

# Chapter 4.1

## Children and the courts

### Key points

- Court proceedings are traumatic experiences for children.
- Sensitive preparation of the child before court can minimise distress.
- Thorough case management can also alleviate anxiety for children.
- Some children, such as children from some cultural groups or children with disabilities, have additional vulnerability.

### 4.1.1 Introduction

In whatever capacity children are before the courts, special measures and processes need to be adopted to ensure they are treated fairly, their rights are respected, their voice is heard and their confidence in the judicial process is maintained. It is also necessary to ensure that the evidence of a child is not treated more favourably than that of the other party, either by the judge or a jury.

The way in which children are treated in court will vary according to the child's age and the capacity in which they are appearing. Section 107 of the Children and Young Persons Act 1933, defines a 'child' as a person under the age of 14 and a 'young person' as a person between 14 and 18. The general guidance in respect of 'children' throughout this Bench Book applies to both categories.

Children also have rights under domestic, European and international legislation, but as well as compliance with legislation judges will want to ensure that the spirit of the law is present in all dealings with children before the court.

### 4.1.2 A child's view

A judge should be aware of the sort of stresses and worries going through a child's mind when in court. Much of what a child knows about going to court will be gleaned from the media, especially television. Many children will have seen programmes which depict rigorous cross-examination, hostile witnesses, distressed witnesses, outbursts from the dock, dramatic revelations and much banging of gavels.

Children in family proceedings may have heard the case discussed by warring parents or siblings, or indeed by guardians and opposing solicitors. They may conclude that court cases are tense, difficult, frightening and even dangerous ordeals with winners and losers.

In criminal cases, whether as a defendant or witness, children may have already formed hostilities and be suspicious of the police, of lawyers and of authority. Children may know others who have been to court and their views on what happens there will be largely informed by their peers.

In all cases, children will be aware that their appearance and their evidence has some crucial bearing on the case; otherwise they would not be there. Some children fear that their evidence may mean a family member with whom they have a positive attachment will go to or stay in prison; for others it may mean the difference between going home and going back to foster care.

Coming to court as a witness can be a traumatic experience even for adults. For children, with a more limited understanding of court processes and outcomes, feelings of fear and anxiety are magnified and often compounded by guilt, blame, shame and vulnerability.

Often the gravity of the case, the impact of any decision on the child, the anticipation of the day and the fear of the unknown can simply be too overwhelming. Children may come to court feeling under pressure to:

- say the right thing;
- say as little as possible;
- not be caught out;
- not break down;
- not upset or offend anyone, especially a parent or family member;
- win or keep the respect of their peers;
- make things better or at least not make them worse;
- agree with everything.

### **Children and diversity**

A disproportionate number of children from minority ethnic communities come before the courts in care proceedings and are looked after by the local authority (*see DfES Statistics 2003, Children looked after by ethnic origin*). The prison population has an over-representation of Black males. Black men are more likely than any other group to be stopped by police (see further Chapter 2.1, section 2.2.2). It would not be surprising therefore if Black children were more fearful, anxious, suspicious and uncomfortable in court proceedings than White children in similar circumstances. Black children may live in an environment of mistrust of authority, statutory processes and those they perceive as representing them. They may not expect to be treated fairly, understood or respected by the judicial system.

Some cultures have particular moral or religious proscriptions on speaking about, describing or naming body parts, sexual activities and bodily functions which, in some proceedings, may be a cause for additional concern for the child. These issues should be highlighted before any proceedings commence and appropriate arrangements made for suitable language to be employed which is respectful to the child's race and culture but which nevertheless is accurate for the purposes of the case. In cases of sexual abuse, for example, the child can use a doll or pencil and paper as aids in describing events that have occurred.

Where a child's first language is not English, arrangements must be made for suitably trained interpreters to be used who are sensitive to the needs of the child. One or two appropriate interpreters should be nominated at pre-trial stage to minimise delay and guidance should be given on the necessity of verbatim reporting avoiding any temptation to 'make sense' of the child's statements (see Appendix 1 Interpreters at the end of Part 1).

Where a child has a disability, the judge should ensure that the exact nature and extent of any disability is known to the court well in advance, and should make appropriate directions and arrangements in court to minimise discomfort or embarrassment for the child, ensuring the child is properly understood and understands.

### **4.1.3 Preparation**

Much can be done to minimise distress to children in court proceedings by preparing them and by thorough case management. What is appropriate in case management will depend upon the type of proceedings, dealt with in Chapters 4.2 to 4.4.

#### **Preparing the child**

The quality and accuracy of a child's understanding of court proceedings and outcomes will depend on a number of factors:

- age, maturity and ability;
- relationship with the person imparting this information;
- time taken to impart the information;
- proximity of commencement of proceedings.

To maximise the chances of a child understanding any court proceedings and to minimise anxiety the following preparations should be made:

- Children should be given information appropriate to their age and understanding in sensitive, plain language using pictures, photographs or diagrams where appropriate.

- This information should be imparted to the child by someone with whom the child has a trusting relationship (e.g. a foster carer, social worker, solicitor or guardian). Where appropriate family members are used it will be necessary to ensure the accuracy and validity of the information offered.
- Information should not be confined to facts and figures. Children should be encouraged to voice their fears and misgivings, to talk openly about what they feel about giving evidence or going to court, and reassurances offered.
- The timing of preparation is crucial to a child's understanding. Children should be given sufficient time to absorb information, to formulate their ideas, and to meet with their advisers and explore their feelings without the pressure of an imminent hearing.
- Preparation should include a pre-trial visit to the court building and courtroom whenever possible at a time when it is likely to be empty. The child can be shown where the different personnel sit or stand, which is the dock, the witness box, the jury box and so forth. An usher may be on hand to assist.
- If children are giving their evidence by video or by TV link they can be shown the TV-link room and be given a demonstration of how such evidence is used.

### **The child as a witness**

Where children appear as witnesses, it is vital that they understand that:

- they will not be judged on their performance in the courtroom;
- the outcome is not determined by them but by the judge;
- they are not to blame for the court case;
- they can give their evidence with someone near to support them;
- all efforts will be made to protect them from recrimination and publicity;
- they should do their best and say if they do not understand something;
- they should tell the truth and leave nothing out;
- they should say everything in their own words;
- they can ask for a break if they need one.

### **General approach**

The relevant literature emphasises the need to expedite cases involving children as far as possible. A trial date should only be changed in exceptional circumstances.

Judges should never underestimate how little of the language of the court a child understands. A child may not admit to the fact that they do not understand something when in court, so judicial vigilance and some second-guessing are vital. Research has shown that children's fears about going to court do not decrease with age, and adolescent witnesses are more likely to exhibit adverse psychological reactions than younger ones.

#### **4.1.4 Post-trial**

Sometimes written judgments are available, for example, in family or civil proceedings. Where age and understanding allow, consideration should be given to making such judgments or parts thereof available to the child. If the judge anticipates this, appropriate language can be employed and the judgment can be drafted in sensitive and plain English.

The judge can also give directions about support to child witnesses following the conclusion of a trial. For example:

- a defendant in criminal proceedings may be found not guilty and the child witness may feel they have not been believed;
- a child may feel guilty and ashamed about giving evidence against a family member.

These feelings will not disappear with the conclusion of the case. Support can be made available from suitable professionals at the direction of the court.

Where a child has not been present in court but decisions have been made about the child's welfare, such information must be imparted without delay in a manner appropriate to the child's age and understanding. The judge should direct that one of the professionals involved should tell the child about the decision and the implications for the child, and provide appropriate support. This is especially important where the child is a young person who has closely followed the court proceedings. In any event, solicitors representing a child should inform the child personally, in writing, of the outcome of proceedings and the effect of any decisions. For children in contested adoption hearings such written material has particular significance especially later in life.

# Chapter 4.2

## Children and civil proceedings

### Key points

- The Civil Procedure Rules 1998 provide strong safeguards for the interests of children, whether they are claimants or defendants, in the course of civil proceedings.
- It can be just as traumatic for a child to appear in court in civil proceedings as in the criminal courts even though there is no possibility of somebody going to prison.

In addition to the general guidance in Chapter 4.1, much of the approach to criminal proceedings in this chapter is equally applicable to civil cases involving children.

### 4.2.1 Child as a party

For many years, special procedures have applied in respect of proceedings by and against a 'person under disability' (as defined). These ensure that a representative is appointed, compromises and settlements of claims are approved by the court, and there is supervision of any money recovered. The procedures used to be found in the Rules of the Supreme Court 1965 (RSC), Order 80 and the County Court Rules 1981 (CCR), Order 10 but for civil proceedings have been replaced by the Civil Procedure Rules 1998 (CPR), Part 21.

The expression 'person under disability' included children (previously described as 'minors' in the CCR and 'infants' in the RSC) and 'patients' (for 'patients' see further Chapter 5.4 section 5.4.3). The expression is no longer used in the CPR but this does not represent a substantive change. Both categories are deemed incapable of conducting their own proceedings, the former due to age and the latter due to personal factors other than age. We are only concerned here with children, being persons under 18 years of age – Rule 21.1(2) CPR.

#### The role of a 'litigation friend'

Unless the court by order permits a child to conduct the proceedings personally, a child must have a representative to look after their interests in bringing or defending a claim and any step taken other than through such a representative is of no effect unless the court otherwise orders – see generally Rule 21.2 and 21.3 CPR. The general term for this representative is now *litigation friend* but was previously *next friend* if bringing the proceedings or *guardian ad litem* if responding.

The rules lay down procedures for the appointment, replacement and removal of the litigation friend. The appointment can only last for the duration of the court proceedings (or until the child attains majority, if earlier) and the representative has no authority as such outside those proceedings. Where there is no suitable person willing and able to act, the Official Solicitor to the Supreme Court will consider accepting appointment but must be given time to make adequate enquiries (81 Chancery Lane, London WC2A 1DD; Tel: 020 7911 7127, Fax: 020 7911 7105).

The decision as to whether proceedings are commenced, how they are conducted and whether they are settled may depend upon the identity of the litigation friend yet until spelt out in the CPR there was no guidance as to how this representative should be selected or act. Rule 21.4 now provides that a person may act as a litigation friend if they 'can fairly and competently conduct proceedings on behalf of the child' and 'has no interest adverse to that of the child'. The Practice Direction to CPR Part 21 defines the duty of this representative in similar terms and continues:

... all steps and decisions he takes in the proceedings must be taken for the benefit of the child ....

It is suggested that the judge cannot simply leave an unfettered discretion to the representative but should be satisfied at all stages that the proceedings are being conducted for the benefit of the child. This may involve seeing the child personally if of an age and maturity to express a view. The need for any settlement or compromise to be judicially approved underlines this judicial role.

### **Approval of settlement or compromise**

In any proceedings brought by or against a child, no settlement, compromise or payment and no acceptance of money paid into court shall be valid without the approval of the court (Rule 21.10 CPR). The court's approval is given at a hearing at which the child will usually be expected to attend, depending on their age, level of understanding and the injuries for which compensation is being claimed. Where a child attends, the judge must remember that it can be a stressful time for the child, that the child is the litigant and usually knows why they are present in court, and that matters will be raised which the child has, perhaps, put to the back of their mind. The judge should talk directly to the child, perhaps at the beginning of the settlement hearing, to explain what will happen and also to give the child a chance to talk to the judge.

### **Supervision of damages**

In any proceedings in which money is recovered by or on behalf of a child or money paid into court is accepted by a child, the money can only be dealt with in accordance with directions given by the court (Rule 21.11). The money (or the balance after allowing for

any money authorised to be released for the immediate benefit of the child) will be transferred to the Court Funds Office and applied for the benefit of the child in such manner as the court thinks fit. Small sums (e.g. up to £1,000) may be released to the parents or carers of a child if the court is satisfied that they will invest or use the money for the benefit of the child, but the higher than market interest rates that are obtained make it attractive to retain the fund in court. Where a fund is retained in court applications may be made for the release of sums for specific purposes and a district judge will wish to consider these with the child and parent or guardian. The parent(s) will be expected to meet any expenses normally associated with bringing up a child if able to do so.

### **4.2.2 Evidence of a child**

A judge in a civil court is given a wide discretion by the CPR as to how evidence is given in the proceedings, and may allow a witness to give evidence through a video link or by any other means. It follows that the video tape of a Memorandum interview conducted in the context of a criminal investigation may be used in a civil case (see further Chapter 4.4, section 4.4.3). This power is particularly important where children are concerned in terms of achieving the overriding objective set by Rule 1: that of enabling the court to deal with cases justly, including ensuring that the parties are on an equal footing.

# Chapter 4.3

## Children and family proceedings

### Key points

- The Children Act 1989 provides strong statutory safeguards for the interests of children.
- In cases where the decision sought by the court relates to the upbringing of the child, the child's welfare is the paramount consideration.
- The views of the child are important and should be ascertained and taken into account.
- Special procedures apply under the Family Proceedings Rules 1991 in respect of proceedings where a child is a party.

### 4.3.1 Introduction

Various factors may affect the courts' future approach and focus in relation to children within family proceedings, including the following:

- Research studies have shown that children who have been subject to court proceedings have felt excluded from the process which was deciding their future, despite the procedures to consult them.
- The establishment of the Children and Family Court Advisory and Support Service (CAFCASS) to replace the various duties of the court welfare service, guardians *ad litem* and the Official Solicitor's Department has proved turbulent and delays in allocating children's guardians or children and family reporters are a cause of concern for the judiciary.
- A *Protocol for Judicial Case Management in Children Act Cases* has been introduced to tackle delay, especially in care proceedings, which is likely to prejudice the welfare of the child.
- Recommendations have been made in a report, *Making Contact Work*, and the debate continues as to the best way of ensuring that children have contact with both parents, where appropriate.

- There is now a greater emphasis on conciliation and mediation in resolving family disputes, countered by concern as to the implications of domestic violence on the welfare of children.
- Existing practices relating to the position of children in family proceedings may yet have to change as a result of the Human Rights Act 1998.

The principal provisions referred to below are the Children Act 1989 ('the 1989 Act') and the Family Proceedings Rules 1991 (FPR).

### **4.3.2 Hearing the voice of the child**

Research studies have shown that children who have been subject to court proceedings have felt excluded from the process which was deciding their future, despite the procedures to consult them. 'The voice of the child', especially with regard to young children, is closely connected to their welfare.

Section 1 of the 1989 Act, which sets out the key principles, provides that:

- When a court determines any question relating to the upbringing of a child (except applications for secure accommodation orders) or the administration of any of the child's property or income, the child's welfare is the paramount consideration.
- In deciding applications relating to residence, contact, specific issues or prohibited steps, or for care or supervision orders, the court shall have regard in particular to the checklist set out in section 1(3) of the 1989 Act. The first item is 'the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding)'.

A judge should always ensure that in proceedings of this nature the voice of the child concerned is heard. The procedure varies according to the nature of the case.

#### **Private law proceedings**

In private law proceedings, under Part II of the 1989 Act (namely residence, contact, specific issue and prohibited step cases), except in the simplest or most urgent of cases the court orders a welfare report. This will be from a children and family reporter from CAFCASS or (usually where a social services department is already involved with the family) an officer of a local authority. The person reporting should, if possible, canvass the views of the child concerned in a way that is not damaging for the child, nor beyond their comprehension. If it is thought that the child is too young or of insufficient intellectual skills to comprehend the issues, the report should say so.

The court can make the child a party and appoint a guardian *ad litem* to represent the child pursuant to Rule 9.5 FPR when it is in the child's best interests. This may be where the case is complex or involves a new matter of law or principle, but may also be thought appropriate in other situations. This power should not be used without first considering the alternatives which include:

- further investigations by the children and family reporter;
- joint instruction of an expert by the adult parties;
- referral to social services under section 37 of the 1989 Act if the court is concerned that there are or may be child protection issues;
- allowing an older and more mature child to be a party without a representative (see below).

A Practice Direction is to be issued from the President. Such a guardian represents the child in the same way as the representative for any other party under a disability (see below), but does not have the same powers of investigation as in public law proceedings. An officer of CAFCASS will normally be appointed.

### **Public law proceedings**

In proceedings under Part IV of the 1989 Act, for care or supervision orders, the child concerned is made a party to the proceedings and a children's guardian is appointed as soon as is practicable, unless there is already a subsisting appointment or the court considers that such an appointment is not necessary to safeguard the interests of the child (Rule 4.10 FPR). The appointment can be made by the court of its own motion or on the application of any party, and usually lasts until terminated by the court, normally at the end of the case.

The guardian must appoint a solicitor to represent the child and legal aid is granted to the child concerned accordingly. It is the duty of the guardian to advise the child according to the child's age and understanding, and instruct the child's solicitor on all matters relevant to the interests of the child (Rule 4.11(2) FPR). The guardian has to advise the court as to the wishes of the child in respect of any matters relating to the proceedings including, for example, the child's attendance at court and any order the court may make as to a medical or psychiatric examination.

Ultimately, the guardian must submit a report advising on the interests of the child. To do so, the guardian must carry out such investigations as may be necessary, conducting such interviews or instructing such experts as appropriate or directed by the court. The guardian in public law proceedings has the right to examine local authority records and take copies, and any such copies referred to in the guardian's report or in the guardian's evidence in court are admissible as evidence.

The guardian must also inform the court if the child intends to and is capable of conducting the proceedings on his or her own behalf. This is a fairly rare occurrence, usually only when either the child has obtained leave to initiate proceedings him or herself (see below) or where the child's wishes and feelings conflict with the guardian's view of the child's best interests.

### **The role of CAFCASS Legal**

On 1 April 2001, when CAFCASS came into being, CAFCASS Legal (CL) took over the functions of the Children's Divisions of the Official Solicitor (CDOS). These comprise mostly, but not exclusively, private law cases in which children require representation (the role of guardian *ad litem*) although other kinds of cases are evolving. This role differs from those throughout the rest of CAFCASS in that the officer acts for the child as well as advising the court about what is in the child's best interests.

Present policy issues include the following:

- Deciding whether a local CAFCASS officer rather than a case officer at CL should act as a child's guardian *ad litem* in private law proceedings. A new CAFCASS Practice Note is to be issued and in view of the limited resources at CL this is likely to provide that county court cases should be referred to the local CAFCASS office and High Court cases to CL, although it would still remain for CAFCASS to determine which office and which officer should deal with the matter.
- Deciding whether separate legal representation of CAFCASS officers in public law proceedings involving older children where the guardian's views about what is in their best interests differ from their own is required. Such representation may be allowed but is not an entitlement. In those cases where it is a good use of public funds, CAFCASS will increasingly be looking to provide legal representation from in-house.

It must be remembered that statutory responsibility for child protection lies not with CAFCASS but with local authorities who have the power to bring protective proceedings.

### **4.3.3 The child as a party**

Where a party to family proceedings, as distinct from a child concerned, is a child then special procedures apply. These are to be found in the Family Proceedings Rules 1991 (FPR), Part IX but all aspects are not covered so reference may still need to be made to Rules of the Supreme Court 1965 (RSC), Order 80 or County Court Rules 1981 (CCR), Order 10 (in their final form).

These rules relate to proceedings by and against a *person under disability* which includes both a child and a patient although, in this context, a child is referred to as a 'minor' being a person under the age of 18 (for 'patients' see Chapter 5.4, section 5.4.3). They ensure that a representative is appointed, compromises and settlements of claims are approved by the court, and there is supervision of any money recovered. The reference to disability should not be confused with any other definition of 'disability' (e.g. that under the Disability Discrimination Act 1995).

### **Need for a representative**

A party 'under disability' (in the present context a child) must generally have a representative to conduct proceedings, called a next friend if bringing the proceedings and a guardian *ad litem* if responding to them (Rule 9.2 FPR). The rules lay down the procedures for the appointment, replacement and removal of the litigation friend. The appointment can only last for the duration of the court proceedings (or until the child attains majority, if earlier) and the representative has no authority as such outside those proceedings.

The circumstances in which a child may personally bring, defend or continue proceedings without a representative are to be found in Rule 9.2A FPR:

- the court can give leave where it considers that 'the child has sufficient understanding to participate as a party' without such a representative;
- where a solicitor considers that the child is able, having regard to his or her understanding, to give instructions in the proceedings and accepts those instructions to act.

It is unlikely that the court would grant permission to a child to conduct proceedings without a next friend or guardian *ad litem* unless the child was to be legally represented (except perhaps in a simple case where the child was close to attaining majority).

There is no procedure for the appointment of a representative in the magistrates' court for family proceedings. Where proceedings are commenced in that court, but one is required, the case should be transferred up to the county court.

### **Role of the representative**

No guidance is to be found in the rules as to how this representative should be selected or act, but it would be appropriate to follow the guidance now set out in the CPR (see 4.3.2 above). The representative must fairly and competently conduct the proceedings on behalf of the child and have no interest adverse to that of the child, and all steps and decisions they take in the proceedings must be taken for the benefit of the child. The judge should not simply leave an unfettered discretion to the representative but should

be satisfied at all stages that the proceedings are being conducted for the benefit of the child. This may involve seeing the child personally if the child is of an age and maturity to express a view.

### **Approval of settlement or compromise**

In any proceedings brought by or against a child, no settlement, compromise or payment and no acceptance of money paid into court shall be valid without the approval of the court (Order 80 RSC; Order 10 CCR). The court may also supervise any money recovered. (The general principles are mentioned at 4.3.2 above.)

### **The child as applicant**

Any application by a child for leave to bring private law proceedings (e.g. for an order that they reside with a certain party or have contact with a certain party, or an order preventing such residence or contact) should be made in or transferred to the High Court and dealt with by a High Court judge. It is necessary to approach such applications with caution. It is very easy for a child to be thrust to the foreground in what is actually a dispute between adults. A judge should enquire why the adult in whose favour the order might ultimately be made is not making the application. A key factor to the question of whether leave is given is the age and understanding of the child. Often independent evidence is required before that can be assessed.

### **Occupation and non-molestation cases**

No application can be made by a child under 16 years of age for an occupation or non-molestation order without leave of the court. Such application for leave has to be made in the High Court and depends on whether the child has sufficient understanding to make the proposed application (section 43 Family Law Act 1996). Other than that, a child will not be a party to the proceedings in the normal course of events unless they have a proprietary interest in the property which is the subject of an occupation order.

### **Financial proceedings**

Under Schedule 1 to the 1989 Act a parent or guardian may apply for a series of financial orders either direct to the child or to the applicant for the benefit of the child. If the application is made by the child's guardian, the child will already be a party; otherwise it is more likely that the person with a residence order in favour of the child is applying for an order against one or other of the parents.

Where there are proceedings for financial relief for a party to a marriage or a child of the family in proceedings under the Matrimonial Causes Act 1973 (divorce, nullity, judicial separation, etc.) any child concerned will not be a party unless they have a proprietary or beneficial interest in the property which is the subject of the application.

### **4.3.4 Other involvement of the child**

#### **The child's presence in court**

On occasion a child requests or even insists on attending court and wishes to be present during the hearing. In private law proceedings, the child is not usually a party and therefore has no right to be present unless, as with any other person, leave is given by the judge. This in turn can depend on the views of the parties to the case.

It can rarely, if ever, be appropriate for a child to witness evidence being given against one or other of the parents or one of the parents being cross-examined, even on the child's own behalf. A major exception can be when it is in the child's interest to learn the decisions of fact in relation to allegations made by the child. It is sometimes quite important and therapeutic for the child to know that the judge has believed their account. However this end can be achieved by the judge ordering a transcript of all or, more likely, part of the judgment to be released to the child.

#### **Hearsay evidence**

Since the Children (Admissibility of Hearsay Evidence) Order 1993, hearsay evidence is admissible when it is in connection with the upbringing, maintenance or welfare of a child. This has been of crucial importance in ascertaining what children have actually got to say. There is no requirement for 'live' evidence, for the court can watch any video recordings of the child being interviewed or can simply read transcripts of what the child has said. Since children often express their views to adults outside the normal court process this permits these communications to be put before the court without inconvenience or embarrassment to the child.

Proceedings under the Children Act 1989 are regarded as investigative rather than adversarial proceedings. The judge hearing such cases should ensure that the child's views have been canvassed directly with the child so far as their age and understanding will permit. To this end, the judge can direct the parties to give further information or a court welfare officer to investigate a certain issue in private law proceedings or secure the assistance of the children's guardian in public law proceedings. This assistance can extend to making enquiries with other agencies (e.g. the police or CPS, immigration authorities or agencies outside the jurisdiction of the court) and can also extend to obtaining expert evidence. One of the duties of a guardian in care proceedings is to co-ordinate the expert witnesses to establish the areas of agreement or disagreement.

#### **Child witnesses**

The judge has absolute discretion as to whether or how to admit the evidence of children. The first question must be the potential relevance of what the child may have to say. It may be of peripheral or negligible importance, or be covered by other evidence, by the child him or herself in report form or by another witness.

Much will depend on the age of the child. If specific, serious allegations are made by, for instance, a child of average intellectual ability in his mid-teens, it may be appropriate, in fairness to the person against whom the allegations have been raised, to give the person the opportunity to cross-examine the child. This happens rarely. All attempts should be made to ensure that the child's evidence can be given by TV link and consideration should be given to the admission of any video-recorded interview standing as evidence-in-chief as would happen if the child were giving evidence in the criminal court.

It is regarded as invidious for any but the oldest range of children to give oral evidence in children's cases and to be subject to cross-examination, even by TV link. In nearly all cases the child's views and indeed accounts of factual matters are adequately put forward by the adult parties or the reporting officer or guardian on the child's behalf.

### **Requests for the judge to see the child**

Sometimes a judge will be asked to see the child in the course of family proceedings. The essential guidance is that this simply should not be done for the following reasons:

- judges are not qualified in this skill;
- it usurps the role of guardian or reporting officer;
- judges cannot offer confidentiality;
- judges may well not be able to discern the real reason for the request.

Exceptionally, a judge may be convinced of the need to see the child. It is essential that all should be clear as to the purpose of the meeting: is it to ascertain that child's wishes and views, or is it simply a case of a child wishing to meet the person making major decisions about that child's life? Moreover, the judge must be satisfied that it is the child who wants this meeting.

If it is decided to see the child, the judge should only see the child after consulting the parties' legal representatives and with a member of the court staff present. The judge should emphasise to the child that the final decision is not that of the child but of the judge. Also the judge should point out to the child that the child's parents and the guardian, if relevant, will be informed as to what the child and the judge have been saying to each other, since otherwise it would be unfair to them.

The parents should subsequently be informed as to the contents of the conversation. It is difficult to envisage any possible exception, unless it involved any danger to the child as a result of what they have divulged. In such a case, there should be discussion with the legal representatives as to what steps to take to afford the child adequate protection. This should be done without divulging what the child has said, since a legal representative is professionally bound, unless given specific dispensation by the client, to inform the client what the judge has told them.

# Chapter 4.4

## Children and criminal proceedings

### Key points

- A child's evidence should be admitted unless the child is incapable of giving intelligible testimony and the judge must form a view on the child's competence at the earliest possible moment.
- Particular procedures must be followed in order that the child's testimony may be adduced effectively and fairly.
- Detailed guidance has been published concerning video interviews of children.
- A significant number of vulnerable witnesses are children and there are various initiatives to provide protection for them.
- It is important for the judge to be conversant with the facilities available for the welfare of the child witness at their own court.

In criminal proceedings, whether in the Crown Court or the Youth Court, a child may appear as a victim or as a witness of crime, as a defendant or as a defence witness. In whatever capacity the child appears, procedures peculiar to children need to be followed in order that the testimony of the child can be adduced as effectively and fairly as possible. To achieve this, judges need to have a thorough understanding of the powers and procedures available to them.

Under section 36 of the Children and Young Persons Act 1933, as amended by section 73(1) of the Access to Justice Act 1999, no child other than an infant in arms shall be permitted to be present in court except when required as a witness.

### 4.4.1 Competence of child witnesses

The concept of a 'child witness' is introduced by section 21 when read with section 16(1)(a) of the Youth Justice and Criminal Evidence Act 1999, such a witness being under the age of 17 at the time of the hearing. Sections 53–55 now deal with a child's competence to give evidence (replacing the provisions in section 33A of the Criminal Justice Act 1988). They can be summarised as follows:

- A lack of competence in a witness is described as an inability to understand questions or to give answers which can be understood.
- The burden of proof lies with the party seeking to call the child to give evidence and is on the balance of probabilities.
- In making a decision on competence, the court shall treat the child as having the benefit of any special measures directions (see below).
- Any hearing to determine competence shall be in the absence of the jury and may include expert evidence. Any questioning of the witness must be in the presence of the parties.
- The evidence of a child shall be given unsworn. A person of 14 years or over who shows an appreciation of the solemnity of the occasion and the responsibility to tell the truth may be sworn, but the witness should give evidence unsworn if such appreciation is lacking.

While the test as to competence does not involve establishing that the child appreciates the difference between the truth and lies, it is sensible to remind a child about to give unsworn evidence of the importance of telling the truth.

### **4.4.2 Case management before trial**

Proper preparatory work and case management can help child witnesses. By exerting tight control at an early stage, it will be less likely that an adjournment will be necessary to safeguard the rights of the defendant.

#### **Facilities at court**

It is important for the judge to be fully conversant with the facilities and staff available for the welfare of the child. The judge should maintain regular contact with the child liaison officer and also the Witness Support Service which:

- provides people who can talk to a child in confidence;
- organises pre-trial visits to the court;
- provides information on court procedures;
- arranges for witnesses to be accompanied in court while giving evidence;
- can explain legal jargon and the decision reached;
- can refer child witnesses to a local Witness Support Scheme or other similar agency.

The judge should also be aware of:

- the arrangements for the child to be delivered to and met at court (usually at a side entrance);
- arrangements for avoiding confrontation between the child and any party to the proceedings;
- the number of escorts required if there is more than one child witness and the welfare provisions during breaks and after the evidence is concluded.

### **Plea and directions hearing (PDH)**

Some specific orders made by a judge at the PDH can make the whole experience of appearing in court less burdensome for the child. Orders appropriate to minimising delay, anxiety and unfairness should be considered at this stage and also whether or not to give special measures directions under the Youth Justice and Criminal Evidence Act 1999 (see 4.4.4 below). Any views or preference expressed by the child should be taken into account. There may be a local protocol to follow, but orders will generally deal with:

- arrangements for the preparation of the child including a familiarisation visit to the court. (It may be useful for the child to make such a visit before the PDH to establish what other orders need to be made.);
- whether or not wigs and gowns will be worn;
- arrangements for the preparation of the courtroom (e.g. use of screens when the child is to give evidence in open court);
- use of video evidence, including directions as to the preparation and use of a full transcript. (It may be that children should be shown their final video before the trial date in order to refresh their memory and allow them to get used to seeing themselves on screen.);
- listing of the case as soon as possible, with a clear start (i.e. not behind another trial or as a 'floater') and avoiding dates which are inconvenient for the child (e.g. exam or holiday time);
- agreement by all parties on the use of language – some terms may need to be agreed by barristers or solicitors in the case;
- agreement of a list of people who will be present in the courtroom;

- what guidance the child will be given before giving evidence and whether or not the child will take an oath or affirm;
- whether a child witness has any special needs (e.g. requiring frequent breaks – as a general rule after half an hour a child will be tired, whether or not this becomes obvious);
- any special arrangements pertinent to the child regarding disability, language, race or culture;
- how the child is to be told of the various decisions of the PDH before coming to court:

Remember to timetable any issues regarding disclosure and public interest immunity (e.g. social services files, medical notes and school reports). If there is a problem, it is the responsibility of the prosecution and the defence to have the case listed for mention.

### **Pre-trial review**

Usually in any case involving a child a pre-trial review will take place before the trial judge seven to 14 days before the trial. This provides an opportunity to check that everything is in order and to deal with any late arguments on points of law to avoid delay at the start of the trial and any consequential upsetting of the timetable. Often judges will order that not less than 21 days before trial any points of law should be put in writing and lodged with the court so that they can be dealt with on notice at the pre-trial review.

Take this opportunity to check that there are no outstanding issues relating to disclosure.

Orders should be made for the child to come in at specific and realistic times to minimise waiting. Sometimes it is possible for stand-by arrangements to be made so that a child can be at a location close to the court and able to attend at short notice after a phone call.

### **4.4.3 Case management at trial**

The judge should check at an early stage that all directions are in place, all special needs are catered for, that the equipment is working and that no last-minute alteration to the timetable is needed. This may include:

- ascertaining that any solicitors or barristers involved are sensitive to the vulnerability of the child;
- making arrangements for the advocates and judge to be introduced to the child before the child gives evidence, usually over the live TV link;

- ensuring that, as regards the child's evidence, there is agreement on:
  - the likely timing (the child should be kept informed);
  - the areas of agreement and any areas on which the child might be led;
  - the tenor, tone, language and duration of questioning and cross-examination;
  - the timing and frequency of breaks scheduled for the convenience and comfort of the child;
  
- deciding who should accompany the child when giving evidence. This may be a trained usher, a social worker, Witness Service personnel or other third party known to the child. Where necessary that person should receive proper instructions as to the need to stay with the child throughout, not to interrupt or intervene during the evidence without good cause, not to prompt the child, to remain with the child during breaks or in the event that the equipment breaks down, and not to speak to the child about the case or allow anyone else to do so during any such interruption.

### **Directions to the child**

It is very important that the judge should explain to the child:

- the need to tell the truth and the importance of leaving nothing out when answering a question;
- the need to say so if the child does not understand the question or know the answer and the importance of not guessing;
- that the child will not get into trouble if they do not know the answer to a question;
- that there will be breaks, but that if the child wants a break they should say so;
- the need to tell the judge if the child has a problem of any sort at any time during the hearing.

### **Control of the advocates**

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. The questions should be unambiguous and the child should be given full opportunity to answer. If a child does not understand a question, they may be tempted to give the answer that they think the questioner wants, rather than the true answer. The child may also be afraid to disagree with a powerful adult figure. Judicial vigilance is always necessary.

While it is important to cater for a child's needs and comfort, judicial efforts to that end should never be such as to amount to a suggestion that the child's evidence is likely to be more credible than that of any another witness. Consistently with that, steps to limit the distress experienced by a child must not overcome the necessity of ensuring that a party has been given a proper opportunity to challenge the evidence of the child.

**Video-recorded and live TV-link evidence**

The Children and Young Persons Act 1933 first allowed the evidence of children to be given in a different way from other witnesses. The Criminal Justice Act 1988 allowed live TV-link evidence for the first time in certain circumstances, and the Criminal Justice Act 1991 went further and allowed previously recorded video interviews to be used. The Youth Justice and Criminal Evidence Act 1999 has introduced further amendments. Under section 21, with certain exceptions, the court must give a special measures direction whereby any child will give evidence in court only by video recording and live TV link. In certain categories of offence, including sexual offences, kidnapping and false imprisonment, a child witness is to be treated as being in need of special protection, which means that all of their evidence whether in chief, in cross-examination or re-examination should also be given by video recording. The child is able to inform the court that they do not wish this provision to apply to them. Sections 28 and 29 of the 1999 Act are not yet in force.

Where video-recorded and live TV-link evidence is being used, judges should have a Memorandum of Good Practice (see below) and some courts have established Protocols to assist vulnerable witnesses and children. The Bar Council, Crown Prosecution Service (CPS) and Home Office also have material to assist in pre-trial directions. The judge should be familiar with such material.

**Memorandum of Good Practice on Video-Recorded Interviews with Child Witnesses for Criminal Proceedings**

This Memorandum was published in 1992 jointly by the Home Office and the Department of Health. It drew upon the 1987 report of Lady Justice Butler Sloss (as she then was) into the Cleveland child abuse case and the 1989 Report of the Advisory Group on Video Evidence (the Pigot Report) and was intended to run alongside the provisions of the Criminal Justice Act 1991. It provides guidance on conducting video interviews of children, including how to confine their answers to comply with the law of evidence. It recommends:

- that the interviews should be conducted as soon as practicable after an allegation of abuse;
- that they should take place in an informal context by a trained interviewer;
- that the child should be encouraged to tell their story before being asked questions;
- that the interviews should not last longer than one hour.

A revised version of the Memorandum was published in February 2001.

The Memorandum is of principal relevance to criminal proceedings although its guidance is also of use in civil and family proceedings. A judge conducting a trial

involving a video recording of the earlier interview should be thoroughly conversant with the Memorandum, particularly given that expert evidence can be admitted on the admissibility of a child's evidence.

### **Evidence in open court**

If a child is to give evidence in a case other than by video recording or live TV link, the child must do so in open court but a witness screen can be used as a special measure with the leave of the judge.

## **4.4.4 Speaking up for Justice**

The publication of the Home Office Report, *Speaking up for Justice*, in June 1998 followed an interdepartmental review of the treatment of vulnerable witnesses in the criminal justice system and contained 78 specific recommendations, all of which have been accepted by the government. Some required legislation, finding expression in the Youth Justice and Criminal Evidence Act 1999.

### **Non-statutory recommendations**

The following are some of the measures taken in response to the recommendations of the report that do not require legislation.

- The Trials Issues Group is developing a national framework for inter-agency protocols for dealing both with witness intimidation and vulnerable witnesses.
- The Home Office has organised a national publicity campaign including education about the criminal justice process and the support measures available to witnesses.
- The Association of Chief Police Officers has developed guidance for the police on identifying vulnerable or intimidated witnesses and obtaining the witness's own views on the pre-trial and trial measures that should be obtained.
- Guidance for the police has been developed on passing on information about witnesses' needs and views to the CPS.
- The Home Office has prepared material to assist vulnerable witnesses to prepare for their attendance in court.
- The Interdepartmental Implementation Steering Group and the Interdepartmental Steering Group on Child Evidence have considered issues of witness preparation.

- The Court Service has appointed liaison officers to implement measures ordered by the Crown Court to assist vulnerable or intimidated witnesses at court.
- The CPS, the Bar Council and the Law Society have considered ways in which the needs of witnesses can be kept under review by the prosecution or defence between the pre-trial hearing and the trial.
- Consideration is being given to the use of pagers so that witnesses can wait outside the court building and be called only when they are needed to give evidence.
- Guidance is being developed for pre- and post-trial support being provided by an agency other than the police, such as Victim Support for victims of rape or serious sexual offences.

### **Statutory measures**

In addition to the giving of evidence by video recording or live TV link (as mentioned above), the special measures which can be directed for children under section 19 of the Youth Justice and Criminal Evidence Act 1999 are:

- *Screening the witness (section 23)* – this puts the use of screens to prevent the child seeing the accused on a statutory basis for the first time.
- *Evidence in private (section 25)* – the judge has power, in certain circumstances, to exclude any person, with some exceptions including the accused, from the court while the child gives evidence.
- *Court dress (section 26)* – the judge may dispense with the wearing of wigs and gowns while the witness gives evidence.
- *Evidence through an intermediary (section 29)* – this provision allows an intermediary not only to communicate questions and answers to and from a witness, but also to explain the questions and answers to enable them to be understood. Given that this provision departs for the first time from the rule that evidence must be given by the witness in their own words, great care must be taken in allowing the use of the services of an intermediary and in ensuring that the defendant is not prejudiced by the way in which the intermediary conveys to the court the meaning of the answers given by the witness. Sections 28 and 29 of the 1999 Act are not yet in force.

Sections 34 to 40 of the Act prohibit unrepresented defendants from cross-examining child witnesses for certain offences and give a wider discretion to judges to prohibit cross-examination of witnesses by unrepresented defendants in other circumstances.

The emphasis of the Act is that treatment of eligible witnesses should be equal to, but not more favourable, than that accorded to other witnesses. Section 32 puts a duty on the judge to warn the jury that a special measures direction does not prejudice the accused. Under section 19(3), the judge must consider whether a special measures direction will inhibit the effective testing of evidence by a party to the proceedings. In various provisions of Part II, judges are enjoined to have regard to the interests of justice when deciding whether and how to exercise their statutory powers.

### **4.4.5 Treatment of the defence**

By section 44(1) of the Children and Young Persons Act 1933 the judge has a duty to have regard to the welfare of a child or young person in court. The above guidance in relation to case management is just as applicable in the case where the defendant is a child or young person and/or where there are child witnesses on the defence side as it is in cases where children or young persons are to be called for the prosecution. In particular the judge should enquire as to whether the child defendant or any defence child witness has any special needs and if so cater for them in the orders that are made.

#### **Defence witnesses**

Judges should be told and if not told should ask at plea and directions hearings if there are any child witnesses on the defence side so as to be able to make any appropriate orders.

#### **Child defendants**

Unlike a child witness, the defendant who is a child must be present in court and is not eligible for any special measures directions under the Youth Justice and Criminal Evidence Act 1999.

In 1999 the European Court of Human Rights held that when tried as 11-year-olds for the offences of abduction and murder of a boy aged two when they themselves were aged ten, there was a violation of the applicants' right to a fair trial as guaranteed by Article 6 of the European Convention on Human Rights – *T v United Kingdom (Application 24724/94)*, *V v United Kingdom (Application 24888/94)*.

The trial had taken place over three weeks in public in the Crown Court amidst extremely high levels of press and public interest. Special measures (not to be confused with those under the 1999 Act) had been taken in view of the youth of the applicants so that, for example, the trial procedure was explained to them, they were taken to see the court room in advance and the hearing times were shortened so as not to tire them excessively. The European Court:

- took the view that in a case of this kind it could be necessary to conduct the hearing in private, so as to reduce as far as possible the child's feelings of intimidation and inhibition, or alternatively to provide for only selected attendance rights and judicious reporting;
- found that the formality and ritual of the Crown Court must at times have seemed incomprehensible and intimidating to a child aged 11 and that there was evidence that certain of the modifications to the courtroom had the effect of increasing their sense of discomfort during the trial;
- observed that there was psychiatric evidence that at the time of the trial both applicants were suffering from post-traumatic stress disorder as a result of what they had done to the two-year-old and that they found it impossible to discuss the offence with their lawyers;
- found that the two applicants had found the trial distressing and frightening and had not been able to concentrate during it;
- did not consider, in such circumstances, that it was sufficient for the purposes of Article 6(1) that the applicants were represented by skilled and experienced lawyers and felt that it was highly unlikely that they would have felt sufficiently uninhibited to have consulted with them during the trial, or indeed outside the courtroom.

In the light of that judgment, the Lord Chief Justice published a Practice Direction as to the arrangements to be followed in the case of young defendants (being children and young persons). That Practice Direction is reproduced below.

## **PRACTICE DIRECTION (2000):**

### **Trial of Children and Young Persons in the Crown Court**

1. This Practice Direction applies to trials of children and young persons in the Crown Court. Effect should be given to it forthwith. In it children and young persons are together called 'young defendants'. The singular includes the plural and the masculine the feminine.
2. The steps which should be taken to comply with this Practice Direction should be judged, in any given case, taking account of the age, maturity and development (intellectual and emotional) of the young defendant on trial and all other circumstances of the case.

### **3. THE OVER-RIDING PRINCIPLE**

Some young defendants accused of committing serious crimes may be very young and very immature when standing trial and in the Crown Court. The purpose of such trial is to determine guilt (if that is in issue) and decide the appropriate sentence if the young defendant pleads guilty or is convicted. The trial process should not itself expose the young defendant to avoidable intimidation, humiliation or distress. All possible steps should be taken to assist the young defendant to understand and participate in the proceedings. The ordinary trial process should so far as necessary be adapted to meet those ends. Regard should be had to the welfare of the young defendant as required by section 44 of the Children and Young Persons Act 1933.

### **4. BEFORE TRIAL**

If a young defendant is indicted jointly with an adult defendant, the Court should consider at the plea and directions hearing whether the young defendant should be tried on his own and should ordinarily so order unless of opinion that a joint trial would be in the interests of justice and would not be unduly prejudicial to the welfare of the young defendant. If a young defendant is tried jointly with an adult the ordinary procedures will apply subject to such modifications (if any) as the court may see fit to order.

5. At the plea and directions hearing before trial of a young defendant, the court should consider and so far as practicable give directions on the matters covered in paragraphs 9 to 15 below inclusive.

6. It may be appropriate to arrange that a young defendant should visit, out of court hours and before the trial, the courtroom in which the trial is to be held so that he can familiarise himself with it.

7. If any case against a young defendant has attracted or may attract widespread public or media interest, the assistance of the Police should be enlisted to try and ensure that a young defendant is not, when attending for the trial, exposed to intimidation, vilification or abuse.

8. The court should be ready at this stage (if it has not already done so) to give a direction under section 39 of the Children and Young Persons Act 1933 or as the case may be section 45 of the Youth Justice and Criminal Evidence Act 1999. Any such order, once made, should be reduced to writing and copies should on request be made available to anyone affected or potentially affected by it.

### **9. THE TRIAL**

The trial should, if practicable, be held in a courtroom in which all the participants are on the same or almost the same level.

**10.** A young defendant should normally, if he wishes, be free to sit with members of his family or others in a like relationship and in a place which permits easy, informal communication with his legal representatives and others with whom he wants or needs to communicate.

**11.** The court should explain the course of proceedings to a young defendant in terms he can understand, should remind those representing a young defendant of their continuing duty to explain each step of the trial to him and should ensure, so far as practicable, that the trial is conducted in language which the young defendant can understand.

**12.** The trial should be conducted according to a timetable which takes full account of a young defendant's inability to concentrate for long periods. Frequent and regular breaks will often be appropriate.

**13.** Robes and wigs should not be worn unless the young defendant asks that they should or the court for good reason orders that they should. Any person responsible for the security of a young defendant who is in custody should not be in uniform. There should be no recognisable Police presence in the courtroom save for good reason.

**14.** The court should be prepared to restrict attendance at the trial to a small number, perhaps limited to some of those with an immediate and direct interest in the outcome of the trial. The court should rule on any challenged claim to attend.

**15.** Facilities for reporting the trial (subject to any direction given under section 39 of the 1933 Act or section 45 of the 1999 Act) must be provided but the court may restrict the number of those attending in the courtroom to report the trial to such number as is judged practicable and desirable. In ruling on any challenged claim to attend the courtroom for the purpose of reporting the trial, the court should be mindful of the public's general right to be informed about the administration of justice in the Crown Court. Where access to the courtroom by reporters is restricted, arrangements should be made for the proceedings to be relayed, audibly and if possible visually, to another room in the same court complex to which the media have free access if it appears that there will be a need for such additional facilities.

**16.** Where the court is called upon to exercise its discretion in relation to any procedural matter falling within the scope of this Practice Direction but not the subject of specific reference, such discretion should be exercised having regard to the principles in paragraph 3 above.

#### **17. APPEALS AND COMMITTALS FOR SENTENCE**

This Practice Direction does not in terms apply to appeals and committals for sentence, but regard should be paid to the effect of it if the arrangements for hearing any appeal or committal might otherwise be prejudicial to the welfare of a young defendant.