

Nuffield Foundation seminar 10 June 2010: *Questioning young witnesses and incorporating good practice into advocacy training*

- *Are existing measures sufficient to ensure questioning is developmentally appropriate?*
- *Are advocates hindered from putting the defendant's case if they cannot lead the witness?*
- *How should developmentally appropriate questioning be addressed in advocacy training?*
- *Are there alternatives to the current system?*

Introduction: Is our system for cross-examining children fit for purpose?

In our adversarial system, children's evidence in criminal proceedings must be tested. Almost all testify for the prosecution: the task of the defence is to create doubt as to whether the child's evidence can be relied on.¹ Cross-examination aims not at accuracy or 'best evidence' but at persuading witnesses to adopt an alternative version of events or discrediting their evidence. In consequence, when children are cross-examined, methods used often contravene principles for obtaining complete and accurate reports from children and may actually exploit their developmental limitations.

Communication problems among children in the general population are more prevalent than previously recognised² and there is a substantial body of research documenting the communication difficulties experienced by children at court.³ In the national study *Measuring Up?* funded by the NSPCC and Nuffield Foundation⁴, half of young witnesses reported not understanding some questions (consistent with other studies), and 65% reported problems of comprehension, complexity, pace of questions that was too fast or having their answers talked over.⁵ Interviews with barristers suggest that some are unaware of the extent of such difficulties, while others perceive them as legitimate cross-examination techniques.⁶

Over 30 years of research have firmly established methods for obtaining the most complete and accurate accounts from children and, conversely, approaches likely to result in inaccuracy. Findings shape policy on questioning children at interview⁷ and inform some policies on the conduct of cross-examination.⁸ However, they have little impact on cross-examination *practice*, which has been demonstrated to decrease significantly the accuracy of children's reports.⁹ Some commentators argue that the gulf between questioning informed by research evidence and cross-examination practice can thwart the fact-finding function of the criminal justice system¹⁰ and call for a change in the philosophy and ethics of advocacy in respect of young and other vulnerable witnesses.¹¹ Can children's evidence be tested in a developmentally appropriate way, while still ensuring a fair trial to the defendant?

Are existing measures sufficient to ensure questioning is developmentally appropriate?

Pre-trial planning: The *Equal Treatment Bench Book* encourages advance discussion and agreement between the judge and parties on the way children are to be questioned.¹² This is recommended in Judicial Studies Board training as part of case management in young witness cases (see below). In practice, advance planning is rare. When an intermediary (a communication specialist)¹³ is appointed to facilitate communication with the witness, 'compulsory' discussions are to be held between the judge, counsel and the intermediary to establish ground rules for questioning before the witness gives evidence.¹⁴ These meetings

assist lawyers by giving them time to plan how their questions should be modified, but a survey found that they occurred in only 47% of 167 intermediary trials.¹⁵

At trial: The parameters of unacceptable questions are not defined in statute here, although this is done elsewhere.¹⁶ However, the “overriding objective” that cases be dealt with “justly”, embodied in Criminal Procedure Rule 1 (2005), ‘means, in essence, that judges and magistrates are both bound and entitled to intervene to check a cross-examination which appears to be hindering the court from reaching a truthful outcome, rather than helping it to do so’.¹⁷ Policies further define when judiciary and prosecutors should intervene¹⁸, though this may come too late to help the witness. *Measuring Up?* findings about communication difficulties are included in current Judicial Studies Board training (Serious Sex Offences Courses, Criminal Continuation Courses and training for district judges).¹⁹ Judge trainers now invite the judiciary to make a ‘cultural change’ in their control of children’s questioning, including avoiding ‘tag’ questions. These are important steps but have not yet produced a consistent approach. Over recent years, judicial interventions in inappropriate questioning have increased but many complex questions go unchallenged.²⁰ Despite policies encouraging prosecutors to challenge inappropriate defence questions, their interventions remain rare.²¹

Intermediaries have increased professionals’ understanding of the communication difficulties facing children in court. A recent report found that ‘Remarkably, every professional with whom we spoke described working with intermediaries as educative, if not “revelatory”’.²² Lawyers increasingly accept the need to modify their language for younger witnesses.²³ While some advocates are adept, others have a limited capacity to put this into practice even when advised by the intermediary and directed by the judge.²⁴ *Achieving Best Evidence* suggests intermediary assessment should be considered where young people are unlikely to recognise a problematic question or tell the questioner – particularly someone in authority – that they have not understood.²⁵ Intermediary appointments are increasing but remain uneven around the country. *Measuring Up?* estimated that 70% of interviewees may have benefitted from intermediary assessment but only two were assessed and only one was assisted at court.

Post-trial: It is not possible to complain about a barrister’s inappropriate cross-examination of a young witness as this does not constitute a specific transgression of the *Code of Conduct*. Any such complaint would have to be based more generally, for example on conduct bringing the Bar into disrepute or conduct diminishing public confidence in the legal profession.²⁶

Are advocates hindered from putting the defendant’s case if they cannot lead the witness?

Children are particularly susceptible to leading questions. Nevertheless, the most suggestive leading questions – those with ‘tag’ endings – are routinely used in cross-examination of young witnesses (“X never touched you with his willy, did he?”, asked of a four-year old). Tag questions take at least seven stages of reasoning to answer and American Bar Association guidance advises that they should be avoided with children.²⁷ However, some advocates consider that the use of suggestion when questioning children is integral to the defendant’s right to a fair trial.

In *R v Barker* (2010)²⁸ the Court of Appeal addressed the scope of cross-examination of young witnesses. It stated that children’s evidence should be placed on the same level as that of all other witnesses but the advocate’s forensic techniques, in particular relating to cross-examination, have to be adapted ‘to enable the child to give the best evidence of which he or she is capable’ while ensuring that the defendant’s right to a fair trial is undiminished. When the issue is whether the child is lying or mistaken, the advocate should ask ‘short, simple’ questions which put the essential elements of the defendant’s case, and ‘fully to ventilate before the jury’ evidence bearing on the child’s credibility. (It should be noted, however, that ‘short, simple’ questions are not easy to achieve.²⁹) Debate at the Criminal Bar Association

conference on 24 April, 2010 reflected the concern of some advocates that limitations on questioning may hinder or even prevent the defence from putting its case. Judiciary and lawyers in the family courts also have a interest in these discussions in light of the Supreme Court decision in *Re W (Children)* (2010)³⁰, removing the presumption that children will not give live evidence in family proceedings.

An intermediary's primary responsibility is to enable complete, coherent and *accurate* communication between the witness and the court.³¹ Maximising accuracy also forms part of the quality of evidence test used in deciding whether special measures, including an intermediary, should be granted.³² Intermediaries may therefore advise the court, based on their assessment of a particular witness's abilities, that leading and suggestive questions are likely to produce unreliable answers and that, in the interests of a fair hearing, alternative questioning styles should be used. In response, some judges restrict the use of leading questions but decisions on this issue seem to be developing in an inconsistent way. Wider discussion and guidance is needed.

How should developmentally appropriate questioning be addressed in advocacy training?

Professional bodies do not regard the questioning of young and other vulnerable witnesses as a specialist skill.³³ It is not specifically addressed in training or exercises other than in ad hoc seminars.³⁴ The position is complicated by the number of bodies involved in delivery and differences in course content.³⁵ The first profession-wide quality assurance standards will be established this year by the Joint Advocacy Group.³⁶ To date, these expect advocates to deal 'appropriately with vulnerable witnesses' without, as yet, any further detail. An Advocacy Training Council working group is due to report in May on how best to train barristers to handle vulnerable witnesses and defendants in court.

Are there alternatives to the current system?

In 1989, the Pigot Committee recommended, by a majority, that courts should have discretion to order exceptionally that advocates' questions be relayed through a specialist child examiner who enjoys the child's confidence. This should be done at a preliminary hearing.³⁷ Section 28 of the Youth Justice and Criminal Evidence Act 1999 (which has not been implemented) allows for pre-trial cross-examination, but without the provision for a child examiner. Calls for the introduction of 'full Pigot' reforms continue³⁸, not least because, as Professor John Spencer points out, pre-trial provisions to take young victims' evidence may be required by European law.³⁹ Referring to the *Framework Decision on the Rights of Victims* (2001)⁴⁰, in 2005 the Court of Justice of the European Communities held Italy to have failed to implement its obligation under EU law, because it had no mechanism to take the evidence of young children before trial.⁴¹ Spencer argues that 'The same criticism can be made, surely, of the arrangements that currently operate in England and Wales'.

A 2010 report for the New Zealand Law Foundation compared experience in six countries, including England and Wales.⁴² It recommended that New Zealand move to a system of pre-recorded cross-and re-examination by a court-appointed specialist child examiner (a role adopted in criminal proceedings in Norway). This would aim "to ensure that children's evidence can be heard and tested in a transparent and timely manner regarding matters of concern to all parties". The report noted that the European Court of Human Rights, which hears cases from both inquisitorial and adversarial systems, suggests that proper questioning by a specialist examiner does not violate the defendant's rights.

This paper was written by Joyce Plotnikoff and Richard Woolfson, Lexicon Limited (jplotnikoff@lexiconlimited.co.uk). It was informed in particular by discussions with Barbara Esam, lawyer, Public Policy, NSPCC, barristers Penny Cooper, David Wurtzel, Bobbie Cheema, Emily Henderson and researchers Kirsten Hanna and Emma Davies; and also recent articles by law professors John Spencer QC and Laura Hoyano and psychologist Rachel Zajac (listed below).

While the paper focuses on young witnesses, concerns about developmentally appropriate questioning apply also to adult vulnerable witnesses and to young defendants.

¹ Leading questions are disallowed in investigative interviews and in evidence-in-chief because of their capacity to contaminate evidence. Advocacy textbooks encourage cross-examination practices that are discouraged when instructing lawyers how to question their own witnesses. See discussion in K. Hanna et al, (2010) *Child witnesses in the New Zealand criminal courts: A review of practice and implications for policy*. Institute of Public Policy, AUT University, and Henderson (2002) "Persuading and Controlling: The theory of cross-examination in relation to children." in H. Westcott et al (eds) *Children's Testimony: a handbook of psychological research and forensic practice*. Wiley. "You're looking ... to make sure they make mistakes. [...] Some counsel... give double negatives to kids. And the kids get it wrong ... But that is a valid technique that is used by very senior counsel and very successfully" (lawyer cited by Henderson p. 286.)

² Around 50% of children in some socio-economically disadvantaged populations have speech and language skills that are significantly lower than those of other children of the same age: Department for Children, Schools and Families (2008) *The Bercow report: A Review of Services for Children and Young People (0-19) with Speech, Language and Communication Needs*. 10% have a clinically recognisable mental disorder: Office for National Statistics (2004) *Survey of the mental health of children and young people in Great Britain*. Rates of childhood autism are around 1%, far higher than previous estimates: G. Baird et al (2006) Prevalence of disorders of the autistic spectrum in a population cohort of children in South Thames. *The Lancet*, 368 (9531) 210-5.

³ See, for example, L. Ellison (2001) *The Adversarial Process and the Vulnerable Witness*. OUP.

⁴ J. Plotnikoff and R. Woolfson (2009) *Measuring Up? Evaluating implementation of government commitments to young witnesses in criminal proceedings*. www.nspcc.org.uk/measuringup.

⁵ *Equal Treatment Bench Book* says children should be given full opportunity to answer: section 4.4.3 (2009) Judicial Studies Board. *Measuring Up?* (op cit.) found that 26% of young witnesses reported their answers were talked over. Advocacy Training Council (undated) *Report to BVC Providers on the common errors made by pupils in advocacy training sessions* highlights "lack of control. Allowing the witness to give a full answer...".

⁶ E. Henderson. (2002) op cit.

⁷ *Achieving Best Evidence in Criminal Proceedings* (2007) Criminal Justice System.

⁸ For example, section 4.4.3, *Equal Treatment Bench Book* (2009) op cit.

⁹ R. Zajac (2009) *Investigative Interviewing in the Courtroom: Child Witnesses under Cross-Examination*, in R. Bull et al., *Handbook of Psychology of Interviewing: Current Developments and Future Directions*, Wiley.

¹⁰ For example, R. Zajac (2009) op cit; K, Hanna et al (2010) op cit.

¹¹ D. Birch (2000). A Better Deal for Vulnerable Witnesses. *Criminal Law Review*; L. Ellison (2001) op cit.; J. Spencer and R. Flin (1993) *The Evidence of Children*. Blackwell; J. Temkin (2000) Prosecuting and Defending Rape: Perspectives from the Bar. *Journal of Law and Society*. 27:2 219-48; E. Henderson (2002) op cit.

¹² Orders [concerning young witnesses] will generally deal with agreement by all parties on use of language – some terms may need to be agreed. At trial, the judge should check at an early stage that all directions are in place and all special needs are catered for. This may include ascertaining that advocates are sensitive to the child's vulnerability and that any special arrangements are made concerning the child's disability, language, race or culture. Issues may include areas of agreement and any areas on which the child might be led; and the tenor, tone, language and duration of questioning and cross-examination: sections 4.4.2, 4.4.3 *Equal Treatment Bench Book*, (2009) op cit.

¹³ Section 29, Youth Justice and Criminal Evidence Act.

¹⁴ Special Measures Application Form, Section F1, CrimPRC(10)02(a): ground rules must be discussed between the court, the advocates and the intermediary before the witness gives evidence.

¹⁵ P. Cooper (2009) *Tell me what's happening: Registered Intermediary Survey 2009*. City University Law School. A barrister in the intermediary pathfinder evaluation said: "A defence advocate is naturally suspicious of doing anything like this [speaking to the intermediary before the trial] in case he loses the advantage of surprise. As it was, I ended up being the one who was surprised - by the extreme difficulty the complainant had in understanding what I thought were the simplest questions" J. Plotnikoff and R. Woolfson (2007) *The "Go-Between": Evaluation of the intermediary Special Measure*. Ministry of Justice. www.justice.gov.uk/docs/RS-int-pathfinders-projects.pdf.

¹⁶ For example, section 85(1) of the New Zealand Evidence Act 2006 'Unacceptable questions': the judge may disallow, or direct that a witness is not obliged to answer, any question that the judge considers improper, unfair, misleading, needlessly repetitive, or expressed in language that is too complicated for the witness to understand. The State of California requires questions posed to children to be developmentally appropriate.

¹⁷ J. Spencer (2010) *Evidence and Cross-Examination*, book chapter in press, Wiley.

¹⁸ *Equal Treatment Bench Book* (2009) op cit; *Achieving Best Evidence in Criminal Proceedings* (2007) op cit; CPS (2008) *Safeguarding Children: Guidance on Children as Victims and Witnesses*; CPS (2006) *Children and*

Young People: CPS policy on prosecuting criminal cases involving children and young people as victims and witnesses.

¹⁹ Judge Cahill QC, Vulnerable Victims and Witness Liaison Judge, speech at the Area Witness Champion Conference, 25 February 2010.

²⁰ J. Plotnikoff and R. Woolfson, (2009) *op cit*.

²¹ *Ibid*.

²² Hanna et al (2010) *op cit*. See also J. Plotnikoff and R. Woolfson (2007) *op cit*.

²³ However, teenagers are at greater risk of miscommunication because of adults' higher expectation of their ability to understand court language: A. Graffam Walker (1999) *Handbook on Questioning Children – A Linguistic Perspective*. American Bar Association Center on Children and the Law.

²⁴ J. Plotnikoff and R. Woolfson (2007) *op cit*. A study comparing the ability of barristers and intermediaries to identify problem questions in transcripts is currently being undertaken by psychologist Sarah Krahenbuhl: S.Krahenbuhl@staffs.ac.uk.

²⁵ Box 2.1 (2007) *op cit*.

²⁶ Phone call, Head of Complaints and Hearings, Bar Standards Board 5.5.2010.

²⁷ A. Graffam Walker (1999) *op cit*.

²⁸ [2010] EWCA Crim 4, para 42.

²⁹ Complex questions are significantly more common during cross-examination than during other aspects of evidential questioning. Problems include complex vocabulary and syntax; problematic grammatical constructions including multifaceted questions; questions phrased in the negative; questions that are inappropriately grammatically or semantically linked questions that require children to understand and employ complex relational concepts (e.g., height, weight, age, time, date and distance; or being asked about peripheral aspects of the alleged event. Other problems include repetitive questions and those where the topic changes abruptly: Zajac (2009) *op cit*. See also J. Plotnikoff and R. Woolfson (2009) *Good practice guidance in managing young witness cases and questioning children*, Annex A Research-based-guidance when questioning children at court:

http://www.nspcc.org.uk/Inform/research/findings/measuring_up_guidance_wdf66581.pdf.

³⁰ UKSC 12.

³¹ *Code of Practice for Intermediaries* (2005) Home Office.

³² Sections 19 and 16(5) Youth Justice and Criminal Evidence Act 1999.

³³ The CPS, Law Society, CBA and Council for Circuit Judges disagreed with a proposal to set up accredited panels of young witness practitioners, favouring instead 'education not accreditation' (*Government response to the Improving the Criminal Trial Process for Young Witnesses Consultation* (2009) Ministry of Justice. The Joint Advocacy Group discussion paper *Quality Assurance for Advocates* (Feb. 2010) refers to previous consultation on "the necessity within a QAA framework for additional specialist training or assessment for particular types of work (such as cases involving juveniles...). The response to this question was overwhelmingly against the inclusion of further training or assessment for particular types of cases". The JAG supports further exploration of a proposal "to allow bolt-ons to existing competencies that would enable advocates to be ticketed via robust and independent accreditation" (paras. 3.7.3-4).

³⁴ For example, section F (Juveniles and the Criminal Courts) of the Bar Vocational Course (becoming the Bar Professional Training Course in autumn 2010) expects the student "to be able to demonstrate a sound understanding" of legal and procedural matters but does not acknowledge that students should also have a basic understanding of the implications of children's developmental differences.

³⁵ A survey of training organisations is being conducted to inform discussions at this seminar.

³⁶ Bar Standards Board, Solicitors Regulatory Authority and Institute of Legal Executives (December 2009) *Consultation on standards for criminal advocates at trial* B3(2), Advocacy Standards.

³⁷ *Report of the advisory group on video-recorded evidence* (1989) Chairman His Honour Judge Thomas Pigot, QC. Home Office.

³⁸ For example, L. Hoyano (2010) Coroners and Justice Act 2009: special measures directions take 2: entrenching unequal access to justice? *Criminal Law Review*; J. Spencer (2010) Children's Evidence: the Barker Case, and the Case for Pigot. 3 *Archbold News* 5-8.

³⁹ J. Spencer (2010) *ibid*.

⁴⁰ Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings; Official Journal L82, 22 March 2001. This required EU Member States to put in place mechanisms enabling the evidence of vulnerable victims to be given without them having to appear in open court.

⁴¹ *Criminal Proceedings Against Pupino*, Case C-105/03 [2006] QB 83; noted [2005] *Cambridge Law Journal* 569.

⁴² K, Hanna et al (2010) *op cit*. The legal argument is set out by E. Henderson in Annex 1 at p 179.