Children in the Witness Box: Bridging the Credibility Gap[†]

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Britain and Australia share common roots in criminal law and both have seen major changes in the last five years in the way children's evidence is treated by the courts. These changes have encompassed both the law of evidence as it relates to children and legal procedure regarding how children's evidence may be heard. The author's own involvement in this process in Britain began through orthodox psychological experiments which examined the competency of children to report accurately events which they had observed,[1] before moving into studies funded by the British Home Office of the impact of one of the major procedural innovations: the "live link" or closed-circuit televised testimony.[2] Subsequently, there was involvement in plans for the introduction of video tapes as evidence in cases involving children and as part of the team which produced the *Memorandum of Good Practice*[3] governing how such interviews should be conducted. Thus, the author's background is that of a psychologist, not a lawyer, but one whose interests have led him to much contact with lawyers, the law and its impact in practice.

This article begins with a brief survey of some of the common legal obstacles facing children in Britain and Australia before going on to discuss what psychological research exists on the impact of courtroom testimony on children. It then describes some recent findings on the impact of live links, seen both from the standpoints of courtroom officials and the quality of the child's evidence and surveys recent innovations in the use of videotapes. Finally, consideration is given to the legal position of child witnesses in Australia in the light of innovations in the United Kingdom.

1. *English Law and the Child Witness*

The decision in 1988 to introduce live links into courts in the United Kingdom was one aspect of a growing concern over how English law treated the evidence of minors. Traditionally, formidable legal hurdles had been placed in

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1 See Davies, G, "Research on Children's Testimony: Implications for Interviewing Practice" in Hollin, C R and Howells, K, *Clinical Approaches to Sex Offenders and Their Victims* (1991) at 93 for a review.

2 Davies, G and Noon, E, *An Evaluation of the Live Link for Child Witnesses* (1991).

3 Home Office, *Memorandum of Good Practice: Video Recorded Interviews with Child Witnesses for Criminal Proceedings* (1992).

the way of children giving evidence in criminal trials, both in Britain and Australia. In Britain, before the *Criminal Justice Act* 1988 (UK), only sworn evidence could convict an accused, and while the adult witness' right to take the oath was rarely challenged, children were normally examined by the judge to establish whether they were competent to take the oath. This competency requirement dates from the case of *R v Brasier*[4] which established that the child must understand the moral duty to speak the truth, otherwise their evidence should be excluded.

In Britain, since the *Children and Young Persons Act* 1933 (UK), s38, an alternative has existed for at least some children who are deemed not to be able to take the oath. This takes the form of a provision which allows a child to give unsworn evidence, "[i]f in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth". However, in Britain this legislation has been interpreted in landmark cases as excluding from court the testimony of children aged five years or under[5] or even six years,[6] though recent cases have suggested a less restrictive attitude is beginning to emerge with witnesses being treated on their individual merits.[7]

A second traditional obstacle in both legal systems has been the need for children's unsworn evidence to be corroborated, either by the evidence of another sworn witness or by other medical or forensic evidence. The corroboration requirement presented formidable difficulties for the prosecution of child sexual abuse, as abusive acts are normally conducted in private and frequently leave no medical sequelae.[8]

A third problem for the child witness was the existence of the judicial caution which was mandatory for the evidence of children, whether sworn or unsworn. The caution, delivered by judges as part of their summing-up, warned juries of the dangers of conviction on the basis of the evidence of a child. Singling out the evidence of children in this way, whatever the quality of that evidence, is inevitably discriminatory and might well raise unnecessary doubts in the minds of the jury.

A fourth problem are the rules of hearsay. Traditionally, English law places a premium on evidence given in person on the day of the trial. In cases of sexual or physical abuse this has the effect of excluding accounts of statements made by the child to a parent or other carer in the wake of such incidents. It has also been widely interpreted as excluding audio or video recordings of interviews with children in which specific allegations of abuse may have been made. The hearsay rule works particularly against the interests of very young children who may be incapable of giving a coherent account of events from the witness box.

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4 (1779) 168 ER 202.

5 *R v Wallwork* (1958) 42 Crim App R 153.

6 *R v Wright* (1990) 90 Crim App R 91.

7 *R v Z* [1990] *Crim LR* 515. For developments in NSW, see *Oaths (Children) Amendment Act* 1990 (NSW); Parkinson, P, "The Future of Competency Testing for Child Witnesses" (1991) 15 *Crim LJ* 186.

8 For Australian commentary, see generally, Warner, K, "Child Witnesses in Sexual Assault Cases" (1988) 12 *Crim LJ* 286.

The presence of such formidable hurdles to the reception of children's evidence reflects a deep-seated scepticism among legal scholars and members of the judiciary toward the evidence of children. It has been frequently alleged that limitations on children's attention and memory capacity make their testimony not merely quantitatively but qualitatively inferior to that of adults.[9] Children were widely alleged to confuse fact with the products of their imagination, to lie in court and to be highly suggestible under questioning.[10]

However, this uniformly negative view of children's competency as witnesses has been challenged by more recent research on memory competency in children. In brief, this suggests that for a range of memory tasks studied under laboratory conditions, children as young as five years of age can provide reliable and useful testimony.[11] The first spontaneous accounts by children of staged events prove as accurate as those of adults, though the absolute amount of information recalled is generally smaller.[12] A recent development has been the study of children's accounts of naturally occurring stressful events in their own lives such as visits to the doctor for intimate examinations or stressful inoculations. Children's accounts of the central features of such events have proved reasonably accurate even for intervals up to a year[13] and have remained impervious to the impact of leading questions designed to imply that abusive events may have taken place.[14]

There have also been the first systematic studies of the frequency with which children demonstrably lie in making allegations of unlawful sexual contact. Demonstrable lying by children in such cases is very rare, and almost certainly lower than for adults testifying from the witness box.[15] A survey of recent findings[16] gives a best estimate of around 2 per cent proven fictitious allegations by children of six years or less, rising to 10 per cent for those over ten years. False allegations appear to be more frequent in custody disputes and in cases involving children in care,[17] but there is little to suggest the need for more than normal vigilance in investigating allegations of abuse by young persons.

These findings coincided with a fresh wave of concern, particularly among the helping professions, over the plight of child witnesses in cases of alleged sexual abuse.[18] The unsatisfactory nature of the rules governing children's evidence was highlighted in a series of articles in professional publications[19] as well as in the British popular media.[20]

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9 Heydon, J, *Evidence, Cases and Materials* (2nd edn, 1984).

10 Id at 84.

11 Above n1 at 99. See also Oates, R K, "Children as Witnesses" (1990) 64 *ALJ* 129.

12 Above n1 at 100.

13 Goodman, G, Rudy, L, Bottoms, B and Aman, C, "Children's Concerns and Memory: Ecological Issues in the Study of Children's Eyewitness Testimony" in Fivush, R and Hudson, J, *Knowing and Remembering in Young Children* (1990) at 275.

14 Fivush and Hudson, above n13 at 276.

15 See Bussey, K, "The Competence of Child Witnesses" in Calvert, G, Ford, A and Parkinson, P (eds), *The Practice of Child Protection: Australian Approaches* (1992) at 69.

16 Spencer, J R and Flin, R, *The Evidence of Children* (1990) at 266.

17 Id at 267.

18 Irvine, R and Dunning, N, "The Child and the Criminal Justice System" (1985) 30 *JL Soc Scot* 264; Davies, G M and Drinkwater, J, *The Child Witness: Do the Courts Abuse Children?* (1988).

19 Williams, G, "Child Witnesses" in Smith, P, *Essays in Honour of J C Smith* (1987) at 188; Spencer, J R, "Child Witnesses: A Case for Legal Reform?" in Davies and Drinkwater

In Britain, as a result of such representations, the Home Office commissioned its own in-house review of the existing research on the competency of child witnesses.[21] This concluded that children's evidence was not so unreliable as to require a mandatory need for corroboration. The abolition of the corroboration rule formed a central feature of the *Criminal Justice Act* 1988 (UK). The Act also abolished the need for a judicial caution regarding the evidence of minors (though such a caution was retained in sex abuse cases under a blanket proviso covering adults as well as children who make complaints of sexual assault). The *Criminal Justice Act* 1991 (UK) made further changes to the competency requirement, such that all children below the age of 14 years giving evidence in cases of sexual assault are permitted to give unsworn evidence, subject to the judge's discretion.

2. *Protecting the Child in the Courtroom*

The *Criminal Justice Act* 1988 (UK) introduced a number of procedural innovations designed to make it easier for children to tender evidence in the courtroom. Chief of these was the "live link" or "videolink", the system of closed-circuit television which allowed the child to testify from an adjacent room at trial, outside the intimidating atmosphere of the courtroom and out of vision of the accused. The scheme was originally introduced to cover some 14 courts in England and Wales and was available, subject to the judge's discretion, to all children aged under 14 years giving evidence in Crown courts in cases of a sexual or violent nature. Subsequent legislation extended the scheme to a further 10 courts and the *Criminal Justice Act* 1991 (UK) enabled the facility to be extended to all juveniles up to the age of 17 years appearing in cases involving sexual offences.

Unlike the original Western Australian experiments and like the scheme in operation in the Australian Capital Territory,[22] the child, accompanied by a supporter approved by the judge, testifies from outside the courtroom. The closed-circuit image is relayed to one of three workstations in the courtroom which can both send and receive pictures and sound. One each is allocated to the judge, prosecution and defence counsel and large television monitors relay a picture of the child for the jury, the accused and the general public. The system is set up so that the court can see and hear the child at all times while the child sees and hears whoever is talking to him or her. In addition, the judge has access to a picture from an overhead camera to monitor the behaviour of the child and supporter so as to ensure that no prompting or signalling occurs.

The main perceived advantage of such a system is that it ensures that the child never sees the accused in court and that the child is protected from the sometimes alien and intimidating atmosphere of the courtroom. But what evi-

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above n18 at 6.

20 Above n15 at 11.

21 Hedderman, C, *Children's Evidence: The Need for Co-operation* (1987).

22 See Australian Law Reform Commission, "The Use of Closed-Circuit Television for Child Witnesses in the ACT" *Draft Report* (October 1992). The ACT scheme was reviewed by Dr J Cashmore: see ALRC, *Children's Evidence, Research Paper I, The Use of Closed-Circuit Television for Child Witnesses in the ACT* (October 1992).

dence is there to support the view that these two aspects of courtroom life are sufficiently stressful to prevent a child giving effective testimony?

The American researcher Gail Goodman[23] asked a group of 42 children to answer a series of questions concerning their feelings and expectations immediately prior to testifying in the Denver lower courts. This survey indicated that a primary fear of the overwhelming majority was the sight of the accused. The same finding emerged from a study in Aberdeen, Scotland, involving some 22 children who were waiting to testify.[24] Other areas of courtroom procedure which also elicited anxiety in both studies included giving evidence in open court and fear of cross-examination.

Very high levels of anxiety are not conducive to effective testimony, whether by children or adults.[25] Research which has actually observed children testifying in court suggests that conventional courtrooms can indeed cause distress to children and that little attempt was made by court officials to modify conventional procedure to assist the witnesses. Both studies involved observing children giving evidence in court and rating first, their behaviour, second, the quality of their evidence and third, their reaction to examination in general and leading questions in particular.

The first study[26] compared a group of 46 children who were involved in court proceedings involving sexual abuse with a parallel group of children who were not required to attend court. As far as possible the two groups were matched in terms of age, sex, socioeconomic status and severity of abuse. Comparisons of the children's behaviour subsequent to court attendance indicated that attendance was associated with a small but significant increase in behavioural disturbance. However, the impact of testifying was particularly marked where the children lacked maternal support or independent verification of their allegations. The impact of testifying was disproportionately greater when the child was called upon to give evidence at a number of hearings. The research also collected ratings by observers of the behaviour of 57 children who gave evidence in court, 40 of whom appeared only in preliminary hearings. Of the latter, half were judged as showing either "some distress" or being "very distressed". Those children who had expressed most concern over seeing the accused prior to courtroom appearance were rated as reacting least well to questioning, and recorded the highest rates of abreaction to testifying. The researchers noted few attempts by the American courts to take account of the special needs of child witnesses.

A similar lack of special concern was noted in a second study of some 89 children who testified in courts in Glasgow.[27] The Scottish sample differed from the US group in a number of important respects. First they were some-

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23 Goodman, G, Jones, D, Pyle, E, Prado-Estrade, L, Port, L, England, P, Mason, R and Rudy, L, "The Emotional Effects of Criminal Court Testimony on Child Sexual Assault Victims: A Preliminary Report" in Davies and Drinkwater, above n18 at 46.

24 Flin, R H, Davies, G and Tarrant, A, *The Child Witness* (1988).

25 Above n15 at 298.

26 Goodman, G, Taub, E, Jones, D, England, P, Port, P, Rudy, L and Prado, L, "Emotional Effects of Criminal Court Testimony on Child Sexual Assault Victims" (1992) 57 *Monog Soc Res Child Dev* 5.

27 Flin, R H, Bull, R, Boon, J and Knox, A, *Child Witnesses in the Scottish Criminal Prosecutions* (1990).

what older on average (60 per cent were aged 14 to 15 years) and only a minority (10 out of 89) were involved in cases of sexual abuse. Nevertheless 10 of the juveniles they observed broke down and cried under examination and the same number under cross-examination. Once again, few concessions were made to assist the children in giving their evidence. Two children gave evidence behind screens, both in sex cases, and 11 were permitted to give their evidence from the well of the court rather than from the witness box.

Taken together, these studies suggest that the motives for the introduction of the videolink have some strong foundations in the real fears of children and that their performance in court may well be considerably less than optimal. However, they say nothing about the effectiveness of the proposed remedy, the videolink. A recently completed research project was devoted to investigating its impact.[28]

3. *The Impact of the Videolink on Court and Child*

This project, which was sponsored by the British Home Office, examined the impact of the videolink on the quality of children's testimony and assessed its acceptance by courtroom personnel, in particular judges, counsel and court clerks. The research faced two major impediments. First, research only began when the videolink experiment was underway, so there was no opportunity to collect comparison data from children testifying in similar cases in the same courts prior to the introduction of the link. Secondly, the researchers were unable to contact either the parents of the children or the children themselves prior to, or immediately subsequent to, their attendance at court.

Consequently, assessment of the children's courtroom performance relied overwhelmingly on ratings of their demeanour and competence under examination collected for the researchers by a team of trained observers. As this study shared many of the same rating scales as the Glasgow survey a degree of comparison could be affected between the live-link children and those in Scotland who had testified in open court. In all, the researchers were able to observe a total of 154 children testifying via the videolink in some 100 cases of alleged child sexual abuse. The average age of the children was 10 years with a range from 4 to 13 years of age. Through the good offices of the Lord Chancellor's Department a wide range of legal opinion was also surveyed. Some 50 judges and 78 barristers who had experience of the link answered questionnaires on the effectiveness or otherwise of the videolink and reactions were available from 13 of the original 14 courts involved with the video experiment.

Within the inevitable methodological constraints of the study, conclusions regarding the efficacy of these links for children were generally very positive. Irrespective of age and sex, 40 per cent of the sample were rated as "self confident" when giving evidence compared to only 1 per cent who were "very lacking in self confidence". Over 85 per cent were rated as "relatively" or "very" fluent under examination or cross examination and audibility, traditionally a problem with child witnesses, was rarely a difficulty. The great majority of children (76 per cent) were able to give evidence without being reduced to tears, only one child was visibly distressed at all stages of examination.

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28 Above n2.

Given the frequently harrowing nature of the evidence in cases of sexual or physical abuse, these results were highly encouraging, though inevitably interpretation needed to be qualified by comparison to appropriate control data for children giving testimony in open court. As has been noted, the Glasgow sample differed in a number of important respects from the English. However, by careful matching it was possible to increase comparability. Where differences between the two groups persisted, as in the proportion of males (much higher in the Scottish sample) or offence categories (more physical violence and bystander witnesses among the Scots) it was possible to argue that this should favour the open court method and there were a number of parameters on which link witnesses significantly out performed their compatriots from north of the border. Link witnesses were judged to be significantly more resistant to leading questions concerning peripheral details, less likely to give inconsistent answers, and, overall, were less unhappy and more audible than their Scots counterparts. Link witnesses were also more confident in their examination in chief, though there were no differences under cross-examination.

This generally positive outcome for the link experiment also extended to courtroom personnel. Some 74 per cent of all judges and 83 per cent of barristers who had experience of the system had formed a "favourable" or "very favourable" opinion of the existing scheme by the end of the study. Interestingly, this positive view extended to counsel appearing for both defence and prosecution with significant differences in their replies. Likewise, 12 of the 13 court staff shared a favourable impression of the innovation, the one exception being a court which favoured the use of screens. No court clerks wished to return to a traditional open court style of examination. The overwhelming positive response from all levels of the legal process has ensured that Links will be more widely available throughout the United Kingdom with a further 30 courts in the process of being adapted for its use.

4. *Prerecorded Video Evidence*

The *Criminal Justice Act* 1991 (UK) introduces a second major video technology innovation into criminal law in Britain: the use of prerecorded video evidence as a substitute for the child's examination in court. The report of the Pigot Committee in 1989[29] had called for legislation which would have effectively removed children from the courtroom entirely by permitting both examination and cross-examination to be carried out in the form of prerecorded videotapes.

After an allegation had been made by a child, Pigot proposed that the child should be formally interviewed by a trained and experienced team consisting of a police officer and social worker. In the event of a disclosure, a tape of this interview would be played to the accused by the police in the hope of eliciting a guilty plea. If the accused denied the allegation and further legal proceedings were necessary, the tape would be viewed by a judge. The judge would rule on its value as evidence, using as a touchstone whether it was more probative than prejudicial: a global assessment which would not discard a tape simply because of isolated examples of leading questions. Subsequently a sec-

29 Pigot, T, *Report of the Advisory Group on Video Evidence* (1989).

ond tape would be made of a hearing in chambers at which the judge, the accused, the child witness and their legal representatives would be present. The accused would be allowed to observe the hearings and instruct counsel but would not be visible to the child. The use of specially adapted hospital suites with one-way mirrors was envisaged by Pigot as one venue for such hearings. The child would be cross-examined on their statement by counsel for the accused. If new lines of defence emerged subsequently, the hearing would be reconvened for further cross-examination under identical conditions. These recordings would then form the basis of the defence case, the original tape replacing live examination in chief and the recording of the more formal hearing substituting for cross-examination at trial.

This radical plan received widespread support not only from child welfare organisations in the United Kingdom, but also from the Criminal Bar Association and the Circuit Judges Council. However, the Home Office felt able only to accept the first element of the Pigot proposals and the 1991 Act will allow taped interviews to substitute for live examination in chief but cross-examination will still require the child to give evidence in court, normally via the videolink. An attempt in May 1991 in the House of Lords to introduce the Pigot proposals in full failed by just 10 votes. During the debate the Lord Chancellor indicated that further legislation might be forthcoming if the present compromise proposals were seen to be ineffective in ensuring that cases involving child sexual abuse receive a proper court hearing.[30]

5. *Australian Reforms*

Where do such radical innovations leave law and practice in Australia? The use of videolink or closed-circuit televisions has now been widely adopted in Australia for child witnesses and in some states for other vulnerable witnesses also.[31] Queensland and the ACT introduced the technique in 1989,[32] with NSW following in 1990,[33] Victoria in 1991[34] and Western Australia in 1992.[35] Only South Australia and Tasmania have failed to enact legislation implementing this procedure.

The recent legislation in Victoria and Western Australia is not limited to the use of closed-circuit television, but also provides other alternatives such as the use of screens or one-way mirrors in the courtroom.[36] Other possible arrangements include counsel not robing and remaining seated during questioning[37] as well as allowing the witness a person to sit with them for emotional support,[38] and even allowing the supporter actually to communicate for the child.[39] Some of these provisions also exist in NSW.[40]

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30 Spencer, J R, "Reformers Despair" (1991) 141 *NLJ* 787.
31 *Acts Amendment (Evidence of Children and Others) Act* 1992 (WA), s106R.
32 *Evidence (Closed Circuit Television) Act* 1989 (ACT).
33 *Crimes (Child Victim Evidence) Amendment Act* 1990 (NSW) ss405D and 405E.
34 *Evidence Act* 1958 (Vic), s37C (3)(a) (introduced in 1991).
35 *Acts Amendment (Evidence of Children and Others) Act* 1992 (WA).
36 *Evidence Act* 1958 (Vic), s37(3)(b) and *Acts Amendment (Evidence of Children and Others) Act* 1992 (WA), sub 106N.
37 *Evidence Act* 1958 (Vic), subs 37(3)(d) & (e).
38 *Evidence Act* 1958 (Vic) sub 37(3)(c).
39 *Acts Amendment (Evidence of Children and Others) Act* 1992 (WA), s106F.

The Western Australian legislation also introduced pre-trial hearings similar to those envisaged by the Pigot Committee. The legislation permits the judge to direct either that the evidence be recorded on video or that an informal pre-trial hearing be held and recorded in the Pigot style which will normally preclude the child from having to be present at the trial.[41] Similar legislation is being contemplated in Tasmania.[42] Queensland however has diverged from this line and introduced legislation which allows videorecorded evidence if conditions specified by the court are satisfied.[43]

The United Kingdom experience of videolink technology now extends to over 550 cases.[44] Disputes over the physical arrangements and appearance of the child on the Link have not proved to be a major area of contention and any loss of immediacy has been compensated for by the increase in the amount of information contained in the child's evidence and their evident increased composure.[45] There has been no apparent increase in the unreliability of children's testimony with some 36 per cent of all cases being settled by late guilty pleas from the accused. For the remaining cases which have gone to trial, some 28 per cent have resulted in a conviction, 26 per cent an acquittal and 10 per cent in some other outcome such as a retrial.[46]

The Australian state legislatures have been in the vanguard of legal reform to permit the criminal law to be available to all potential victims, whatever their age or race. It would be a pity if, through misconceptions over the impact of video technology, any states were now to be left behind.

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40 *Crimes Act* 1900 (NSW), s405F.

41 *Acts Amendment (Evidence of Children and Others) Act* 1992 (WA), s106K .

42 Law Reform Commissioner of Tasmania, *Child Witnesses* (Report No 62, 1990), recommendations 4-5.

43 *Evidence Act* 1977 (Qld), subs21A(2)(e), (3) & (5)-(7).

44 Law Reform Commission of WA, *Report on the Evidence of Children and Other Vulnerable Witnesses* (1991).

45 Above n2 at 34.

46 Above n2 at 133.