

How Young Is Too Young? The Evidence of Children Under Five in the English Criminal Justice System

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Perceptions of children's competence as witnesses have shifted repeatedly in the last few decades. Recent international research confirms that very young children can provide reliable descriptions of past events when properly interviewed. In England, the legislative foundations are now in place to enable the evidence of very young children to be heard and tested: clear guidance is available for interviewing teams, prosecutors and advocates, and the judiciary.

Yet practice with very young children is erratic across England, both at investigation and at trial. Many practitioners do not feel confident to interview or cross-examine very young children and in some areas children under five are not interviewed at all. Very few under fives give evidence in English courts, although this is beginning to change.

This paper briefly summarises recent research and current guidance and explores the reasons for variability in practice. A range of practical strategies are suggested to enable very young children to give their best evidence. These strategies link the research base to the author's direct involvement as a registered witness intermediary in more than 70 investigative interviews and criminal trials with children aged two to five. Copyright © 2013 John Wiley & Sons, Ltd.

KEY PRACTITIONER MESSAGES

- Very young children are particularly vulnerable, both to maltreatment and to inept adult questioning.
- Very young children can give reliable and accurate evidence.
- There is now consistency and clarity of guidance in relation to the evidence of very young children at interview and at trial.
- The communicative competence of very young child witnesses depends heavily on the competence of interviewing teams, intermediaries, advocates and the judiciary.

KEY WORDS: interviewing young children; young witnesses; best evidence

Why It Matters

The evidence of very young children may be crucial to justice:

- A girl of 16 months was raped; the only witness was her four-year-old brother.
- A boy of two was deliberately burned; his mother and stepfather each blamed the other.
- A girl of three was the sole witness to the murder of her mother.

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‘The competence of very young child witnesses has still been questioned in more recent decades.’

The way in which we elicit and assess the testimony of young children has been the subject of intense debate for many years and has received extensive recent professional attention (Brammer and Cooper, 2011; Cambridge University, 2011; HM Crown Prosecution Service Inspectorate and HM Inspectorate of Constabulary, 2012; Lamb *et al.*, 2008, 2011; Plotnikoff and Woolfson, 2009, 2011). The issue has also received recent mainstream media coverage in England (Brooke, 2011; Hughes, 2009).

This issue is important because very young children are particularly vulnerable, both to maltreatment and to inept adult questioning:

- Under fives are more likely to be subject to a child protection plan than any other age group (Department for Education, 2010), and almost three-quarters of children under 15 killed at the hands of another person are aged under five (Smith *et al.*, 2012).
- Very young children are also particularly vulnerable to unsafe interview strategies and leading or complex questioning, which makes it challenging for professionals to safely elicit and test their evidence (Hershkowitz *et al.*, 2011; Hewitt, 1999; Lyon, 2010; Myers, 2005; Powell and Snow, 2007; Schrieber *et al.*, 2006; Spencer and Lamb, 2012).

The Context

We have come a long way from the position taken by a previous Lord Chief Justice in 1958, where a five-year old had been called as a 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.’ (Lord Goddard CJ in *R v Wallwork* (1958) 42 Cr App R 153)

Yet the competence of very young child witnesses has still been questioned in more recent decades. For example, in 1987 an Appeal Court judgment stated that ‘quite exceptional circumstances’ were required to justify calling a child of tender years such as age six’ (*R v Wright and Ormerod* (1987) 90 Cr App R 91 at 94–95) and in 1990 the Appeal Court suggested it would be ‘very rarely that a five-year-old will satisfy the (statutory) requirements (as a witness)’. (*R v Z* (1990) 2 All ER 971)

The Youth Justice and Criminal Evidence Act 1999 effectively removed the legal constraints on calling younger witnesses, clearly separating out the issue of competence from issues of credibility and reliability.

There has been a significant recent growth (of almost 60%) in the number of young witnesses called to criminal court (Plotnikoff and Woolfson, 2011). The great majority of these young witnesses are over ten, but a number of four- and five-year olds have recently been cross-examined at trial.

Notably, an Appeal Court judgment in 2010 upheld a conviction for rape based on the evidence of a child aged three at interview (four at trial) who was describing events which had occurred when she was two. In the judgment, our current Lord Chief Justice stated clearly that

‘the age of a witness is not determinative on his or her ability to give truthful and accurate evidence. . . the judge determines the competency question . . . provided the witness is competent, the weight to be attached to the evidence is for the jury’. (*R v Barker* (2010) EWCA Crim 4 paras 40 and 41)

Consistent with the legislative position, current English guidance does not suggest a minimum age at which a child can be interviewed (Ministry of Justice, 2011) and this is also the case at trial: ‘There are no fixed rules about how old children must be before they can give evidence or before we will prosecute a case’ (Crown Prosecution Service (CPS), 2006, p. 9) and even more explicitly: ‘whatever the age of the victim, as long as the legal safeguards and support necessary to ensure a fair trial are in place, their voice will be heard’ (CPS, 2010).

Clear guidance is also now available for the judiciary:

‘Judges should ensure that advocates do not attempt over-rigorous cross-examination and that they use language that is free of jargon and appropriate to the age of the child.’ (Judicial Studies Board, 2009, p. 4).

‘Adapt questions to child’s developmental stage, enabling this child’s ‘best evidence’ (Judicial College, 2012)

For the first time, there is consistency and clarity of guidance in relation to the evidence of very young children, and yet practice remains erratic and inconsistent. For example, there is great variability across the country in referral rates of very young children to the witness intermediary matching service (Dr. Kev Smith, National Vulnerable Witnesses Adviser, 2012) and in many areas practitioners confirm that children under five are not interviewed at all.

Why is Practice so Variable?

Young children are often seen as the problem. One senior police officer advises ‘if the child is under five, run a mile’ and an experienced barrister described his encounter with a four-year-old witness as ‘the Everest of cross-examinations’.

In very practical terms, young children may not comply with adult expectations at interview or trial: perhaps they won’t come into the room, won’t separate from their parent or carer, won’t stay in the room, won’t stay in one place, won’t sit still or won’t sit at all. Young children may be seen as un-interviewable, unable to distinguish fantasy and reality, unable to give clear or reliable accounts, or to understand the difference between truth and lies. They may attempt to answer questions that they do not understand, or they may answer questions unintelligibly, or with single words only, or by showing rather than telling, or not at all.

The English criminal justice system has not developed with young children in mind, and relies heavily on spoken testimony. This presents significant barriers to anyone who finds it difficult to put their experiences into words and tell what happened. These barriers particularly disadvantage very young children for several reasons:

- Their ability to understand and use language is at an early stage of development. They are less able to respond to open questions, tend to provide briefer accounts and are more likely to respond erroneously to suggestive questions (‘that didn’t happen, did it?’), forced-choice questions (‘was the car red or blue?’) and yes/no questions (Hershkowitz *et al.*, 2011; Lamb *et al.*, 2008, 2011; Powell and Snow, 2007).

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- Adults may find it difficult to adapt their own communication in order to make sense to young children. This is more complex than it may appear:

‘avoiding difficult words only scratches the surface ... questions can be complicated because of their structure and their implications, not just because of their words’. (Lyon, 2010, p. 92)

- Very little specialist training is available and professionals often ask complex questions: ‘When this happened, and mummy was out shopping, whereabouts exactly in the room were you?’, or use complex language ‘Can you explain in greater detail the layout of the room?’, or add unnecessary words that create confusion ‘I wonder if you can remember where you were in the room at the time that this happened?’
- Young children rely much more on gesture, facial expression or demonstration than older children, both to understand and be understood (Doherty-Sneddon, 2003). Unspoken communication may go unnoticed or unrecorded, or be unintentionally disregarded at interview or trial (Marchant, 2010a).

In summary, given the barriers inherent in the system, the communicative competence of very young child witnesses (and therefore the accuracy, completeness and coherence of their testimony) depends heavily on the competence of interviewing teams, intermediaries, advocates and the judiciary. This competence is extremely variable and therefore practice is erratic.

What We Know From Research

We now know a great deal about how young children’s communication, understanding and memory develop, and how this impacts on their ability to give accurate accounts of their experiences.

Research about the Development of Children’s Communication and Understanding

Children gain communication skills from birth, with rapid development of many skills in the early years. Understanding and use of language changes dramatically between ages two and five, with major developments in auditory working memory, sentence length, vocabulary and understanding, and use of grammar. Speech intelligibility also changes: it is normal for children to leave out, mix up or add sounds until at least age five (Buckley, 2003).

Very young children are less able to work out what others know or need to know (comprehension monitoring) and also find it difficult to identify how they have acquired their own knowledge (source monitoring) (Melinder *et al.*, 2006). Both these abilities are linked to theory of mind: the understanding that others have beliefs, knowledge and intentions that are different from one’s own. Theory of mind usually develops between three and five years of age (Wellman, 1990). Children who do not yet have a robust

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‘theory of mind’ will find the processes of interview and cross-examination particularly challenging and will need help to understand that others do not know what they know, and to adapt the information that they give according to the knowledge of others.

Research about the Development of Children’s Memory

For a long time, it was thought that the ability to remember was closely related to the development of language, but we now know that infants remember their experiences well before they acquire language (Fernyhough, 2008).

This does not mean that they can recall and recount those experiences; memory abilities develop dramatically throughout childhood. Children aged between two and three remember many experiences, but younger children forget more quickly than older children. Time also erodes children’s memories, as it does adults:

‘The most important determinant of children’s memory capacity is age – as children develop, they are progressively able to remember their experiences for longer and longer periods of time – from a few days in infancy to several years by the time children are five years old’ (La Rooy *et al.*, 2011, p. 53)

Research about Children’s Ability to Give Evidence

The youngest children considered in research on investigative interviewing or cross-examination have generally been aged five or six. More recently, there has been some focus on three- and four-year olds (Lamb *et al.*, 2011; Marchant, 2010b, 2011). Key findings include:

- Age is the main contributor to resistance to suggestions, to correct source monitoring (knowing how one knows something) and to correct responses to specific questions (Melinder *et al.*, 2006).
- Three- to four-year olds ‘have the requisite cognitive, verbal and communicative skills, as well as sufficient attentional capacities, to function as engaged interlocutors with adults’, but perform better with specific (directive wh- questions: what, where, when) rather than open-ended prompts (Hershkowitz *et al.*, 2011, p. 612).
- From the age of two, children begin to be able to deliberately deceive others (Fernyhough, 2008) and from four are considerably knowledgeable about lying and truth-telling and appreciate the seriousness of lying (Bussey and Grimbeek, 2000).

Strategies That Help

Very young children need to be able to predict and make sense of what is happening, to be clear about the choices that they can make, to be asked questions that they can understand, to perceive themselves as competent communicators and to realise that they are the experts on their own experience. They need to feel safe and comfortable with the interviewing team, and they may also need help to separate from their parent or carer, to regulate their emotional state, to learn and try out the communication rules, and to practise giving clear and detailed accounts of neutral (non-evidence related)

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experiences. The following lessons from experience must be tailored to each child and situation.

Adjust the Process to the Child

Give Clear Explanations and Expectations to Children

For example, through simple introductory leaflets or letters, with photos of settings and key people, explaining what will happen at interview and trial.

Create Child-Friendly Environments for Interview and Trial

This means doors that the child can easily open; furniture the right size; quiet, calming play materials; and an easily accessible bathroom. There are strong grounds for interviewing very young children in properly equipped interview suites rather than using mobile equipment in familiar settings. Firstly, it is essential to capture non-verbal communication and as young children are very likely to move around this requires cameras that can track and follow the child; and secondly, safe spaces are particularly likely to be 'contaminated' for young children if they are interviewed, for example, at nursery or in foster care.

Establish Rapport and Assess the Child's Needs Before the Interview or Trial
Pre-interview or pre-trial assessment should include, in particular, their ability to understand and use spoken language and non-verbal communication, to give a detailed account of a neutral event, to refute inaccurate adult suggestions, to concentrate, to attend and to manage their own arousal levels. This pre-interview or pre-trial session can also appropriately be used to introduce and practise rules and expectations and to settle a child in the interview or livelink room.

Help the Child to Separate from their Parent or Carer

There are sound reasons not to have the child's parent or carer present in the interview or livelink room, but it is not appropriate to expect very young children to separate without preparation. The child needs to be familiar with both the people and the setting, to know where their accompanying adult will wait, to understand that they can go to them if and when they need to and to practise doing so.

Let the Child Set the Pace at Assessment, at Interview and during Cross-Examination
The assumption is often that very young children will need to go slowly, but in fact many young children struggle to maintain their attention and train of thought if there are long gaps between questions, for example, following a long pause during cross-examination, 'what he talking about?'

Let the Child Control Breaks

Children can be taught to cease the interaction when they need to and come back when they are ready. This is especially important for distressed or traumatised children, who can learn to manage their own state by brief pauses in the room: 'I tell you in a minute, OK?'; by leaving the room: 'I come back when I ready'; or by hushing the interviewer: 'Be quiet now' 'Sssh sssh I'm sticking, I need you to be shush'.

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How Young Is Too Young?

Some young children use breaks to continue their recall, returning to the room to spontaneously extend their account without being asked any additional questions, for example, 'AND he put it in my mouth.' Others use breaks from the room to pace their recall, for example:

- 'Can we ask more about what happened?'
- 'No not yet' (shaking head)
- 'Can I ask a question now?'
- 'No' (leaves room briefly, returns)
- 'Can I ask some questions now?'
- 'Yep' (answers questions calmly for 6 minutes)
- 'I go now' (leaves room, plays with the sand, returns spontaneously after 3 minutes)
- 'OK I do one more talking now.' (answers questions for another 7 minutes)
- 'I did talk one more time. All done' (leaves room)

Help the Child Understand

Establish the Child as an Expert Informant from the Outset in Your Interactions
Never speak over children as if they are not there, and avoid using complex language in the child's presence (Marchant *et al.*, 2009).

Make Your Expectations Clear

Interviews are outside the experience of very young children:

'children are accustomed to interactions with adults in which the adult knows the answer and the child is either being taught the answer, or should have learned the answer and is now being tested'. (Lyon, 2010, p. 94)

They will need help to understand what is expected of them, for example,

'I need to ask you questions. You can play with these quiet things while we talk. You can stop. You can go to the toilet. You can go to (mummy/daddy/foster carer). You can come back when you're ready. We will finish by lunchtime. Then you will go to nursery'.

Very young children may not understand why they need to tell what happened, in fact, they may assume that you already know, for example,

- 'Why you keep ask me things?'
- 'Because we don't know what happened'
- 'Why you all quiet?'
- 'Because we are listening'
- 'Well, you **know** what happened'
- 'We don't know, we weren't there'
- 'What, you didn't be there?'
- 'No'

Reduce the Cognitive Load on the Child

For example by adjusting your vocabulary, sentence length and sentence structure to the child's level. Avoid exposing the child to unnecessarily complex language (e.g. most of the formal set up of an interview can be completed without the child in the room – date, time, location, adult names/roles/numbers/declarations).

'Some young children use breaks to continue their recall'

'Establish the Child as an Expert Informant from the Outset in Your Interactions'

'They may assume that you already know'

'Avoid exposing the child to unnecessarily complex language'

'Never suggest a violent event or attribute blame to the child in your example'

'Children as young as two can understand the idea of rules'

Check the Child's Understanding of Important Explanations

Check the child's understanding not by asking 'do you understand me?' but by asking them to explain it back to you or to someone else (e.g. a child can be shown around the interview suite or livelink room and then asked to show their parent or carer around).

Work Out What Communication Rules the Child Needs

Determine what communication rules the child needs and teach and practise only those rules, rather than listing a set of standard rules. Some can be presented as rules of the room, that apply to all present not just the child. All rules are best presented through modelling and practising.

Use Visual Resources

Visual resources help to explain what is happening and to clarify expectations at interview and at trial (e.g. photos, drawings, rules, letters, books or visual timetables) (Figure 1).

Explore the Child's Understanding of Truth and Lies

Explore the child's understanding of truth and lies in a straightforward, practical way. Avoid telling stories or asking children to pretend or imagine and never suggest a violent event or attribute blame to the child in your example. Picture versions and real examples can help. Children may initially demonstrate their understanding non-verbally (e.g. covering their own mouth, pointing at the person who lied, shaking their head, looking disapproving). This can be noticed and explored. Children can then be invited to make 'a promise' to tell the truth, because the research is clear that a child's promise to tell the truth is a better predictor of later honesty than the ability to distinguish truth and lies (Lyon, 2011). Most under fours will not know the words 'promise' or 'truth', but many will understand their family's words for lying or pretending, and children as young as two can understand the idea of rules. The importance of telling the truth can be explained in other ways, for example, only talk about things that really happened, or things you are sure about, or things you saw or heard or felt; no lying, no pretending, no making things up, no guessing.



Figure 1. Three sample rules.

Help the Child Explain

Undertake at Least One Practice Narrative

This strategy, which involves letting a child talk about a neutral, non-evidence-related event has many benefits, especially with very young children. It is one of the most effective ways to build rapport (Hershkowitz, 2011) and it improves both the quantity and accuracy of information given at interview (Roberts *et al.*, 2011). This must be episodic questioning about a single event (e.g. ‘Tell me what happened at the nursery Christmas party’), not generic questioning (e.g. ‘Tell me about nursery’).

Prompt, Attend to and Respond to the Child’s Non-verbal Communication

Very young children are often more able to communicate if they show as well as tell (Marchant, 2010a, 2010c), for example by:

- Nodding and shaking their heads
- Pointing and gesturing
- Drawing or using drawings provided
- Indicating and demonstrating with their hands or mouths
- Demonstrating with their whole bodies
- Demonstrating with props (e.g. dolls and furniture)

One of the safest ways to prompt a child’s non-verbal communication is to extend or slightly exaggerate your own non-verbal communication. For example, showing a child non-verbally that you don’t know what happened or you don’t understand what they mean (by a ‘don’t know’ expression or by shrugging) can prompt them to give additional information and/or to use additional channels of communication. It is crucial that your non-verbal communication is non-leading.

Record the Child’s Non-verbal Communication

Record non-verbal communication by ensuring that the child’s face and hands are clearly visible (over closed-circuit TV at court and on the interview recording) and cease questioning if the child moves out of sight or range. Notice when a child is pointing or demonstrating by clearly looking and attending. Clarify if necessary. It can also be helpful to comment verbally (e.g. ‘you’re pointing’) to direct the attention of the viewer, both at interview and over livelink at trial. Transcripts must be a record of what was said and done, not just what was said.

Enable the Child to Look Away from You While Explaining

Most adults will switch off from environmental stimulation (by looking away or closing their eyes) in order to concentrate better, particularly during challenging cognitive tasks such as remembering information. However, we often expect children to look at us when we communicate with them, and when children look away we may see this as a sign of disengagement or lack of interest. But gaze aversion while children are thinking or speaking is something to be encouraged rather than discouraged (Doherty-Sneddon, 2004). Gaze aversion in response to difficult questions is a skill that develops with age, and young children may need adult help to avert their gaze at

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interview or cross-examination. Looking away yourself can help, as can calming, quiet things for the child to fiddle with and look at.

Plan the Interview Carefully

The interview must be planned carefully because:

‘Young children often require more structured interview strategies, needing to rely on the organisational framework of the interviewer to access their knowledge’ (Faller, 2007, p. 150)

It is particularly important to plan how to introduce the topic of the interview (Powell, 2003) because young children may respond unpredictably to an initial open invitation, for example, ‘What have you come to talk to me about today?’ ‘*my new football*’ ‘*Cinderella*’ ‘*going on a train?*’. They may be confused by the introduction of unfamiliar words, for example, ‘a bruise’ instead of an ‘ow’ and baffled by discussions about related topics, for example, ‘*why you asking me ‘bout BATHS?*’ Plan in detail, including the actual wording of key questions.

Scaffold the Child’s Account

Scaffold the child’s account by providing support for communication, thinking and recall. Importantly, the ‘scaffold’ does not hold up the building (or the account); it allows the child and adult to climb higher (Bruner, 1978). Therefore, take great care not to introduce new information which might confuse or contaminate the child’s recall. Verbal scaffolds can include statements of facts not in dispute, or brief summaries of information that the child has already given, always in their own words. Non-verbal scaffolds can include drawings, pictures, photographs, symbols, dolls, figures and props. There are real risks in using props without careful planning (Poole and Dickinson, 2011; Schreiber *et al.*, 2006). Crucially, never combine any prop with a leading question. Also, check that props have a stable identity in the child’s mind, for example, by making a deliberate naming error to see if the child will correct you. Some young children struggle to understand that a visual prop is a representation of a thing rather than the thing itself and thus have enormous difficulty making sense of maps or diagrams, arguing, for example, that the thin red line can’t be a road because ‘*you can’t fit a car on it*’, or a picture of stairs can’t be stairs because it ‘*doesn’t go up*’, or the body outline ‘*isn’t big enough like me*’. (See guidance contributed by the author on using drawings, pictures, photographs, symbols, dolls, figures and props with children in Ministry of Justice, 2011).

Adapt the Questions to the Child’s Developmental Level

Young children may respond literally to questions, for example, ‘Can you tell me what happened?’ ‘*Yep*’.

They may struggle with forced alternatives, for example, ‘Were your clothes on or off?’ Silence; later: ‘*my pants was round my feet*’. They may also guess at answers when asked developmentally inappropriate questions, for example, ‘How many times did this happen?’ ‘*Maybe twice?*’ ‘*81 and a thousand*’.

Similarly, young children struggle to locate events in time, and do not yet have a firm grasp of concepts like now/then/next/before/after/since/when, and

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yesterday can mean anything in the past and tomorrow anything in the future, for example, ‘When did this happen?’ ‘*Half past 15*’ ‘lots’ ‘*When I was littler and had different shoes*’. A better approach is to link the child’s memory to a specific feature. Similarly, present tense questioning can be very alarming to young children (e.g. ‘So you are in the bed and he’s taken your pyjamas off, now what’s happening?’). Also, suggestions of ‘taking you back to the place where it happened’ may be taken literally and cause panic.

Clarify What a Child Means

Some children may have more than one person in mind when they say ‘*Daddy*’ and some people in the child’s life will have more than one name or more than one identity, for example, ‘*There was a monster doing the willy up my bum thing. But it wasn’t a monster, it was just Jack*’. Categories may not be used as we would expect, for example, pyjamas or underwear might not be defined as clothes. Prepositions such as inside/outside/on/under/behind/above/below/beside can create confusion because young children may not yet fully understand them. Thus, children can usually respond to a request to place an object ‘in’ or ‘under’ well before they can reliably describe where an object is or was. Similarly, ‘any’ is surprisingly complex because it asks a child to search for every possibility (Jones, 2003).

Seek a Complete Account

Young children often give just two or three details and then say firmly ‘*that’s it*’, ‘*finished*’ or ‘*the end*’. This may lead interviewers to this kind of checking question: ‘Which, if any, part of this person’s body did what, if anything, to which part of your body?’ Even at its simplest ‘Which part of him touched which part of you?’ this is a five-keyword question (part > him > touch > part > you?), which is way beyond what most young children can process. Touch also has multiple meanings (as an act, as a sense, as a feeling) and is often seen by young children as something you do with your fingers, which leads to incomplete accounts, for example, oral, anal or vaginal rape may not be seen as touching. This has led some to recommend direct questioning after an initial disclosure, for example, within the National Institute of Child Health and Human Development (NICHD) protocol: ‘Did s/he touch this part?’ (Lamb *et al.*, 2008).

Develop Your Own Communication Skills

You cannot practise these skills with adults. To get good at communicating with three-year olds you need the help of three-year olds (e.g. through structured, recorded training opportunities that involve direct questioning of very young children).

How Young Is Too Young?

In the author’s experience, if properly interviewed, children as young as two can give reliable and accurate evidence about their experiences, and with careful planning and developmentally appropriate questioning this evidence can be tested at trial.

‘Present tense questioning can be very alarming to young children’

‘Any’ is surprisingly complex because it asks a child to search for every possibility’

‘You cannot practise these skills with adults’

‘For very young children, this delay may equate to a third of their life’

‘Children could be cross-examined shortly after interview’

‘How young is too young thus depends heavily on the competence of the questioner’

This does not mean that every potential very young witness should be interviewed; all of the usual guidance applies in terms of weighing up the interests of justice and the interests of the child (Ministry of Justice, 2011).

To the best of the author’s knowledge, the youngest witnesses ever to have given evidence at trial in England have been aged four. This includes a number of children who were three when their police interviews were undertaken, some of whom were giving evidence about events that happened when they were two.

Currently, in England, children’s evidence-in-chief is almost always video recorded, but re-examination and cross-examination take place at the trial, usually by livelink. A major difficulty for all child witnesses in England is the lengthy delay between interview and trial, which averages more than a year (Plotnikoff and Woolfson, 2011), despite clear guidance that such cases should be fast-tracked (CPS, 2008). For very young children, this delay may equate to a third of their life. Pre-trial delays create real barriers to children’s ability to give complete and consistent testimony, and affect their mental health (Plotnikoff and Woolfson, 2009).

Pre-trial video-recorded cross-examination and re-examination are now in place in a number of other jurisdictions (Henderson, 2011). This was originally recommended in England more than 30 years ago (Pigot, 1989) and was included as one of the eight special measures in the Youth Justice and Criminal Evidence Act 1999, but has not yet been enacted in England. The implementation of this last special measure would mean that children could be cross-examined shortly after interview; this would make a significant difference for very young children and is currently under active consideration (Spencer, 2011).

In the author’s view, very young children should not be expected to separate from their carers without help, to sit still, to do nothing, to process complex language or to resist suggestive questioning, either at interview or at trial. Very young children require help to understand that we need to ask questions, that they can provide information to us, that we will listen carefully with no guessing, that they can correct us if we get it wrong, that they can stop the questioning at any time and do something else, or leave the room when they need to and come back when they are ready.

When the processes of interview and trial are adapted in line with their needs, very young children can provide accurate, complete and coherent accounts of their experiences, something that was perhaps better understood long ago: ‘Infants of very tender years often give the clearest and truest testimony.’ (Blackstone, 1769, v 4/214) Crucially, the ability of very young children to answer questions is dependent on the ability of the questioner to ask developmentally appropriate questions that the child can understand: how young is too young thus depends heavily on the competence of the questioner.

Case List

- R v Barker* (2010) EWCA Crim 4
- R v Wright and Ormerod* (1987) 90 Cr App R 91
- R v Z* (1990) 2 All ER 971
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