been made for the purpose of criminal

¹⁰⁶ Murphy, P. (1995) p.293

¹⁰⁷ McEwan (1989) p.631

¹⁰⁸ See in particular: Sattar G, and Bull, R. Child Witnesses in Court: Psycho-legal Issues (1996) S.J. 4 at 5. and Butler, T. Spare the Child [1993] Police Review (Dec) p.14

proceedings, the court must grant leave for the evidence to be admitted. This is not a mere discretion but an active analysis of whether it would be “in the interests of justice” for such evidence to be admitted.¹⁰⁹ Murphy argues that where some testimony has been given¹¹⁰ this evidence should not be admitted:

*The weight of a hearsay statement must be affected by the fact that the witness has already given some oral evidence. There is a corresponding difficulty facing the other side in attempting to contravert the evidence. It is submitted that in such a case, the court should be ready to exclude the hearsay evidence in the exercise of its discretion.*¹¹¹

McEwan argues that if the facts contained in the statement are relevant then:

*the loss of the opportunity to cross-examine... is a disadvantage [but] this may appear... to be of marginal importance when set against the relevance of the facts stated.*¹¹²

If McEwan is correct then an amended section 23 would permit the video-evidence of a child - who would be harmed by testifying at trial - to be placed before the jury yet the defence would not have the opportunity to test that evidence. Following the enactment of the Human Rights Act 1998 a major factor to take into account would be whether it is possible to amend s.23, or whether this would fall foul of the European Convention on Human Rights.

In Unterperntinger v Austria¹¹³ the European Court of Human Rights held that where the prosecution case is composed “mainly” of statements by persons whom the defence cannot cross-examine, this was a breach of Articles 6(1)¹¹⁴ and 6(3)(d).¹¹⁵

¹⁰⁹ See Murphy (1997) paras F16.15, F16.16

¹¹⁰ And a pre-recorded video admitted under s.32A, Criminal Justice Act 1988 must surely be regarded as testimony.

¹¹¹ Murphy (1995) p.289

¹¹² McEwan (1989) p.640

¹¹³ (1986) 13 E.H.R.R. 175

¹¹⁴ Right to public trial

¹¹⁵ Right to examine witnesses

This was confirmed by the later case of Lüdi v Switzerland¹¹⁶ which stated that if such statements composed a “significant” part of the prosecution, Article 6 would be breached.

Given that this is the situation it is unlikely that section 23 could be amended in a manner compliant with the Convention. In child abuse trials it is submitted that it would be rare for the pre-recorded video not to form a significant part of the prosecution case. As such any application to admit such evidence under s.23 would contravene Article 6 and so should be refused.

s.80 PACE 1984

It could be argued that compellability could be abolished by amending section 80, Police and Criminal Evidence Act 1984. Section 80 states that the spouse of a defendant is not compellable as a witness for the prosecution. Zuckerman states that the justification for this was that forcing a spouse to testify would cause marital discord.¹¹⁷ If this is correct, then could it not be argued that forcing a child to testify would cause family turmoil? The argument is somewhat weaker when s.80(3) is taken into account which states that if the offence for which the spouse is to be called against the defendant, is one of sex or violence against a child, the spouse is compellable. If the legislature believed that protecting children was important enough to justify an exception to the long-established rule that a spouse was not compellable¹¹⁸ it is unlikely that an offence against a child would justify abolishing compellability for the child.

¹¹⁶ A 238 (1992)

¹¹⁷ See Zuckerman (1992) p. 290

¹¹⁸ The rule was enshrined in the common law prior to s.80 being enacted. See Zuckerman (1992) pp.287-289

Even if this was not the case, Zuckerman argues that exceptions to compellability should not be permitted:

*One may perhaps be able to defend a failure to initiate a complaint but it could hardly be maintained that without incriminating evidence from the court, once the accused has been charged, [this] is morally acceptable, especially where the offence is a grave one.*¹¹⁹

Zuckerman is stating that a victim should perhaps have the right to stop an investigation beginning, but that once court proceedings have begun it is for all members of society to co-operate. Fortin, however, argues that the child's welfare should be taken into account:

*...the interests of child witnesses are too often sacrificed to protecting the public against child abusers, with little tangible benefit to the children themselves.*¹²⁰

This position assumes that the child should play a significant role in the proceedings: that the victim is not a mere witness but that the criminal justice system should be based around the victim *and* the defendant. This is a significant step from the traditional role of the system. Clarkson & Keating state that the system could operate on a personal retributive method.¹²¹ This would be where the system is based upon the need to help the victim gain revenge for the crime committed against them.¹²² On that basis if a victim did not wish to seek retribution (ie by not testifying) this would be the end of the legal proceedings.

This is in direct contrast to the conventional theory highlighted by Zuckerman above, which supports the argument that a crime is an action against society and that society has the right to demand retribution. This demand would also mean they would have

¹¹⁹ Ibid., at 291-292

¹²⁰ Fortin (1998) p. 428

¹²¹ Clarkson & Keating (1998) p. 26

¹²² Ibid. at p. 27

the right to compel a person (including a child) testifies.

The conventional theory is supported by the effects of victims not testifying. If the child does not testify then it is highly unlikely that the case can proceed. Without a prosecution there can be no conviction and this could have an effect on child protection. A conviction will label the offender a Schedule I offender¹²³ or, if appropriate, he will be required to register under the Sex Offenders Act 1997. The use of these Acts can help local authorities track an offender, whereas it has recently been held that local authorities do not have a similar ability with regard to suspected abuse. In Re L (Sexual Abuse: Disclosure)¹²⁴ the Court of Appeal stated that neither section 17 nor section 47 of the Children Act 1989 places upon a local authority a duty to inform another authority about a person suspected of abusing children. Butler-Sloss L.J. said:

*I have great sympathy with the judge's wish to protect other children who may be at risk from a man whom he has found to be an abuser. But it is important to recognise that Parliament has not thought it appropriate to include cases of this nature... within the statutory and regulatory framework under which there is now widespread dissemination of information specifically for the protection of children.*¹²⁵

This case can be criticised for a number of reasons but it sets a precedent by which disclosure can realistically only take place after a conviction. If this is correct then children can only be protected once a conviction has been obtained.¹²⁶ This strengthens the argument that society has the right to seek a conviction where appropriate which means society can demand the compelling of a child to testify.

¹²³ Schedule I, Children and Young Persons Act 1933

¹²⁴ [1999] 1 W.L.R. 299

¹²⁵ Ibid., at 305

¹²⁶ Given that the majority of abuse is intrafamilial, it is unlikely that the provision contained in the Protection of Children Act 1999 would be of any assistance in situations such as this.

The issue of the compellability of a child is a thorny one. It is quite clear that forcing a child to testify can cause harm to the child. This harm has led many to call for compellability to be removed. However there are reasons why it should stay, not least that society has the right to see a person convicted.

Fortin, Spencer & Flin and McEwan want what is best for the child but ultimately the child can only be one part of the criminal justice system. The fault is not with compellability but with the process of testifying. If it were not for the fact that the current approach to cross-examination causes harm, compellability would be fine. It is presumably for this reason that Fortin only gave a conditional call for compellability to be removed¹²⁷ - for it to be removed until better arrangement are made.

However this failure by society to make testimony less harmful cannot by itself justify the ending of compellability. Vulnerable members of society need protection and society needs to see those who breach its rules caught and tried. Without compellability neither of these tasks are possible.

¹²⁷ See Fortin (1998) p.428 and see Supra Fn 88 and associated text.

Chapter 7

The Testimony of a Child

We now turn to the question of child testimony. The testimony of witnesses is vital to the outcome of a trial. In child abuse cases, the main witness will, where the child is old enough, be the child itself. Controversy exists over how a child should give his testimony in an adult court. There appears to be a consensus that special procedures are required to help the child, but considerable disagreement over what these special procedures should be. We must first, therefore, illustrate how a child testifies under the present law, and show why this is unsatisfactory; then critically examine the proposals put forward in recent legislation to help a child testify in an adult court. The analysis of these reforms will test whether they will not only help the child, but do so without harming the interests of justice, or undermining the defendant's rights to due process.

EXAMINATION-IN-CHIEF

Traditionally the first testimony a person will give is his or her examination-in-chief. This is where the witness gives evidence on behalf of the party that called him. Where the witness is a child there are two possible ways for their examination-in-chief to be taken:

- (1) the traditional 'live' examination-in-chief
- (2) through a pre-recorded video interview

These two options will be examined in order to see whether they are adequate in presenting the child's testimony.

PRE-RECORDED INTERVIEW

Section 32A, Criminal Justice Act 1988¹ permits a court to allow a pre-recorded video interview to be admitted as the examination-in-chief. The government had previously set up an Advisory Group on Video Evidence under the chair of H.H.J. Pigot Q.C. Their report recommended that pre-trial videos be permitted.² They argued that:

*most children are disturbed to a greater extent by giving evidence in court...these effects are generally agreed to be peculiarly injurious and very often long lasting...The admissibility of video-recorded interviews would relieve some of these pressures.*³

Thus pre-trial testimony can be taken, but does it work and how often is it used? To decide whether the pre-recorded interview is helpful to the child victim it is necessary to examine closely the process of admitting such a tape as evidence.

Who decides to make a tape and when?

The first decision must be whether to make a tape, but who makes this decision? The *Memorandum of Good Practice* was issued:

*to help those making a video recording of an interview with a child witness where it is intended that the result should be acceptable in criminal proceedings.*⁴

Pigot had suggested that a Code of Practice, similar to those contained in the Police and Criminal Evidence Act 1984, should be drafted⁵ but the Memorandum is not such a code:

The guidance is voluntary only, not having the binding statutory force of the kinds of Codes of Practice issued under the Police and Criminal Evidence

¹ As inserted by s.54, Criminal Justice Act 1991

² See Recommendation 1 of the Pigot report

³ Ibid., paras 2.10-2.11

⁴ Memorandum, p.1

⁵ Pigot report, para. 4.8

Act.⁶

that said, however, the Memorandum is an important document and the courts have suggested that departure should be made from it only rarely.⁷

The Memorandum states that the decision to make a video, and indeed the actual making of the video, should follow the framework of inter-agency co-operation set out in *Working Together*.⁸ That is to say, all professionals - but especially the police and the social services - should co-operate on the making of a video and the decision should be a joint one. In the early years of video evidence, there was often a tension between the local authority and the police because most forces did not have an established relationship with other agencies.⁹ This appears to have been resolved and a recent report suggested that inter-agency co-operation had improved.¹⁰

The timing of the video is also controversial. Pigot stated that the video should be made as soon as possible:

*We recognise that several days may elapse after the initial complaint before an interview can be arranged but we do not think longer delays should be tolerated.*¹¹

The Memorandum is less precise:

*The video recorded interview which is to be admissible in court should broadly equate with a witness statement of the first detailed account given to the police and should be conducted as soon as is practicable. Sufficient time must, however, be allowed for proper inter-agency consultation and planning..*¹²

⁶ McEwan, J. Where the prosecution witness is a child: the Memorandum of Good Practice (1993) 5 J.C.L. 16

⁷ R v Naylor (1995) The Times, February 8

⁸ See the Memorandum, p. 2

⁹ See Davis and Wilson. The videotaping of children's evidence: issues of research and practice [1994] P.C.L.B. 68

¹⁰ Thematic Review 1/98 The Inspectorate's report on cases involving child witnesses CPS. London.

¹¹ Pigot Report, para 4.10

¹² Memorandum, para 1.7

It is submitted that the approach adopted by the Memorandum is the correct one. Although the video should be made as soon as possible, if it is made prior to consultation and planning it is likely to be worthless and repeat videos would be necessary, something which could prejudice the welfare of the child or lead to the tape being declared inadmissible.¹³

Conducting the Interview

The Memorandum sets out guidance on how the interviewer should conduct the interview. Such guidance, if followed, should hopefully lead to an acceptable video. However if the interview does not follow the Memorandum this will not, by itself, necessarily lead to a ruling of inadmissibility:

*A video recording that does not strictly comply with the Memorandum will not automatically be ruled inadmissible. On the contrary, it was Parliament's clear intention that such video recordings of children's testimony should be admitted unless...it would be contrary to the interests of justice to do so.*¹⁴

The Courts have agreed with this approach¹⁵ although cautiously. This must be correct. The Memorandum is not a binding document but it does give guidance and so if it were not designed to be followed, why set it out in the first place? The Memorandum adopts a "phased approach" and this is set out (in summary) below.¹⁶

There are four phases:

Phase one - Rapport

Phase two - Free Narrative Account

Phase three - Questioning; and

¹³ See Ward, B. Interviewing child witnesses (1992) 143 NLJ 1547

¹⁴ Memorandum, page 1.

¹⁵ R v Naylor (1995), op.cit.

¹⁶ Based upon the Memorandum, pp 22-23

Phase four - Closing the Interview¹⁷

The rapport stage is merely allowing the child to be put at ease, get used to the questioner and the video equipment. Phase two is when the child is asked to give his or her account of what happened without interruption, but adopting “pro-active listening.”¹⁸ The third phase is where the questioner asks questions of the child. The Memorandum notes that there are four types of questions:

- (i) open-ended questions
- (ii) specific yet non-leading questions
- (iii) closed questions; and
- (iv) leading questions

and that ideally open-ended questions should be used and leading questions avoided.¹⁹

This approach has been the subject of criticism. Davies and Wilson state:

*One criticism which has been aired concerns what might be termed the implicit model of the child witness embodied in the Memorandum. It is said to be of a child who is ready to speak fully of their abuse and just requires skilled and tactful interviewing to tell the complete story. While such victims clearly exist, they are regarded as a minority.*²⁰

Bentovim²¹ et al suggest:

*the Memorandum was not created to deal with emotionally disturbed or hesitant children and presumes a degree of spontaneity which is seldom seen in clinical practice.*²²

¹⁷ Ibid., at pp 15-21

¹⁸ See Memorandum para 3.15

¹⁹ Ibid., para 3.17 and 3.35

²⁰ Davies & Wilson (1994) p.69

²¹ Bentovim, A; Bentovim, M; Vizard, E. Facilitative interviews with children who may have been sexually abused (1995) 4 Child Abuse Review 246 at 251

²² Ibid., at 251

What makes these criticisms more tangible is that the Memorandum suggests that the interview should last a maximum of one hour.²³ This figure, although referred to as a “rule of thumb” has come under continual criticism. McEwan notes that:

*In the light of [the phased approach], the one-hour optimum seems unattainable. It might have been more sensible to suggest that the interview should be abandoned if no evidence of criminal behaviour emerges within that time.*²⁴

The Memorandum states:

*The video recorded interview which is to be admissible in court should broadly equate with a witness statement... given to the police.*²⁵

Yet McEwan asks:

*how long would an adult have to compile a witness statement describing not one but many offences taking place over years.*²⁶

This is a salient point. Witness statements can take a considerable time to prepare and that is when the witness - an adult - is supposed to have a greater ability to communicate. Equally, adults giving witness statements can make numerous statements whereas the Memorandum suggests that it should be rare for a second interview to occur.²⁷

The problems of the phased approach together with the one-hour approach have led some to suggest that the Memorandum:

*[is] an ideal approach for a one-off event, particularly perpetrated by a stranger...*²⁸

It is easy to see why such criticism has been levelled at the Memorandum. There are

²³ Memorandum, para 2.17

²⁴ McEwan (1993) p. 17

²⁵ Memorandum, para 1.7

²⁶ McEwan (1993) p. 17

²⁷ Memorandum, para 3.41

²⁸ Spencer & Flin (1993) p.342

evidence.²⁹

The prosecution should, at the pre-trial hearing, make an application under s.32A(2) of the 1988 Act for the video evidence to be admitted as the child's examination-in-chief. The judge hears any arguments as to admissibility and makes a decision. The video stands as the examination-in-chief and as such the child must be competent. The legal rules regarding competence were dealt with above³⁰ but how does the judge decide whether a child is competent? This issue was addressed by the High Court in D.P.P. v M.³¹ The defendant, himself a youth, had been convicted of the indecent assault of a young girl by a youth court. He appealed to the Crown Court. The recorder presiding decided that the victim, then aged 5, was not competent by age alone and refused to watch the video to decide competence. The defendant thus won the appeal but the prosecution appealed to the Divisional Court by way of case stated. The Court noted that the recorder made an error of law by deciding a child was not competent by age alone³² but also stated:

*In order to determine, under section 32A(3)(c), whether the interests of justice require him to refuse [an application], the judge in most, if not all, cases must watch the video recording.*³³

The ruling in D.P.P. v M is helpful. By watching the video upon application, a judge should be able to make a decision as to competence at the outset of court proceedings.

There had been some doubt as to frequently video evidence was used. Plontikoff & Woolfson suggested the figures were quite low³⁴ but their research was based upon

²⁹ Under section 78, Police and Criminal Evidence Act 1984

³⁰ See pp.72-75

³¹ [1997] 2 F.L.R. 804

³² Ibid. at 809

³³ Ibid. at 808 per Philips L.J.

³⁴ Plontikoff & Woolfson (1995) pp 75, 79-81

the first year of implementation of the 1991 Act.³⁵ More recent studies have shown an improved situation.³⁶ The table below shows a comparison of the data the two studies compiled.³⁷

| | Thematic Review (%) | Plontikoff & Woolfson (%) |
|---|---------------------------|---------------------------------|
| Cases in which video evidence applied for | 95.3 | 59 |
| Video applications granted | 85.5 | 71 |
| Video evidence granted but not used | 16.7 | 53 |

It can be seen that the recent data shows a marked improvement since initial implementation, although there are some issues of concern raised. The first point to note is that although in 85.5% of cases the application to use a video was granted, this means in 14.5% of cases the video was considered by the judge to be inadmissible.³⁸ Although this figure is much improved from the earlier study when almost twice as many tapes were inadmissible, it is still unsatisfactory. One pleasing improvement is that the percentage of cases where the CPS has failed to apply for video evidence to be permitted has fallen from 40% of cases to just 5% Finally, although the percentage of cases where permission for video evidence had been granted but not taken up has fell from 53% to 16.7% this improved figure still appears relatively high. There will always be cases when it might not be appropriate to use the evidence³⁹ but a percentage as high as 16% would appear to suggest that some trial counsel are choosing not to use this invaluable resource even though it must have been considered appropriate at the time of application.

³⁵ Ibid., at p.13

³⁶ Thematic Review 1/98, op.cit., pp. 31-34

³⁷ Source: Figures from tables set out in Thematic Review 1/98, op.cit., at pp.32-33

³⁸ No details are given as to why they were unsuitable although the Inspectorate did note that the quality of some videos were questionable. See paras 8.38-8.40 .

³⁹ For example the child witness may not want to give testimony that way.

Advantages of the Pre-recorded Interviews

A number of advantages can be shown in respect of pre-trial examination-in-chief.

The main ones are as follows.

Guilty pleas are induced

Pigot noted that some suggest a pre-trial interview can adduce guilty pleas:

*...the availability and admissibility of video recordings is said by some to have led to a significant increase in guilty pleas...*⁴⁰

This argument is, presumably, based on the assumption that a defendant viewing the tape realises that his victim is capable of giving detailed evidence and so his chances of acquittal are reduced. Plontikoff & Woolfson felt unable to come to any conclusion on this:

*It has been anticipated that the admissibility of videotaped interviews will result in a higher rate of guilty pleas. It was too early for us to assess whether this is true...*⁴¹

The latest research on child witnesses⁴² did not consider this issue but others have doubted whether such an assumption is valid.⁴³ Realistically, it is unlikely that a videotape by itself could precipitate a guilty plea as the defendant may believe his counsel will be able to undermine the child's credibility during cross-examination. This, however, may alter if cross-examination is taken pre-trial also.⁴⁴

Reduced Stress

The Pigot committee argued that permitting video-recorded examination-in-chief

⁴⁰ Pigot Report, para. 2.11

⁴¹ Plontikoff & Woolfson (1993) p. 79

⁴² Thematic Review 1/98, op.cit.

⁴³ See McEwan (1993) p.18 and Spencer & Flin (1993) p. 197

⁴⁴ See pp.124-130



would help alleviate the stress a victim suffers during testimony.⁴⁵ This belief has been supported by academics such as Childs⁴⁶ who stated:

*[Videorecordings] were calculated to address the difficulty faced by those attempting to prosecute offences against children; the younger and more vulnerable the victim, the greater the likelihood that proceedings might fail... because the child was too traumatised to give evidence...*⁴⁷

Spencer, however, argues that there is a danger that it could cause additional stress.⁴⁸ He suggests that because no live examination-in-chief is possible on issues covered in the tape⁴⁹ this will mean in the majority of cases the child will be immediately cross-examined. This, he suggests, is traumatic and he proposes that “regular” questions should be permitted. Although it is true that cross-examination will take place immediately, it is difficult to see how live examination-in-chief would alleviate this pressure. The style of questioning in cross-examination is considerably different and it is submitted that this is the cause of the trauma, rather than an absence of live examination-in-chief.

Fresh Evidence

The main advantage pre-recorded testimony has is that it is fresh.

*Evidence which we received from practitioners, psychiatrists, social worker and the police suggested that if an interview takes place shortly after the child's first allegation or disclosure it will usually provide the freshest account least tainted by subsequent discussions and questioning.*⁵⁰

The reliability of children's testimony was discussed above⁵¹ but this is a fair point

⁴⁵ Pigot Report, paras 2.10-2.11 and see Supra Fn 3 and related text.

⁴⁶ Childs, M. Children's evidence in criminal cases [1996] C.F.L.Q. 81

⁴⁷ Ibid., at 82

⁴⁸ Spencer, J. (1993a) Using the CCTV link (1993) Archbold News, July 2

⁴⁹ Section 32A(5)(b) Criminal Justice Act 1988 provides this bar.

⁵⁰ Pigot Report, para 2.16

⁵¹ See pp.66-72

and other commentators have agreed that this is the one big advantage pre-recorded interviews have.⁵²

Appropriate language

Another advantage of pre-recorded interviews is it shows how the child speaks enabling the questioner to use appropriate language:

Spencer & Flin note that:

*In the course of being questioned, little children often pick up the adult words for sexual acts. They then use these when giving examination-in-chief, which often leads to the suggestion that they have been coached.*⁵³

and emphasises this point by using an example:

*When an eight-year-old says, 'And then he ejaculated over me' defence counsel will immediately ask, 'Did your mummy teach you that word?', to which the answer will probably be yes - with the resulting suspicion that the child's knowledge of such things come from the mother rather than witnessing an indecent act. If when she first described the incident her words were 'And then he kind of flicked white wee from his willy', a videotape would often reveal that she originally used words appropriate to her age and understanding.*⁵⁴

This example is a particularly strong one: a child should not be disadvantaged for picking up language from adults.

A related point is made by McEwan who notes that counsel are often unable to use suitable language when asking questions.⁵⁵ This can cause problems in cross-examination but when it occurs in examination-in-chief this could result in counsel destroying the credibility of his own witness. If a child becomes confused because of

⁵² See McEwan (1993) p.18 and Spencer & Flin (1993) pp. 196-197

⁵³ Spencer & Flin (1993) p.196

⁵⁴ Ibid.

⁵⁵ See McEwan (1993) p.18

the language used in the traditional style of questioning, it is likely that he will become flustered and appear to be changing his story. The consequences for his credibility would be somewhat serious.

Disadvantages of video testimony

Although there are some advantages to pre-recorded examination-in-chief, some disadvantages have also been identified. It is important to note that many of these relate to aspects other than the video testimony so many will be dealt with elsewhere. They are listed here, however, for completeness.

Live Cross-examination remains

The main problem with the existing law is that cross-examination remains live. The implications of live cross-examination will be discussed below⁵⁶ but this was a problem that Pigot noted:

*Video-recorded interviews [may] not relieve the pressure upon child witnesses since cross-examination would be necessary in any case and that the stress experienced by children might actually increase...*⁵⁷

The Group did not believe that this would be a continuing problem because they recommended pre-trial cross-examination also.⁵⁸

Evidential weight

One of the disadvantages that has been levelled at video technology is the allegation that the weight of the evidence is compromised. There are two aspects to this; the reception by a jury to the child's presence and rehearing the evidence. The reception

⁵⁶ See pp.111-130

⁵⁷ Pigot Report, para 2.20

⁵⁸ Ibid., paras 2.22, 2.25, 2.29-2.31 and see pp.124-130 below

of evidence by the jury is considered when examining the use of CCTV links during cross-examination⁵⁹ because the principles are very similar.

Of particular concern, however, is the rehearing of evidence. By its very nature, pre-recorded testimony is capable of being replayed, whereas traditional evidence cannot. The question of whether it is appropriate to replay the evidence was first examined in R v Rawlings; Broadbent (Practice Note).⁶⁰ The jury in both cases wished to hear the videorecording of the complainant again after they had been sent to consider their verdict. The judge in each case permitted it and the defendants were convicted. They appealed alleging, inter alia, that the judge was wrong to replay the video. The Court began by noting that traditionally if a jury wishes to be reminded about testimony the judge would read from his notes.⁶¹ The Court commented that:

*Even since shorthand writers became able to take a verbatim note of all questions and answers... the practice has remained the same.*⁶²

The Court heard submissions as to whether a replay should be permissible and, not surprisingly, these submissions were diametrically opposed:

*In favour of allowing an "action replay," it is submitted that, on request, the jury should be given the most accurate and complete reminder of the witnesses' evidence which is available.*⁶³

and

*For the appellants, it was argued that to replay the video after conclusion of evidence, speeches and summing up, would give undue prominence to the complainant's examination-in-chief.*⁶⁴

The Court of Appeal decided that the judge had a discretion to replay the video

⁵⁹ see pp.114-120

⁶⁰ [1995] 1 W.L.R. 179

⁶¹ Ibid., at 180

⁶² Ibid. per Lord Taylor C.J.

⁶³ Ibid. at 181

⁶⁴ Ibid.

although this discretion should be tempered by why the jury wish the replay:

*Usually, if the jury simply wish to be reminded of what the witness said, it would be sufficient and most expeditious to remind them from [the judge's] own note. If, however, the circumstances suggest or the jury indicate how the words were spoken is of importance to them, the judge may in his discretion allow the video to be replayed.*⁶⁵

The Court then stated that if a replay did occur, three conditions need to be satisfied:

- (1) the replay should be in open court
- (2) the judge should warn the jury not to place undue weight on the replay
- (3) the judge should remind the jury of the cross-examination and re-examination to ensure a fair balance.⁶⁶

The judgment in *Rawlings* appears to strike the right balance. If a jury simply wishes to be reminded of the testimony then there is no reason why a child complainant's evidence should be treated differently to other witnesses. Where they wish to see how that testimony has been given - ie the composure of the witness - then it seems sensible to permit such a request since it is possible to conform. That said, it is sensible so long as the safeguards set out in *Rawlings* are kept. Unfortunately those safeguards have already been weakened.

In *R v Sanders*⁶⁷ a judge who had, admittedly, given a substantial summing up detailing the cross-examination, replayed the complainant's video and asked the jury whether they wished to hear his notes on the cross-examination. The jury stated they did not and the judge refused to do so on his own motion. The Court of Appeal dismissed the defendant's appeal stating:

⁶⁵ Ibid. at 183

⁶⁶ Ibid.

⁶⁷ [1995] 2 Cr. App. R. 313

*We recognise and acknowledge the terms in which Lord Taylor C.J. expressed himself in passage (c) [of Rawlings] but we do not accept that the learned Lord Chief Justice could ever have intended to require a judge to remind the jury yet again of cross-examination after that judge had taken the care that [this judge] did...*⁶⁸

This ruling appears contrary to the third condition of *Rawlings* and it is unfortunate that the Court of Appeal permitted the irregularity to stand. It could be argued that juries are sensible and they know whether they wish to hear all the evidence, but it raises the appearance of unfairness. It is a fundamental part of the English legal system that justice must be seen to be done and not just done. It is submitted that where a jury hears the evidence without hearing the rebuttal of that evidence, there is the appearance of unfairness towards the defendant. *Sanders* should, therefore, stand only on its facts and not as an exception to *Rawlings*.

Similar issues have arisen in relation to transcripts. Normally a jury listens to the testimony of a witness and make notes if they so wish. However since the examination-in-chief is given by video it has been questioned whether the jury can have a transcript of the video. The leading case in this area is R v Welstead.⁶⁹ The defendant was charged with the indecent assault of three boys aged 11-14. All three gave examination-in-chief through a pre-recorded interview. The jury requested a transcript and the judge, after consultation with counsel, permitted a transcript to be given. The next day the defence objected stating that some members of the jury were reading the words and not watching the screen. The judge overruled this objection and stated the jury could have the transcripts until they retired. The defendant appealed contending, inter alia, that this was a material irregularity in the trial.

The Court of Appeal stated that the jury could receive transcripts but attached three

⁶⁸ Ibid., at 318 per Russell L.J.

⁶⁹ [1996] 1 Cr. App. R. 59

provisos:

- (1) The transcripts must assist them in following the evidence of the witness.
- (2) The judge should direct the jury that the transcript is purely to aid them and that the witnesses' evidence is what they see and hear on the tape and it is that which they must concentrate on.
- (3) The judge should warn the jury not to place disproportionate weight on the transcripts or evidence of the child.⁷⁰

In giving the decision the Court stated they agreed with cases from other jurisdictions:

*In MacLean and MacLean (no. 1) (1979) 49 C.C.C. (2d) 399 Everett J. said "To deny the jury the benefit of reading with their eyes the same words as they heard with their ears seems to me to put the law into an ill-fitting straightjacket."...We gratefully adopt that statement of general principle and we have no hesitation in [adopting] that same approach...*⁷¹

In *Welstead* the transcripts were removed from the jury before retiring, but other cases have approached the issue of transcripts after retirement. In *R v Boakes*⁷² the Court of Appeal permitted a transcript to be taken into the jury room so long as the judge gave a warning as to weight. There must be a real danger that by permitting a jury to take transcripts into their room they could give undue weight to the examination-in-chief, not least because they would not have details of the cross-examination before them. In *R v McQuiston*⁷³ the Court of Appeal stated that transcripts posed the same danger of undue weight as videorecordings and that the conditions in *Rawlings* should apply.⁷⁴ Given that the first condition of *Rawlings* is that any replay should take place in open court it must be questioned whether *Boakes* should remain good law. It would perhaps be prudent to restrict transcripts to helping juries follow the evidence and not so they

⁷⁰ Ibid. at 69

⁷¹ Ibid. at 71-72 per Evans L.J.

⁷² [1996] C.L.Y. 1393

⁷³ [1998] 1 Cr App. R. 139

⁷⁴ Ibid. at 141

can refresh their memories. The alternative is for the cross-examination to be transcribed too.⁷⁵ Giving the jury the complete transcript would mean that the defence can be assured that the jury are at least capable of refreshing their minds as to the cross-examination in the same way as with the examination-in-chief. The present system has the appearance of bias or undue weight and this must be a cause for concern.

Delay to Therapy

McEwan suggests that a major disadvantage of pre-recorded testimony is that it may delay therapy.⁷⁶ Therapy is a complex issue and was discussed in an earlier chapter⁷⁷ but it was seen that there is a real danger that therapy may be delayed. However given that therapy is delayed until after the child is cross-examined, it must be questioned whether this is a disadvantage in relation to pre-recorded testimony or whether it is a general problem. If the evidence was taken live, the child would presumably still be unable to receive therapy until after the cross-examination so it would appear to be a problem in relation to cross-examination rather than videorecorded testimony.

LIVE EXAMINATION-IN-CHIEF

Not every case necessarily has a pre-recorded interview. Where a pre-recorded video is not used the child may have to be examined-in-chief at the trial.⁷⁸ It is clear that the police do not seek to make a videorecorded interview in every case, a point noted by the CPS Inspectorate:

[The police] may choose not to do so where the child is a witness, but not a victim; where the child is at the older end of the age range; or where the

⁷⁵ As noted in *Rawlings*, it is now possible to provide a verbatim transcript of a witnesses' testimony. See Supra Fn 63 and associated main body text.

⁷⁶ McEwan (1993) p.18

⁷⁷ See pp.25-34

⁷⁸ However the prosecution may decide that if the videorecording is not admissible they will not proceed with the prosecution.

*victim and defendant are of a similar age.*⁷⁹

Where a video is not used it is likely that an ordinary witness statement will be taken rather than using the phased approach suggested by the Memorandum. In R v Naylor⁸⁰ the normal manner of taking evidence was adopted in respect of an intelligent 12 year old boy. The defence argued that his testimony should be ruled inadmissible under s.78 Police and Criminal Evidence Act 1984 because it did not adhere to the Memorandum. The Court of Appeal stated the judge was correct to admit the evidence although the jury should be warned that the safeguards of the Memorandum are there for a reason: namely to protect the welfare of the child and yet to ensure the testimony is fair and not the subject of coaching etc.

However even live examination-in-chief differs from adult witnesses in one major way. Section 32, Criminal Justice Act 1988 permits the use of a live TV link. This is usually used to cross-examine a child following the admission of a pre-recorded interview but can be used for examination-in-chief.⁸¹ The use of a TV link is considered in the next section examining the cross-examination of a child witness.

REFORM OF EXAMINATION-IN-CHIEF

We have seen that examination-in-chief is no longer too problematic, and this has been reflected in the Youth Justice and Criminal Evidence Act 1999 which seeks to make very minor changes in this area.⁸²

One important change, however, is the introduction of a presumption in favour of the use of pre-recorded examination-in-chief. It was seen above that even though the

⁷⁹ Thematic Review 1/98, para. 8.37

⁸⁰ (1995) The Times, July 15

⁸¹ See Spencer & Flin (1993) pp. 103-104

⁸² Despite the Act being fairly radical in terms of other aspects.

position has been improving in recent years, there are still a number of cases where the police or CPS are choosing not to use a pre-recorded interview as the examination-in-chief. Section 21 of the 1999 Act states that there shall be a presumption in favour of a pre-recorded tape.⁸³ The section provides two principal ways this presumption can be rebutted, although only one applies to cases of child abuse. The first way of rebutting the presumption is where the court is not equipped to deal with videorecordings.⁸⁴ The second method is where the judge considers the video would not “*maximise the quality of the witness’s evidence.*”⁸⁵ However, given that there are rules as to the admissibility of pre-recorded tapes⁸⁶ there must be a third method of rebuttal: which would be where the tape cannot be adduced because it contravenes the rules set out.

The report of the interdepartmental working group on vulnerable and intimidated witnesses noted the advantages of pre-recorded examination-in-chief⁸⁷ but thought the measures should be discretionary.⁸⁸ It is submitted that a presumption is, however, more useful. Under the current regime a substantial number of videos were not used, even when they had been authorised,⁸⁹ a presumption will hopefully lead to this deficiency being corrected.

The one drawback with this presumption, however, is the methods of rebutting it. Research has shown that a child can testify better if he or she is given the choice as to

⁸³ Sub-sections (1) to (3)

⁸⁴ s.21(4)(a) when read in conjunction with s.18(2)

⁸⁵ s.21(4)(c); but note that s.21(4)(c) does not apply where the witness is the victim of a sexual or violent offence or one of cruelty. (s.21(5))

⁸⁶ s.27(2)-(7)

⁸⁷ See *Speaking up for Justice*, paras. 8.38-8.41

⁸⁸ *Ibid.*, at para. 10.17

⁸⁹ See p.99 above.

methodology.⁹⁰ It would thus make more sense to give the child – assuming he or she is of sufficient age and understanding – the right to decline the use of pre-recorded testimony.⁹¹

CROSS-EXAMINATION

After the examination-in-chief, the next stage of a child's testimony is the cross-examination. Like examination-in-chief, the cross-examination of a child can differ between adult and child witnesses. This section will examine four aspects of the cross-examination:

- live traditional cross-examination
- use of screens
- use of live CCTV link
- defendant personally cross-examining the child victim

TRADITIONAL CROSS-EXAMINATION

Under the traditional style of cross-examination the witness gives evidence from the witness stand. The witness is in full view of the judge, jury, counsel, the defendant and indeed members of the public. In addition, the witness can see all those persons too. However research has shown that children find the traditional style of cross-examination problematic:

*Children (like many adults) can find the examination and cross-examination processes confusing and stressful.*⁹²

⁹⁰ See Thematic Review 1/98, para. 8.46

⁹¹ It could have been argued that if a child would not wish the video to be used, this would not "maximise the evidence of the child" (s.21(4)(c)) but as noted above, this ground may not be used for offences of child abuse.

⁹² Sattar & Bull. Child Witnesses in Court: Psycho-Legal Issues [1996] S.J. 401

and this was something Pigot recognised:

*All of the submissions which we received that addressed the matter indicated that most children are disturbed to a greater or lesser extent by giving evidence in court.*⁹³

When the Home Secretary set out the terms of reference to the Group he made it clear that cross-examination itself must remain, and this led to them considering possible alternative methods of conducting cross-examination. Two alternatives were implemented immediately and can be discussed now, whereas some recommendations were not implemented. These will be discussed at a later stage of this chapter.

USE OF SCREENS

The first option available to the courts is the use of a screen. The use of screens was developed on an *ad hoc* basis:

*The first judge to permit the use of screens when children were giving evidence was the Common Serjeant, Judge Pigot Q.C., when a group of men were tried at the Old Bailey for serious sexual offences involving children in the Autumn of 1987.*⁹⁴

The defendants were convicted and appealed to the Court of Appeal contending, *inter alia*, that the use of screens prejudiced the trial.⁹⁵ The Lord Chief Justice, giving the judgment of the court, upheld the use of screens:

*We do not think.... that any sensible jury could have been prejudiced against any defendant by the existence of this barrier between the witness and the dock.*⁹⁶

and then continued by stating the common law would permit such measures:

We take the view that we do not need authority to confirm us in the view that what the learned judge here did in his discretion was a perfectly proper, and

⁹³ Pigot Report, para. 2.10

⁹⁴ Spencer & Flin (1993) p.100

⁹⁵ *R v X; Y; Z* (1990) 91 Cr. App. R. 36

⁹⁶ *Ibid.*, at 40

*indeed a laudable attempt to see that this was a fair trial: fair to all, the defendants, the Crown and indeed the witnesses.*⁹⁷

However some have queried whether the court was right to dismiss the claims of the defence:

*Screens proliferate in courts around the country, yet the question of whether or not their introduction invariably sends messages to the jury about the need to protect the child witnesses from the baleful stare of the accused remains unanswered.*⁹⁸

The main complaint the appellants raised was that it was:

*an unfair and prejudicial act to erect this screen... that the jury might think that there was a suggestion that the person in the dock had already in some way intimidated the child...*⁹⁹

It is difficult to know what a jury would think, but a physical block suggests the child needs protection from the defendant.¹⁰⁰ The risk of this prejudice must be real yet it is readily accepted. The Court of Appeal has said that screens may be prejudicial¹⁰¹ although a different constitution of the Court of Appeal stated that so long as the judge warns the jury that the screen is not to be taken into account, and keeps in mind the need for a fair trial, the use of screens can be justified.¹⁰²

Interestingly, the European Commission of Human Rights has considered that the use of screens is not a breach of human rights.¹⁰³ The case concerned a Northern Ireland terrorist trial where screens were used to protect the identity of some witnesses. The defendants were convicted and applied to the European Court of Human Rights contending, inter alia, that the use of screens contravened Article 6(1) and/or Article

⁹⁷ Ibid., at 41

⁹⁸ Zedner in Stockdale & Casale (1992) pp. 269-270

⁹⁹ *R x X; Y; Z*, op.cit., at 40

¹⁰⁰ See Zedner in Stockdale & Casale (1992) p. 270

¹⁰¹ *R v Cooper and Schaub* [1994] Crim. L.R. 531

¹⁰² *R v Foster* [1995] Crim. L.R. 333

¹⁰³ *X v United Kingdom* (1993) 15 E.H.R.R. C.D. 113

6(3)(d). The Commission rejected both of these arguments stating the interference was justified in the circumstances.¹⁰⁴ It is submitted that such a decision would apply to child cases too. Accordingly although screens may cause an element of prejudice, so long as the trial judge maintains a fair trial by warning the jury, screens do not constitute a breach of human rights.¹⁰⁵

LIVE CCTV LINKS

The live CCTV link is a more “high-technology” solution to the problem of removing the child from the presence of the accused. Section 32, Criminal Justice Act 1988 which permits the use of the link¹⁰⁶ is as follows:

(1) *A person other than the accused may give evidence through a live television link on a trial in proceedings to which subsection 1A below applies if -*

(a) *the witness is outside of the United Kingdom; or*

(b) *the witness is a child, or is to be cross-examined following the admission under section 32A below of a videorecording of testimony from him...*

but evidence may not be so given without the leave of the court.

Section 1A lists trials by indictment, appeals to the Court of Appeal, trials in the youth court and appeals to the Crown Court as a result of such a trial, as proceedings in which the link can be used.

It is important to note that the words “without the leave of the court” are present. These words give to the judge a discretion to permit the evidence. Spencer & Flin

¹⁰⁴ Ibid., at 114

¹⁰⁵ Note s.23, Youth Justice and Criminal Evidence Act 1999 places the use of screens onto a statutory footing: they may be used whenever the trial judge believes they would be useful. However, it is to be hoped the use of CCTV links will replace the need for the use of screens in child witness cases. (See pp.119-120 below)

¹⁰⁶ As amended by s.55, Criminal Justice Act 1991

note that neither statute nor the rules of court give details as to how this discretion is to be exercised.¹⁰⁷ However a Crown Court judge sitting in Leeds set out some guidelines to help in this exercise:¹⁰⁸

- (a) a judge should not grant permission for the live link automatically, but should balance the risk of harm to the child against the risk of creating prejudice against the defendant by allowing the live link to be used.
- (b) in principle, if the prosecution want the live links to be used it is up to them to produce some evidence that it is likely to be harmful to this particular child to give evidence in the traditional way.
- (c) in the case of a young child, however, 'there must come a time when the very fact of the child's age is almost sufficient in itself to show that it would be very detrimental for the child to have to give evidence in open court and to be cross-examined in the usual way.'¹⁰⁹

This is a useful guide for judges, and it must be correct for the onus to be on the prosecution – who is calling the witness – to prove the need for the link. However controversy exists over how ready the courts are to grant leave. Spencer & Flin discuss research conducted by Davies and Noon soon after the implementation of the Act¹¹⁰ which suggested that 92-98% of applications to use the link were granted,¹¹¹ although other studies have cast doubt on these figures. Plontikoff and Woolfson concluded that their research showed that approximately 70% of applications were granted¹¹² and the CPS Inspectorate found the success rate was 85%¹¹³ It is difficult to conclude which is the correct figure although the research conducted by the CPS Inspectorate was the most recent so their finding may reflect current practice.

¹⁰⁷ Spencer & Flin (1993) p. 105

¹⁰⁸ R v Guy (1989) December 21. and see Ibid.

¹⁰⁹ Ibid.

¹¹⁰ See Spencer & Flin (1993) p.105

¹¹¹ Ibid., at 106

¹¹² Plontikoff & Woolfson (1995) pp. 75-76

¹¹³ Thematic Review 1/98, p.33

Use of the Link

How does the link operate? I have had the opportunity to watch a trial in the Crown Court and examine the system both in operation and close-up. The Courtroom has 3 sets of TV link systems. The judge has one, counsel for the prosecution and counsel for the defence have one each.¹¹⁴ The stations used by counsel have a monitor and a camera. The camera is “voice-activated”, that is the picture automatically switches to whoever is speaking.

The station operated by the judge has two monitors. The first is a duplicate to the one counsel has, and he sees whatever they do. The second is permanently watching the witness. The judge manually operates his camera, switching it on when he wishes to speak to the child. He also has what is known as a “panic” button. This button, when pressed, cuts the link so that no picture is seen nor sound heard. It can be used, for example, if there is a disruption in court, if the victim needs a break, if an inappropriate question is being put, or if a matter of law is discussed. In the case I viewed, it was used when the defence counsel “changed places.”¹¹⁵

The picture shown on the monitors is also sent to large monitors positioned in the court so that the defendant, the jury, all counsel and solicitors, and indeed many of the public can see the testimony.

Impact of the Testimony

There have been questions raised about what impact a CCTV link has. The first point

¹¹⁴ Where there is more than one defendant represented by more than one counsel, the defence share a station, swapping after each examination.

¹¹⁵ There were several defendants, each represented separately.

to query is whether the removal of the child is *prima facie* prejudicial to the defence in the same way as screens are. Zedner argues they are:

*Clearly this innovation may imply to the jury that children are at some indefinable risk from physical proximity with the accused such that they must be kept at a distance... Yet again the potential damage done to the rights of the accused is apparently deemed less important than the imperative of protecting the witness.*¹¹⁶

However it is easier to rebut this suggestion when discussing TV links. It is known that courts are considered by many to be strange or “awing” places which make people feel nervous, even when they are not on trial.¹¹⁷ If a judge told the jury that the child was in less formal surrounding because it was felt children should not need to appear in court it is highly likely the jury would understand this and accept this statement without giving thought to whether the defendant has intimidated the witness.

More controversial, however, is whether the jury treat the evidence with the same weight as live evidence. Spencer & Flin note that there are two arguments:

*Some commentators, apparently working on the theory that people tend to believe anything if it is on television, claim that it enhances the impact of the child's evidence, with the risk of making it more credible than it deserves to be.*¹¹⁸

and

*Other commentators, working on the opposite theory that nobody ever believes a thing they see on television, argue that the live link has exactly the opposite effect...*¹¹⁹

If either proposition is correct it would be a cause for concern as it will either prejudice the defence or the prosecution. It would appear that it is mainly American

¹¹⁶ Zedner in Stockdale & Casale (1992) p.270

¹¹⁷ Stephenson (1992) p. 175

¹¹⁸ Spencer & Flin (1993) p. 109

¹¹⁹ Ibid.

commentators who adopt this first approach.¹²⁰ Indeed in one American case such an argument won judicial backing:

*It is recognised that the media bestows prestige and enhance the authority of an individual by legitimising his status... such considerations are of particular importance when, as here, the demeanour and credibility of the witnesses are crucial...*¹²¹

Although it is possible to see why such an argument has been raised, it is to be questioned whether it is correct. It is submitted that it is not the presence on-screen that brings credibility, but presence on certain programmes such as the news or a documentary. It is likely that a jury can differentiate between a television programme and a CCTV link when they see the live interaction. Additionally, juries would be able to view counsel asking the questions which must show them they are witnessing court proceedings and not a television programme.

The opposing argument - that the impact of the child's testimony is reduced - has attracted more commentary. Plontikoff & Woolfson showed that many lawyers hold this view:

*In our study, most CPS lawyers and law clerks... expressed the view that testimony over TV link lessens the impact of the child's evidence...*¹²²

Cobley states that Davies and Noon found

that on occasions prosecution barristers, when faced with a particularly impressive and resilient witness, have quite deliberately opted for an in-court appearance on the grounds of its greater impact! [SIC]¹²³

and this is something that Fortin also notes and condemns:

research indicates that many CPS lawyers are still opposed to its use due to their conviction that juries are more convinced by the child's evidence given

¹²⁰ See Cobley (1995) p.165

¹²¹ *Hochiester v Supreme Court* (1984) 208 Cal. Rptr. 273 at 278. Also see Cobley (1995) p. 165

¹²² Plontikoff & Woolfson (1995) p.77

¹²³ Cobley (1995) p. 165

*live in court, particularly when the child shows emotion and tears. It is difficult to justify such an exploitation of the distress of a child witness.*¹²⁴

This last point is most salient. How can using a child's distress to secure a conviction possibly be justified? This is playing on a child's fear of court proceedings and fear of testifying. Spencer & Flin argue that:

*If it is true that with the live link emotional impact is reduced, it is not necessarily a bad thing if the emotional temperature of the courtroom is lowered.*¹²⁵

If a person is to be convicted of an offence, he should be convicted on the facts and the law and not on emotion. It is clear that the use of the CCTV link is helpful in reducing the stress of a child¹²⁶ and as such they should be used when appropriate. If the emotional impact is reduced then so be it; using the emotion of a child to obtain a conviction is of questionable ethics.

Reform of the use of CCTV links

Section 21(3)(b) of the Youth Justice and Criminal Evidence Act 1999 introduces a presumption on the use of CCTV links. Under the new regime, a child will usually given their evidence via a live link unless the judge decides one is not needed.¹²⁷ The interdepartmental working group on vulnerable and intimidated witnesses said:

*[We] consider that, where the child is required to give oral evidence to [a] court, the use of [the] live CCTV link is an effective way of ensuring the child does not have to be present in the court room when being questioned...*¹²⁸

This presumption is to be welcomed as it has been seen above that the link is a useful way of helping the child to cope with the testimony process. Another advantage that

¹²⁴ Fortin (1998) p. 429

¹²⁵ Spencer & Flin (1993) p. 110

¹²⁶ See Spencer & Flin (1993) p.111; Lyon & de Cruz (1993) p. 308 and Fortin (1998) p. 429

¹²⁷ ss.19(1) and 20(5) set out the statutory basis on which the presumption can be rebutted.

¹²⁸ *Speaking up for Justice*, para. 10.21

this presumption brings is that the use of screens in child abuse trials should be phased out because the CCTV link is a more appropriate method of “seperating” the victim and the defendant. However, the link does not solve all the problems¹²⁹ and in some situations pre-recorded cross-examination will be preferred.¹³⁰

DEFENDANT CROSS-EXAMINING A CHILD

Traditionally a defendant can conduct his own defence¹³¹ but Pigot noted that this can cause problems for child victims of abuse.

*we believe that defendants should be specifically prohibited by statute from examining child witnesses in person or through a sound or video link. The limitation which this places upon the defence is, in our view, for less significant than the damage which can be inflicted upon the child...*¹³²

The government responded by enacting s.34A, Criminal Justice Act 1988¹³³ which prevents a defendant charged with an offence of violence, sex or cruelty from personally cross-examining the child victim. McEwan notes that this section is controversial but states:

*There is no constitutional right to confrontation in English law, and no problem is contemplated with the European Convention on Human Rights.*¹³⁴

Article 6(3)(d) of the European Convention on Human Rights states that a person has the right to “examine or have examined” witnesses against them. Article 6(3)(c) states a defendant has the right to “defend himself in person or through legal assistance of his own choosing.” Both Articles therefore appear to suggest that someone other than the accused can put his case and this will still safeguard his rights.

¹²⁹ See pp.121-124 for the disadvantages of cross-examination.

¹³⁰ See pp.124-130

¹³¹ Zuckerman, A.A.S. (1989) The Principles of Criminal Evidence Clarendon Law. Oxford. at p.87

¹³² Pigot Report, para 2.30

¹³³ As inserted by s.55(7), Criminal Justice Act 1991

¹³⁴ McEwan (1992) p. 129

In R v De Oliveira¹³⁵ the Court of Appeal was asked to consider s.34A. The defendant was charged with gross indecency with a child and indecent assault. The case was listed as fasttrack. The defendant wanted a specific member of the Bar to be his counsel, but he was unavailable for some two months. The trial judge refused to delay the trial deciding fasttrack was appropriate. However he did offer to sign a legal aid certificate for two counsel but the offer was refused. The trial judge explained that if he refused legal representation he could not cross-examine the complainant. At trial he represented himself. The judge prevented him from cross-examining the child but the judge asked questions to exclude the possibility of collusion. The defendant was convicted and appealed contending, inter alia, that the trial should have been delayed until his chosen counsel was available. The Court of Appeal rejected this submission stating that normally a defendant was permitted counsel of his choice but this was subject to the availability of witnesses, availability of a suitably equipped court and the timescale appropriate to the case. Here the judge correctly balanced these issues and made a generous offer as to legal aid.¹³⁶

By refusing the legal aid certificate the defendant prevented himself from having the main complainant's evidence subject to scrutiny. It is clearly not the role of the judge to conduct a cross-examination (although as in this case he can test matters such as a collusion) and so the witness's examination-in-chief is effectively entered as fact without contest. The Court was effectively stating that refusing legal representations meant the defendant was waiving his rights. Yet this means that he cannot defend himself which would appear contrary to Article 6(3)(c) but Harris et al. state that the right to defend oneself is not an unfettered right:

¹³⁵ [1997] Crim. L.R. 600

¹³⁶ Ibid. at 601

*The right of the accused to defend himself in person has not been interpreted as allowing the accused a completely free choice. As the law of Convention parties provides, the state may require that he be assisted by a lawyer in the interests of justice at the trial stage....*¹³⁷

De Oliveira has adhered to this principle: it is in the interests of justice that the case was fasttracked and that the child should not be traumatised by the defendant personally cross-examining her. The Court offered alternative competent representation but this was refused; thus the defendant waived his rights under the Convention.

GENERAL CRITICISMS OF CROSS-EXAMINATION

The main criticism levelled at CCTV is that of emotional impact considered above.¹³⁸ The other criticisms are, in effect, general criticisms levelled at cross-examination of children and are considered below.

Therapy

It was noted from the previous section that one of the problems of pre-recorded examination-in-chief was that therapy continues to be delayed.¹³⁹ This is because cross-examination does not take place until trial because the defence could use the excuse of therapy to suggest coaching.¹⁴⁰ As was noted in the previous sections this continues to be a problem and whilst there is a significant delay between pre-recorded examination-in-chief and cross-examination this will remain a problem.

¹³⁷ Harris et al. (1995) p. 258

¹³⁸ See pp.116-119

¹³⁹ See p.108 above and chapter 3

¹⁴⁰ See Lyon & de Cruz (1993) p. 305 and Plontikoff & Woolfson (1995) p. 60

Style of questioning

The style of questioning in cross-examination differs significantly from examination-in-chief.¹⁴¹ This can cause problems for children. One of the main points to note is the use of leading questions. Leading questions are not normally permitted in an examination-in-chief and this was one of the reasons why, prior to being accepted, pre-trial examination-in-chief videos were criticised:

*the legal profession got so cross about psychiatrists asking children leading questions that some lawyers have used the risk of leading questions being put during interviews as an argument against...the use of videotapes as evidence in the criminal courts.*¹⁴²

Yet, as Spencer & Flin comment, leading questions are positively encouraged in cross-examination.¹⁴³ They point out that lawyers appear to either re-write the rules, or reconsider the effects of these rules, when attempting to justify cross-examination:

*If rule number one of the lawyers' manual of psychology seems to be that memory improves with the passage of time, and rule number two that stress improves recall, rule number three seems to be that suggestive questions produce unreliable information **except** [SIC] when asked by lawyers in cross-examination.*¹⁴⁴

The comments of Spencer & Flin show that the justification for retaining the current form of cross-examination appears contrary to common sense. Virtually every reason given for not permitting something in examination-in-chief does not – according to lawyers – prevent the same style being employed in cross-examination. Presumably the argument is that when they are employed in examination-in-chief the danger is the child is not telling his or her own story but a recantation of allegations told by others. But if a child is capable of being influenced in that way the same effect must arise

¹⁴¹ See Murphy, P. (1995) Murphy on Evidence 5th Ed. Blackstone Press. London. p.470

¹⁴² Spencer & Flin (1993) p. 271

¹⁴³ Ibid.

¹⁴⁴ Ibid., at 272

with cross-examination. By using leading questions counsel for the defence can get the child to agree to his version of the evidence rather than what the child actually wants to say. Stone, a writer of a leading evidence professional text¹⁴⁵, states this is the very purpose of cross-examination:

*One form of cross-examination is to lead the witness forcefully on one point after another, keeping maximum control over him and his testimony... Restricting the witness by narrow questions and small steps, prevents him from dealing with the whole issue.*¹⁴⁶

Stone admits that this amounts to duplicity. He warns that if it looks as though counsel is giving evidence the advantage would be lost. He therefore gives this advice:

*Thus, it is desirable to conceal the extent of control and leading, so far as possible, while maintaining it to the necessary extent [of controlling the testimony.]*¹⁴⁷

The danger of such an approach is obvious, but where it is employed against children this poses an additional chance that the child's evidence will be misrepresented. However it is unlikely that this problem can be eradicated because it is a feature inherent in the adversarial approach to trials. The job of counsel for the defence is to weaken the credibility of the victim, and to try and ensure that the evidence that the victim gives appears more favourable to his client. Whilst this continues the danger of misrepresentation will remain.

REFORM OF CROSS-EXAMINATION

We have seen that live cross-examination carries many disadvantages. The Youth Justice and Criminal Evidence Act 1999 has accepted this and attempted to make

¹⁴⁵ Stone (1988) Cross-examination in Criminal Trials. Butterworths. London.

¹⁴⁶ Ibid., at 271

¹⁴⁷ Ibid., at 272

what appears to be a radical change to the system, by permitting pre-recorded cross-examination.

Availability

Before examining the substantive reform it is necessary to discuss the availability of pre-recorded cross-examination. Section 28 of the Act labels pre-recorded cross-examination a “special measure” within the meaning of section 19. This means that a judge can order the use of this measure under the powers given to him under section 16. Of more importance, however, is section 21(6) which states that if the witness is the victim of *sexual* abuse, then there is a presumption that the child’s cross-examination should be pre-recorded.

This section was enacted at a late stage in Parliamentary proceedings.¹⁴⁸ The justification for including it was that child victims of sexual abuse should be given extra protection. However this section has created a divide between the different types of abuse: where the child is the victim of physical abuse or neglect, no presumption exists. The government would appear, therefore, to be suggesting that victims of these types of abuse do not experience the same trauma as those who have been sexually abused. There is no evidence to support this theory. Another part of the 1999 Act appears to appreciate this since it implements a uniform definition of the age of a child.¹⁴⁹ The interdepartmental working group on vulnerable and intimidated witnesses noted that there was no reason for any distinction to be made¹⁵⁰ and the

¹⁴⁸ See Home Office Press Release 180/99 Youth Justice and Criminal Evidence Bill: New Amendments

¹⁴⁹ s.16(1)(a) states that a child is anyone under the age of 17. Prior to this there was a distinction between the different categories of abuse. See pp.65-66 above.

¹⁵⁰ *Speaking up for Justice*, para. 10.8

government must have agreed with this conclusion when they enacted s.16(1)(a). This makes the decision to re-introduce the divide on pre-recorded cross-examination somewhat illogical and it is submitted that the divide should be removed at the first available opportunity.

Use of the Measure

Section 28 will, when implemented, finally enact the main recommendation of the Pigot report which stated:

*We are...concerned that it is desirable to use video technology to alter the context in which [cross-examination] takes place so that it becomes a less oppressive experience for the child and [is] a more informative exercise for the court that at present.*¹⁵¹

This proposal was rejected by the then government. According to Smith and Wilson¹⁵² the reasons for this were:

*First...cases involving child witnesses [would] be expedited...Secondly, that pre-trial hearings would unfairly shift the balance against the accused...by forcing the defence to disclose their case in advance.*¹⁵³

Spencer¹⁵⁴ stated there was a third reason which was there would still have to be live cross-examination because new facts may arise between the pre-trial examination and the trial.¹⁵⁵ These remains are, now, largely unconvincing and perhaps this is one of the reasons why the proposal has now been implemented. The hope for the fasttrack process to reduce delay has proved false¹⁵⁶ and the argument that the defence would need to disclose their defence is considerably weakened when one notes there is now

¹⁵¹ Pigot report, para. 2.22

¹⁵² Smith, P. and Wilson, A. Children as witnesses: The Criminal Justice Act and the Pigot proposals [1991] Fam. Law 323

¹⁵³ Ibid., at 324

¹⁵⁴ Spencer, J. Pigot and Children's Evidence: The Criminal Justice Bill 1990 (1991) 3 J.C.L. 34

¹⁵⁵ Ibid., at 35

¹⁵⁶ See chapter 3

mandatory defence disclosure.¹⁵⁷ This leaves the argument concerning supplementary cross-examination. The working group suggested that a possible solution would be a rebuttable presumption that no further cross-examination be permitted unless “*new material comes to light which could not have been ascertained with due diligence.*”¹⁵⁸ This would be a useful solution to avoiding constant repeated cross-examination: it places the burden of proving the necessity of further cross-examination firmly on the party wishing the extra testimony.

Neither the working group nor the Act explains how pre-recorded cross-examination will be taken but since it is based upon the Pigot proposals it is possible the same methodology proposed there could be used. Spencer & Flin set out the process envisaged by Pigot in diagramatic form¹⁵⁹ and this is set out overleaf as figure 8.1. According to Spencer & Flin the initial interview would take place as soon as practicable¹⁶⁰ and then shown to the suspect. At that point – or soon afterwards – the cross-examination would take place before a judge in chambers. There are two points of note here: first, the timing of cross-examination, and secondly, the methodology.

Pigot expected the cross-examination to take place reasonably quickly, but *after* the judge had ruled on the admissibility of the initial interview.¹⁶¹ This has the advantage of knowing *before* the cross-examination takes place whether live testimony will be required.¹⁶² However the working group highlighted the concerns of Sanders that the defence may wait until primary and secondary disclosure has taken place, and “*this*

¹⁵⁷ Introduced by the Criminal Procedure and Investigations Act 1996, ss.5 and 6

¹⁵⁸ *Speaking up for Justice*, para. 8.60

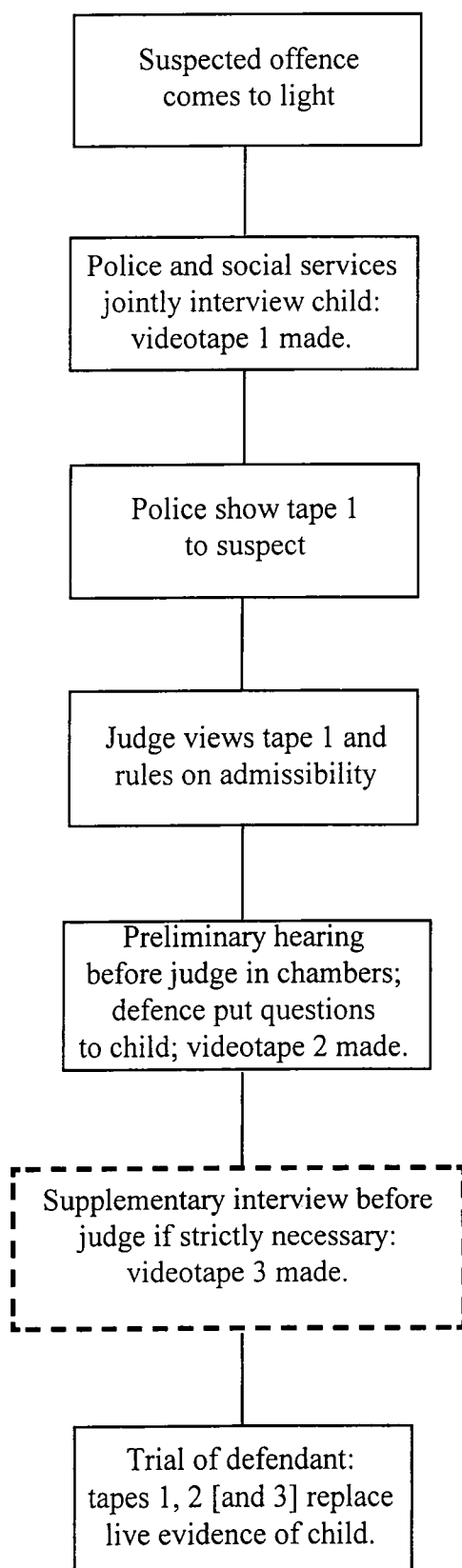
¹⁵⁹ Spencer & Flin (1993) p.89

¹⁶⁰ *Ibid.*, at 88

¹⁶¹ Pigot report, para.2.27

¹⁶² Since if the initial interview is ruled inadmissible, the pre-recorded cross-examination cannot be adduced either, and all the testimony will be taken live.

The Pigot committee's proposal for taking a child's evidence



Source: Spencer & Flin (1993) 89

might result in the defence only being in a position to cross-examine shortly before trial.”¹⁶³

It would be disappointing if cross-examination only took place shortly before trial as one of the main advantages that pre-trial brings is it permits therapy to begin earlier than would normally be the case.¹⁶⁴ However even if cross-examination does not take place as soon as one might hope, it could still be a useful scheme. Trials are often adjourned with little or no notice¹⁶⁵ and it is impossible to plan an exact timetable for a trial which means a child will not know exactly when he or she will testify. This will be solved by pre-trial examination as the child will know the exact date he or she must testify. This stability must arguably reduce the stress that testifying can cause to a child.

The second point to consider is how the cross-examination would be conducted.

According to Spencer & Flin, the cross-examination would:

*take place before a judge in chambers...The only people present would be the judge, prosecution and defence counsel, the child, and the child's "support person." The defendant would not be physically present, but would be able to watch the proceedings from an adjourning room by means of a one-way mirror or live video link...*¹⁶⁶

It is submitted that a more appropriate method would be to reverse the order; i.e. the child would be in a separate room and everyone else would be in a convenient place, probably the courtroom.¹⁶⁷ Given that CCTV links have become accepted practice it would be useful to use them. The child sits in a comfortable, relaxed room whilst

¹⁶³ *Speaking up for Justice*, para 8.57

¹⁶⁴ This was highlighted by the working group. (See *ibid.*, at 8.57) but also see pp.25-34 for an argument relating to a right to immediate therapy.

¹⁶⁵ See Plotnikoff & Woolfson (1995) pp.71-74

¹⁶⁶ Spencer & Flin (1993) p.88

¹⁶⁷ Although the hearing would technically be “in chambers”, i.e. sitting *in camera*.

counsel, the judge and the defendant sit in the court. It is likely that the equipment currently used¹⁶⁸ could record the cross-examination whilst it is being conducted.

Of course, pre-recorded examination means that the defence need to prepare and conduct a substantial proportion of their case early on. Article 6(3)(b) of the E.C.H.R. states that a person must have “*adequate time and facilities for the preparation of his defence.*” Harris et al. state Article 6(3)(b) is designed to protect the defendant from an unduly hasty trial.¹⁶⁹ Article 6(3)(b) is clearly an important consideration with pre-recorded cross-examination. The courts when deciding whether to use this measure will have to ensure that the defence has had sufficient time to prepare. This does not mean that the defence should set the timetable as this would not be appropriate, but courts must clearly consider defence representations very seriously.

The reform contained in s.28 is obviously a very significant step forward and must be warmly welcomed. The eventual implementation of the Pigot proposal is long overdue and should help reduce the trauma caused by a child testifying.

TESTIFYING THROUGH AN INTERMEDIARY

Section 29 of the 1999 Act introduces what could be a controversial measure. The court will be permitted to make a direction stating that questions being put to the witness should be put through an intermediary rather than counsel. This was originally proposed in the Pigot report:

[A majority] propose that the judge's discretion...should extend where necessary to allowing the relaying of questions from counsel through a paediatrician, child psychiatrist, social workers or person who enjoys the

¹⁶⁸ A station comprising a video-recorder, a camera and a monitor

¹⁶⁹ Harris et al. (1995) p.252

*child's confidence.*¹⁷⁰

This was the sole recommendation that was proposed by a majority. Anne Rafferty, the representative from the Criminal Law Bar Association, disagreed with the recommendation. Her dissenting opinion was:

*the intervention of a specialist interlocutor would hinder rather than assist counsel in conducting the case. [Miss Rafferty] believes that the difficulty which has been explained should be overcome by allowing greater opportunities for counsel to establish a rapport with a child witness before the hearing took place.*¹⁷¹

The working group on vulnerable and intimidated witnesses considered that the use of an intermediary would carry some advantages, most notably that it could improve the quality of the evidence of a child witness.¹⁷² However the group also noted that unless the intermediary was skilled, there may be the danger of misrepresentation and bias.¹⁷³ The group continued by stating this possibility of bias could be mitigated because:

*the court would hear the original answers and could disregard any attempt by the intermediary to present the answer in a different way.*¹⁷⁴

This quote is particularly telling. There are, it is submitted, two possible forms of an intermediary. The first is a “pure” intermediary who would simply listen to the questions counsel wished to be put, and then “translate” them into “child-friendly” language. The second possible form is more of a communicator than an intermediary. The “communicator” would not only “translate” counsel’s questions into “child-friendly” language, but also explain what the child’s answer means. The group appears to be recommending the latter form; this can be seen by their comment as to

¹⁷⁰ Pigot Report, para. 2.32

¹⁷¹ Ibid., at para 2.34

¹⁷² Speaking up for Justice, para. 8.73

¹⁷³ Ibid.

¹⁷⁴ Ibid.

an original answer¹⁷⁵ and they also state:

*The proposed function or role of a communicator or intermediary to assist in criminal proceedings can be compared with that of an interpreter for those who do not speak English...*¹⁷⁶

If the working group does wish to follow this format they could encounter some difficulties, not least from the appearance of bias they admit may exist. A court would have the benefit of hearing the original reply but unless the court is a Magistrates' court, this could lead to confusion.¹⁷⁷ Indeed it could be argued that this confusion and appearance of bias should automatically rule out the use of an intermediary in the Crown Court. Even if a judge directed the jury to listen to the child, the jury may be swayed by the "expert" status of the intermediary. This would be a most dangerous move which would be highly prejudicial.

Article 6(1)(d) of the European Convention on Human Rights provides that the defendant has the right to examine or have examined, witnesses on his behalf. It was seen in an earlier section, that barring a defendant from personally cross-examining a victim can be justified so long as his legal representatives are permitted to examine on his behalf.¹⁷⁸ It could be argued that the use of an intermediary is not only preventing the defendant from cross-examining the child but it is also preventing his legal representatives from cross-examining on his behalf. On that basis it is likely that this may be deemed a breach of Article 6.

If, however, the first form of intermediary is used, this conclusion is not automatically reached. If the intermediary is simply formulating questions into a child-friendly

¹⁷⁵ See Above.

¹⁷⁶ Speaking up for Justice, para. 8.73

¹⁷⁷ i.e. The bench would know that it should listen to the child whereas a jury may be seriously confused by hearing two answers that may appear to be contradictory.

¹⁷⁸ See pp.120-122 above

format, then it could be argued that counsel does retain control of the case. It was noted in an earlier section of this thesis that one of the reasons why children have traditionally been considered unreliable is because they often cannot understand adult language¹⁷⁹ or that adults cannot understand a child's reference.¹⁸⁰ If the intermediary can help solve that problem then perhaps they are to be welcomed, although it would seem more prudent to train counsel in using child-friendly language than to go through the inconvenience and expense of employing child psychologists to act as intermediaries.

¹⁷⁹ See p.69 above.

¹⁸⁰ Ibid.

Chapter 8

Conclusions

This thesis has examined the principal aspects of a Crown Court trial involving charges relating to child abuse. The aim of the thesis has been to assess how the criminal justice system can adapt to the needs of both the child victim of abuse and the defendant.

Child abuse trials pose a particular problem; not only do such trials evoke strong emotions from members of society¹ but, by definition, offences of child abuse involve the child becoming involved in a trial process designed for adults. This can obviously cause some difficulties and as such the trial process needs to accommodate those without the maturity to cope with adult processes, but without prejudicing the right of the defendant to due process. This inevitably causes a tension as seen throughout this thesis.

The decision to prosecute is a key aspect of the criminal justice system. In England and Wales the criminal justice system operates on the public policy basis, it is not for the victim to decide whether or not a prosecution should take place as there is a general public interest in the prosecution of crimes against the person. The CPS uses two tests to govern the decision to prosecute and unless these two tests are satisfied the person accused should not be brought to trial. However, even these tests have had to give way to the special considerations in respect of child witnesses. Under the United Nations Convention on the Rights of the Child the prosecution must be in the child's best interests and therefore a prosecution should be stopped if it could be

¹ As evidenced by the special protection those convicted of offences need to receive in prison.

harmful to the child. Traditionally, a victim could not influence a decision to prosecute but it was seen in chapter 2 that the Human Rights Act 1998 might permit a victim to use Article 8 of the E.C.H.R. to force the CPS to prosecute a case of child abuse.

The tension between adapting the procedures to accommodate the needs of children and the rights of the defendant is seen clearly during the process of taking testimony from the child. It was seen in chapter 7 that the current methods of testifying fail children. The Youth Justice and Criminal Evidence Act 1999 puts forward a new framework to help, *inter alia*, child victims of abuse to testify. However, important as it is to help a child to testify in an adult court, it remains important that the defendant's right to due process is not compromised.

In general, the 1999 Act manages to tread the thin line between helping the child and not compromising the rights of the defendant. There are a few aspects of concern; notably the changes to oath and competency which could lead to a situation in which a witness who does not understand the difference between truth and fiction would nevertheless be able to give testimony. Such evidence could be highly prejudicial and may render a conviction unsafe. The proposal to permit questioning through an intermediary also raises difficulties.

Nevertheless, the Act makes many improvements. The extension of pre-recorded testimony is to be welcomed. However drawing a distinction between sexual abuse and other abuse is a mistake. For victims of abuse, there is a presumption that the child's cross-examination will be taken pre-trial but no such presumption exists for other types of abuse. It was seen in Part IV that pre-recorded testimony carries many

advantages; it enables the testimony to be taken early, at the time of best recollection, and it enables the evidence to be taken in a relatively informal atmosphere. Ten years ago Pigot recommended that all child testimony should be taken pre-trial. It now appears that this position has been reached but it should be used when required without distinguishing between different forms of abuse. When used, considerable care need to be taken concerning the timetabling of testimony as there may be a conflict between the interests of the victim and the rights of the defendant. A defendant is entitled to a reasonable length of time to prepare his defence. Judges must ensure that this is not abused and that testimony is taken when appropriate.

Alongside the tension between the interests of the victim and rights of the defendant, there is another tension: between the criminal justice system and the civil protection system provided by the Children Act 1989. Where the abuse is intrafamilial abuse² it is likely that the local authority will bring protection proceedings. The protection proceedings will invariably examine the same facts and issues as the criminal trial, and in most cases they will take place before the criminal trial. In Part III it was shown that conflicts arise because the parents are, in the majority of proceedings, subject to both systems. It was seen that parents may be at a disadvantage at a subsequent criminal trial if they co-operate in the civil proceedings yet if they do not co-operate it is possible that the local authority feels compelled to apply for a care order, which may, ultimately, lead to the removal of the child. This situation is not an easy one to solve because the two systems have different aims. The only way to reduce this tension is to train the judiciary to understand the conflict, and help them to understand the implications their rulings may have on the other proceedings.

² And the majority of child abuse cases are intrafamilial. See Grubin, D. *Police Research Series Briefing Note 99 Sex Offences Against Children: Understanding the Risk*. Home Office. London

Arguably, the key chapter in this thesis is chapter 3: delay. Throughout this thesis it has been shown that pre-trial delay is the cause for great concern in both processes. In civil proceedings the courts are under a statutory duty to minimise delay³ yet no such duty exists in criminal proceedings. As noted in chapter 2, for many years the criminal justice system has attempted to tackle pre-trial delay but without success. The majority of the problems relating to the tension between victim and defendant, and the criminal justice and civil justice systems can be traced back to delay. For example, many of the problems that relate to the testimony of a child are due to pre-trial delay. The difficulty relating to section 98 is a problem of delay. If it were possible to reduce pre-trial delay, much of the tension could be reduced. However reduction of delay must still provide the defendant with adequate time to prepare his defence.

The conclusion to this thesis must be that there is a tension which exists between the interests of the victim and the rights of the defendant. It is unlikely that this tension will ever disappear as the two are issues are diametrically opposed to one and other. There is much that can be done to alleviate this tension and it is likely that the Youth Justice and Criminal Evidence Act 1999 will help achieve this. It will not be easy to reduce the problem and there are likely to be many mistakes on the way. For the criminal justice system the right of the defendant to due process must always be the primary concern.

³ Section 1(2), Children Act 1989

APPENDIX A

CODE FOR CROWN PROSECUTORS

1. INTRODUCTION

- 1.1 The decision to prosecute an individual is a serious step. Fair and effective prosecution is essential to the maintenance of law and order. But even in a small case, a prosecution has serious implications for all involved - the victim, a witness and a defendant. The Crown Prosecution Service applied the Code for Crown Prosecutors so that it can make fair and consistent decisions about prosecutions.
- 1.2 The Code contains information that is important to police officers, to others who work in the criminal justice system and to the general public. It helps the Crown Prosecution Service to play its part in making sure that justice is done.

2. GENERAL PRINCIPLES

- 2.1 Each case is unique and must be considered on its own, but there are general principles that apply in all cases.
- 2.2 The duty of the Crown Prosecution Service is to make sure that the right person is prosecuted for the right offence and that all relevant facts are given to the court.
- 2.3 Crown Prosecutors must be fair, independent and objective. They must not let their personal views of the ethnic or national origin, sex, religious beliefs, political views or sexual preference of the offender, victim or witness influence their decisions. They must also not be affected by improper or undue pressure from any source.

3. REVIEW

- 3.1 Proceedings are usually started by the police. Sometimes they may consult the Crown Prosecution Service before charging a defendant. Each case that the police send to the Crown Prosecution Service is reviewed by a Crown Prosecutor to make sure that it meets the tests set out in this Code. Crown Prosecutors may decide to continue with the original charges, to change the charges or sometimes to stop the proceedings.

- 3.2 Review, however, is a continuing process so that Crown Prosecutors can take into account any change in circumstances. Wherever possible, they talk to the police first if they are thinking about changing the charges or stopping the proceedings. This gives the police the chance to provide more information that may affect the decision. The Crown Prosecution Service and the police work closely together to reach the right decision, but the final responsibility for the decision rests with the Crown Prosecution Service.

4. THE CODE TESTS

- 4.1 There are two stages in the decision to prosecute. The first stage is **the evidential test**. If the case does not pass the evidential test, it must not go ahead, no matter how important or serious it may be. If the case does pass the evidential test, Crown Prosecutors must decide if a prosecution is needed in the public interest.
- 4.2 The second stage is **the public interest test**. The Crown Prosecution Service will only start or continue a prosecution when the case has passed both tests. The evidential test is explained in section 5 and the public interest test is explained in section 6.

5. THE EVIDENTIAL TEST

- 5.1 Crown Prosecutors must be satisfied that there is enough evidence to provide a 'realistic prospect of conviction' against each defendant on each charge. They must consider what the defence case may be and how that is likely to affect the prosecution case.
- 5.2 A realistic prospect of conviction is an objective test. It means that a jury or bench of magistrates, properly directed in accordance with the law, is more likely than not to convict the defendant of the charge alleged.
- 5.3 When deciding whether there is enough evidence to prosecute, Crown Prosecutors must consider whether the evidence can be used and is reliable. There will be many cases in which the evidence does not give any cause for concern. But there will also be cases in which the evidence may not be as strong as it first appears. Crown Prosecutors must ask themselves the following questions:

Can the Evidence be used in court?

- a) Is it likely the evidence will be excluded by the court. There are certain legal rules which might mean that evidence which seems relevant cannot be given at trial. For example, is it likely that the evidence will be excluded because of the way in which it was gathered or because of the rule against using hearsay as evidence? If so, is there enough other evidence for a realistic prospect of conviction?

Is the evidence reliable?

- b) Is it likely that a confession is unreliable, for example, because of the defendant's age, intelligence or lack of understanding?
- c) Is the witness's background likely to weaken the prosecution case? For example, does the witness have any dubious motive that may affect his or her attitude to the case or a relevant previous conviction?
- d) If the identity of the defendant is likely to be questioned, is the evidence about this strong enough?

5.4 Crown Prosecutors should not ignore evidence because they are not sure that it can be used or is reliable. But they should look closely at it when deciding if there is a realistic prospect of conviction.

6. THE PUBLIC INTEREST

- 6.1 In 1951, Lord Shawcross, who was Attorney General, made the classic statement on public interest, which has been supported by Attorneys General ever since: "*It has never been the rule in this country - I hope it never will be - that suspected criminal offences must automatically be the subject of prosecution.*" (House of Commons Debates, volume 483, column 681, 29 January 1951.)
- 6.2 The public interest must be considered in each case where there is enough evidence to provide a realistic prospect of conviction. In cases of any seriousness, a prosecution will usually take place unless there are public interest factors tending against prosecution which clearly outweigh those tending in favour. Although there may be public interest factors against prosecution in a particular case, often the prosecution should go ahead and those factors should be put to the court for consideration when sentence is being passed.
- 6.3 Crown Prosecutors must balance factors for an against prosecution carefully and fairly. Public interest factors that can affect the decision to prosecute usually depend on the seriousness of the offence or the circumstances of the offender. Some factors may increase the need to prosecute but others may suggest that another course of action would be better.

The following lists of some common public interest factors, both for and against prosecution, are not exhaustive. The factors, both for and against prosecution, are not exhaustive. The factors that apply will depend on the facts in each case.

Some common public interest factors in favour of prosecution.

6.4 The more serious the offence, the more likely it is that a prosecution will be needed in the public interest. A prosecution is likely to be needed if:

- a) a conviction is likely to result in a significant sentence;
- b) a weapon was used or violence was threatened during the commission of the offence;
- c) the offence was committed against a person serving the public (for example, a police or prison officer, or a nurse);
- d) the defendant was in a position of authority or trust
- e) the evidence shows that the defendant was a ringleader or an organiser of the offence;
- f) there is evidence that the offence was premeditated;
- g) there is evidence that the offence was carried out by a group;
- h) the victim of the offence was vulnerable, has been put in considerable fear, or suffered personal attack, damage or disturbance.
- i) the offence was motivated by any form of discrimination against the victim's ethnic or national origin, sex, religious beliefs, political views or sexual preference.
- j) there is a marked difference between the actual or mental ages of the defendant and the victim, or if there is any element of corruption;
- k) the defendant's previous convictions or cautions are relevant to the present offence;
- l) the defendant is alleged to have committed the offence whilst under an order of the court;
- m) there are grounds for believing the offence is likely to be continued or repeated, for example, by a history of recurring conduct; or
- n) the offence, although not serious in itself, is widespread in the area where it was committed.

Some common public interest factors against prosecution

6.5 A prosecution is less likely to be needed if:

- a) the court is likely to impose a very small or nominal penalty;
- b) the offence was committed as a result of a genuine mistake or misunderstanding (these factors must be balanced against the seriousness of the offence);
- c) the loss or harm can be described as minor and was the result of a single incident, particularly if it was caused by a misjudgement;
- d) there has been a long delay between the offence taking place and the date of the trial, unless
 - the offence is serious;
 - the delay has been caused in part by the defendant;
 - the offence has only recently come to light; or
 - the complexity of the offence has meant that there has been a long investigation;
- e) a prosecution is likely to have a very bad effect on the victim's physical or mental health, always bearing in mind the seriousness of the offence;
- f) the defendant is elderly or is, or was at the time of the offence, suffering from significant mental or physical ill health, unless the offence is serious or there is a real possibility that it may be repeated. The Crown Prosecution Service, where necessary, applies Home Office guidelines about how to deal with mentally disordered offenders. Crown Prosecutors must balance the desirability of diverting a defendant who is suffering from significant mental or physical ill health with the need to safeguard the general public;
- g) the defendant has put right the loss or harm that was caused (but defendants must not avoid prosecution simply because they can pay compensation); or
- h) details may be made public that could harm sources of information, international relations or national security.

6.6 Deciding on the public interest is not simply a matter of adding up the number of factors on each side. Crown Prosecutors must decide how important each factor is in the circumstances of each and go on to make an overall assessment.

The relationship between the victim and the public interest

- 6.7 The Crown Prosecution Service acts in the public interest, not just in the interests of any one individual. But Crown Prosecutors must always think very carefully about the interests of the victim, which are an important factor, when deciding where the public interest lies.

Youth offenders

- 6.8 Crown Prosecutors must consider the interests of a youth when deciding whether it is in the public interest to prosecute. The stigma of a conviction can cause very serious harm to the prospects of a youth offender or a young adult. Young offenders can sometimes be dealt with without going to court. But Crown Prosecutors should not avoid prosecuting simply because of the defendant's age. The seriousness of the offence or the offender's past behaviour may make prosecution necessary.

Police cautions

- 6.9 The police make the decision to caution an offender in accordance with Home Office guidelines. If the defendant admits the offence, cautioning is the most common alternative to a court appearance. Crown Prosecutors, where necessary, apply the same guidelines and should look at the alternatives to prosecution when they consider the public interest. Crown Prosecutors should tell the police if they think that a caution would be more suitable than a prosecution.

7. CHARGES

- 7.1 Crown Prosecutors should select charges which:

- (a) reflect the seriousness of the offending;
- (b) give the court adequate sentencing powers; and
- (c) enable the case to be presented in a clear and simple way.

This means that Crown Prosecutors may not always continue with the most serious charges where there is a choice. Crown Prosecutors should not continue with more charges than are necessary.

- 7.2 Crown Prosecutors should never go ahead with more charges than are necessary just to encourage a defendant to plead guilty to a few. In the same way, they should never go ahead with a more serious charge just to encourage a defendant to plead guilty to a less serious one.

- 7.3 Crown Prosecutors should not charge simply because of the decision made by the court or the defendant about where the case will be heard.

8. MODE OF TRIAL

- 8.1 The Crown Prosecution Service applies the current guidelines for magistrates who have decided whether cases should be tried in the Crown Court when the offence gives the option. (See the 'National Mode of Trial Guidelines' issued by the Lord Chief Justice.) Crown Prosecutors should recommend Crown Court trial when they are satisfied that the guidelines require them to do so.
- 8.2 Speed must never be the only reason for asking for a case to stay in the magistrates' courts. But Crown Prosecutors should consider the effect of any likely delay if they send a case to the Crown Court, and any possible stress on victims and witnesses if the case is delayed.

9. ACCEPTING GUILTY PLEAS

- 9.1 Defendants may want to plead guilty to some, but not all, of the charges. Or they may want to plead guilty to a different, possibly less serious, charge because they are admitting only part of the crime. Crown Prosecutors should only accept the defendant's plea if they think the court is able to pass a sentence that matches the seriousness of the offending. Crown Prosecutors must never accept a guilty plea just because it is convenient.

10. RE-STARTING A PROSECUTION

- 10.1 People should be able to rely on decisions taken by the Crown Prosecution Service. Normally, if the Crown Prosecution Service tells a suspect or defendant that there will not be a prosecution, or that the prosecution has been stopped, that is the end of the matter and the case will not start again. But occasionally there are special reasons why the Crown Prosecution Service will re-start the prosecution, particularly if the case is serious.
- 10.2 These reasons include:
- (a) rare cases where a new look at the original decision shows that it was clearly wrong and should not be allowed to stand;
 - (b) cases which are stopped so that more evidence which is likely to become available in the fairly near future can be collected and prepared. In these cases, the Crown Prosecutor will tell the defendant that the prosecution may well start again;

- (c) cases which are stopped because of a lack of evidence but where more significant evidence is discovered later.

11. CONCLUSION

- 11.1 The Crown Prosecution Service is a public service headed by the Director of Public Prosecutions. It is answerable to Parliament through the Attorney-General. The Code for Crown Prosecutors is issued under section 10 of the Prosecution of Offenders Act 1985 and is a public document. This is the third edition and it replaces all earlier versions. Changes to the Code are made from time to time and these are also published.
- 11.2 The Code is designed to make sure that everyone knows the principles that the Crown Prosecution Service applies when carrying out its work. Police officers should take account of the principles of the Code when they are deciding whether to charge a defendant with an offence. By applying the same principles, everyone involved in the criminal justice system is helping the system to treat victims fairly, and to prosecute defendants fairly but effectively.
- 11.3 The Code is available from:

Crown Prosecution Service
Information Branch
50 Ludgate Hill
London
EC4M 7EX
Telephone : 0171 273 8049
Facsimile : 0171 329 8377

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Plea and Directions Hearing

Judge’s Questionnaire

(In accordance with the practice rules issued by the Lord Chief Justice)

A copy of this questionnaire, completed as far as possible with the agreement of both advocates, is to handed to the court prior to the commencement of the Plea and Directions Hearing.

The Crown Court at

Case No. T
PTI URN

R v

Date of PDH
Name of Prosecution Advocate at PDH
Name of Defence Advocate at PDH

| | | | | |
|---|---|---|-----|----|
| 1 | a | Are the actual/proposed not guilty pleas definitely to be maintained through to a jury trial? | Yes | No |
| | b | Has the defence advocate advised his client of section 48 of CJPOA 1994? <i>(Reduction in sentence for guilty pleas)</i> | Yes | No |
| | c | Will the prosecution accept part guilty or alternative pleas | Yes | No |

2 How long is the trial likely to take?

3 What are the issues in the case?

4 Issues as to the mental or medical condition of any defendant or witness.

| | | |
|---|---|---------------------------------|
| 5 | Prosecution witnesses whose evidence will be given. | To be read (number) |
| | Can any statement be read instead of calling the witnesses? | To be called (number) Names: |

- | | | | |
|---|---|--|-------------|
| 6 | a | Number of Defence witnesses whose evidence will be placed before the Court. | Defendant + |
| | b | Any whose statements have been served which can be agreed and accepted in writing. | |

| | | | |
|---|---|-----|----|
| 7 | Is the prosecution intending to serve any further evidence? | Yes | No |
|---|---|-----|----|

If Yes, what area(s) will it cover?

What are the witnesses' names?

| | |
|---|---|
| 8 | Facts which can be admitted and can be reduced into writing (s10(2)(b) CJA 1967) |
|---|---|

| | |
|---|--|
| 9 | Exhibits and schedules which are to be admitted. |
|---|--|

| | |
|----|--|
| 10 | Is the order and pagination of the prosecution papers agreed |
|----|--|

| | | | |
|----|---|-----|----|
| 11 | Any alibi which should have been disclosed in accordance with CJA 1967? | Yes | No |
|----|---|-----|----|

| | | | |
|----|---|---|--|
| 12 | a | Any points of law likely to arise at trial? | |
| | b | Any questions of admissibility of evidence together with any authorities it is intended to rely upon. | |

| | | | | |
|----|---|--|-----|----|
| 13 | a | Has the defence notified the prosecution of any issue arising out of the record of interview? <i>(Practice Direction Crime: Tape Recording of Police Interview)</i> | Yes | No |
|----|---|--|-----|----|

| | | | |
|--|---|---|--|
| | b | What efforts have been made to agree verbatim records or summaries and have they succesful? | |
|--|---|---|--|

| | | | |
|------|--|-------------|----|
| 14 | Any applications granted/pending for: | | |
| | (i) evidence to be given through live television links? | Yes | No |
| | (ii) evidence to be given by pre-recorded video interviews with children? | Yes | No |
| | (iii) screens? | Yes | No |
| | (iv) the use of video equipment during the trial? | Yes | No |
| | (v) use of playback equipment | Yes | No |
| 15 | Any other significant matter which might affect the proper and convenient trial of the case? (eg expert witnesses or other cases outstanding against the defendant) | | |
| 16 | Any other work that needs to be done. | Prosecution | |
| | Orders of the Court with time limits should be noted on Page 4. | Defence | |
| 17 a | Witness availability and appropriate length of witness evidence. | Prosecution | |
| | | Defence | |
| b | Can any witness attendance be staggered? | Yes | No |
| c | If Yes have any arrangements been agreed? | Yes | No |
| 18 | Advocates' availability? | Prosecution | |
| | | Defence | |

Case listing arrangements

Name of Trial Judge:

Custody Cases *Fix or warned lists within 16 weeks if committal*

Fixed for trial on _____ for week beginning _____

Place in warned list for trial

Further directions fixed for

Not fixed or put in warned list within 16 weeks because

Bail Cases

Further directions fixed for

Fixed for trial on

Fixed as a floater/backer on

Place in reserved/warned list for trial for week beginning

| List officer to allocate | within before | days/weeks |
|--------------------------|------------------|------------|
|--------------------------|------------------|------------|

Sentence

Adjourned for sentence on

(to follow trial of R v

Other directions, orders, comments

Signed: *Judge*

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