DIRECT FROM THE WITNESS BOX : THE VOICE OF THE CHILD IN FAMILY PROCEEDINGS IN ENGLAND AND WALES

By

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Introduction

"A child seldom needs a good talking to as a good listening to"[2]

How a child's voice can properly be heard in family proceedings[3] which concern and affect them has been much discussed and debated among professionals for many years. Lady Hale summarised the basis of the debate thus:

" There is a growing understanding of the importance of listening to the children involved in children's cases. It is the child, more than anyone else, who will have to live with what the court decides. Those who do listen to children understand that they often have a point of view which is quite distinct from that of the person looking after them. They are quite capable of being moral actors in their own right. Just as adults may have to do what the court decides whether they like it or not, so may the child. But that is no more reason for failing to hear what the child has to say than it is refusing to hear the parents' views"[4]

That sentiment has seen children becoming much more involved in all aspects of family proceedings and greater calls for that involvement to include giving oral evidence in certain circumstances. On the 3rd March 2010, the Supreme Court of England and Wales set out a new test[5] to be applied when considering whether a child should be called to give oral evidence in family proceedings. For some, this new approach, which essentially removes the presumption that a child should rarely be asked to enter the fray and give evidence, is a natural progression of the continuing "voice of the child" debate. Others worry that the guidelines may throw open the gates and lead to many more children giving evidence in family proceedings when the system may not quite be ready for this to happen.

This article takes a quick canter through the development of the case law in this area and what it adds to the voice of the child debate in England and Wales.

Pre Re W : An overview of the case law in this area

Three reported cases set out the state of the law prior to the recent decision in Re W.

1. The presumption that a child should only be called to give evidence in exceptional circumstances began with the case of R v B County Council[6]. In that case, J a 17 year old

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[3] The Children Act 1989 governs most domestic family proceedings which fall into 2 categories. Public law/care are those proceedings that are brought by the state in circumstances where it is believed that a child has suffered, is suffering or likely to suffer significant harm. Private law proceedings are those that concern the resolution of disputes about a child's welfare and upbringing within its own family. The disputes in private law proceedings tend to be between parents or other members of the child's family

[4] Re D (A Child) 1 AC 619

[5] Re W (Children) (Abuse:Oral Evidence)[2010] 1 FLR 1485

[6] [1991] 1 FLR 470

girl and the eldest of 4 children, alleged that she had been sexually abused by her stepfather. Criminal proceedings brought against him were discontinued and he then asked the Local Authority to make her available to give evidence in the care proceedings. The Court of Appeal upheld the decision of the Magistrates who had refused to issue a witness summons and relied on hearsay evidence (J's statement to the police and her interviews with a child psychiatrist) to find that the stepfather had behaved as she described. The Court of Appeal made clear that an order requiring attendance of a witness would not be made in circumstances where it would be oppressive to do so. The Court emphasised that the family courts were primarily concerned with promoting the welfare of children and this would be defeated if an alleged abuser could require a child to give evidence.

2. In Re P (Witness Summons) [7] , N, aged 12 years at the date of the hearing, made allegations that she and her friend, S, had both been sexually abused by S's stepfather. N's interviews were recorded on video. S herself denied that her stepfather had behaved in an inappropriate way against her. In subsequent care proceedings brought in respect of S, her mother and stepfather applied for N to give evidence and be cross examined. The trial judge refused the application and the refusal was upheld by the Court of Appeal on the basis that it would be oppressive so to order. The Court of Appeal recognized that each application for a child to give evidence would turn on its particular facts and that the older the child the more arguable it was that they should give evidence. Nevertheless said the Court of Appeal, it was unusual for a child to give oral evidence at a hearing and, an already damaged child risked further and grave harm if subjected to questioning by a skilled advocate whose primary task and focus is to discredit their account.

3. LM (By Her Guardian) v Medway Council, RM and YM[8] is a rare example of when the court did direct that a child, aged 10 years at the hearing, should be called to give evidence. The facts of the case were that in the 2 years preceding the relevant hearing, the child had made serious allegations of violence against her father on two separate occasions. On both those occasions, the interviews had been recorded on video and on both occasions, her mother corroborated her account and provided further details. After the second set of allegations, the child's mother agreed that she should be placed in foster care. The mother then changed her mind and said that she (the mother) had made the allegations up and encouraged her daughter to make false allegations. The Local Authority did not accept her retractions and commenced care proceedings. The application by the parents for the child to give evidence at the hearing was successful and the trial judge's decision was upheld by the Court of Appeal. Although the Court of Appeal felt that in this case calling the child to give evidence was a sound decision, Smith LJ took the opportunity to reiterate that

"the correct starting point(in accordance with past Court of Appeal guidance)is that it is undesirable that a child should have to give evidence in care proceedings and that particular justification will be required before that course is taken. There will be some cases in which it will be right to make an order. In my view, they will be rare" and outlined the factors that will be relevant when a court is considering the issue of a child giving evidence namely:-

1. The balance to be struck between the need for that evidence in all the circumstances of the case and the potential for harm to the child;

[7] [1997] 2 FLR 447
[8] [2007] 1 FLR 1698

2. The importance of that evidence to the process as a whole and to the decision about the child's welfare and arrangements for its future; and
3. The guidance, based on research[9], of the effect on children of giving evidence (rather than simply to relying on the impression of the child gleaned through the professionals or the court itself).

Competing claims

It is plain that, in England and Wales, there was a certain amount of confusion about when a court was likely to order/direct a child to give evidence in family proceedings. The only thing that was clear was that there was a clear hurdle to get over because the court's starting point was that children should not give evidence unless there were compelling arguments for that to happen.

What is also plain from the above cases is that there are two competing arguments at play here. On the side of the adult against whom very serious allegations are made, the idea that there should be a presumption against that the child's account being challenged in the court arena is flawed and

"would cause surprise to most litigation lawyers experienced in different disciplines...because such a procedure is, on the face of it, not only obviously unfair to the father, it is also likely to be materially damaging to the prospect of a safe discharge of the court's fact finding exercise, a combination of considerations potentially productive of a serious miscarriage of justice"[10]

On the other side of the coin is the argument in support of shielding the child, which is unsurprisingly welfare and research based. In its report[11], the Pigott Committee relied on evidence from the Royal College of Psychiatrists and unanimously reported that:

"2.12 *We are satisfied that a majority of children are adversely affected by giving evidence at trials for serious offences under existing circumstances. We attach particular importance to the psychiatric opinion we received which suggests that not only do abused children who testify in court exhibit more signs of disturbed behaviour than those who do not, but that the effects of a court appearance are most severe and prolonged in those who have suffered the worst abuse and those without family support. We received evidence from this point from paediatricians, psychiatrists, social workers and a range of organisations and individuals with professional and voluntary responsibility for child care and the care of victims. This led us not only to endorse the case already explained for relieving the stress upon child witnesses, but also to wonder whether the nature and extent of the problem is fully comprehended by the legal profession and the wider public. We cannot emphasise strongly enough that those children who are clearly upset or who break down in the witness box manifest openly the effects of a much more generally harmful experience."*

Re W

It is against the background of these two competing claims, and decisions going either way without much rhyme or reason, that the Supreme Court sought to bring clarity.

[9] The Report of the Inquiry into Child Abuse in Cleveland (1987) and The Pigott Report (The Report of the Advisory Group on Video Evidence) (December 1989)
[10] Rimer LJ in Re W when it was before the Court of Appeal
[11] The Pigott report (December 1989)

There was nothing unusual in the facts of this case. This was a public law case involving a family of 6 children although only 5 were relevant as the eldest was now an adult. The oldest of the 5 relevant children was 14 years old at the hearing. She had been taken into care of the Local Authority following her making the most serious allegations of sexual abuse against her stepfather (the father in the home). This was not the first serious allegation made. The previous year and whilst still living in the family home, she made and then retracted similar serious allegations. The previous allegations had led to a police investigation which had been closed when she retracted her allegations. A medical examination was inconclusive but there was other compelling evidence: her video recorded interviews and the stepfather's DNA on her clothes and underclothes. The father's application that she be called to give evidence was refused by the trial judge and that refusal was upheld by the Court of Appeal. The father then appealed to the Supreme Court and Lady Hale said that

1. The current law, whereby there is a presumption or starting point that a child will not give evidence, is at odds with the approach of the European Courts of Human Rights. In family proceedings, a balance needs to be struck between the Article 6 rights for fair trial which must include the ability to challenge evidence and Article 8 rights to respect family life;

2. Two considerations applied to whether a child should give evidence, namely on the one hand the obvious advantages that that evidence may bring to the determination of the truth and on the other hand the damage it may have on that child's welfare;

Further, Lady Hale set out the factors that should be borne in mind when considering whether a child should give evidence. These factors include: the nature of other evidence before the court, the issues to be determined, the child's age and maturity, the length of time since the events in question and the child's own views about giving evidence. The Supreme Court urged practitioners to ensure that, in cross examining a child, the focus should be more about putting forward an alternative explanation which would assist the court to determine the factual matrix and less about questioning with the sole purpose of intimidating the child so that the court's conclusion is that he/she has been untruthful.

After Re W

Removing the presumption and setting out the criteria to be applied certainly succeeds in bringing clarity to the issue. But will it also succeed in throwing open the floodgates? Can we expect many more successful applications for children to give evidence in our family proceedings?

I would say probably not. First of all, Lady Hale is careful to note that the considerations set out by the Supreme Court in Re W are simply an amplification of those outlined by Smith LJ in LM and Medway case[12]. The important difference is that the starting point/presumption has been removed. The caution with which the courts have always approached this issue is likely to continue.

Indeed what happened after the Supreme Court's decision in Re W itself supports this assertion. Having decided the general approach the courts should take, the Supreme Court remitted the case back to the trial judge for consideration. The trial judge, applying the new test, again refused to order that the child should give evidence and went on to make findings against the stepfather based on all the other available material. The child did give

[12] [2007] 1 FLR 1698

evidence in the criminal proceedings and her stepfather was convicted of several counts and is serving a lengthy prison sentence.

Secondly and importantly, I suspect that the essential and overriding test that the courts will continue to apply is whether justice can be properly and fairly achieved without the need for the child to give evidence. It is likely that welfare considerations will tend to prevail so that after undertaking the balancing exercise, the usual decision will be that the harm that is likely to fall on the child by giving evidence will far outweigh the overall benefit to the child and the process in calling him/her to give evidence.

Most family lawyers welcome the clarity in the approach to be taken and the removal of the presumption. In particular, some older children may well wish not to be bystanders but to be active participants in the process[13]

Where I can see the potential increase of children giving evidence is in private law disputes. The decision in Re W applies as much to private law disputes as care proceedings. In principle, therefore, a parent can ask the court to order a child of the family to give evidence in his/her parents' acrimonious divorce proceedings. The risk to the child in this scenario is obvious: the allegations of abuse are not being made by a Local Authority which is neutral and has nothing to gain by making them but by one parent who may be determined to gain an advantage in their "battle". In cases where the child appears to be mature, outspoken and favours a particular outcome in support of one parent, I can see that the dilemma that besets the court when deciding whether that child should be separately represented will intensify and include whether that child should also speak on his/her own behalf from the witness box.

The problems that may arise if such an application is successful are far and wide but my particular concern would be that usually, the child in private law proceedings has no Guardian to represent him/her. It seems to me that it is in the private law arena that the court will need to be extra vigilant to ensure that all measures and precautions that can be put in place to prevent or limit harm to the child <u>are</u> put in place.

<u>Should we be concerned by these recent developments.</u>

Re W may not necessarily lead to a vast increase in the numbers of children who give evidence but I am sure that many more applications will be made. If the applications succeed, is the family justice system ready to deal properly with child witnesses?

Lady Hale provides some assistance to practitioners on some practical matters such as the style and language of questions posed to create optimum conditions for the child. Lady Hale also urges the family courts to be creative and realistic about how these optimum conditions are created generally and states:

"The Youth Justice and Criminal Evidence Act 1999 now provides for a variety of special measures to assist children (and other vulnerable witnesses) to give evidence in criminal cases. These include screens, live television links, using video-recordings as evidence-in-chief , providing aids to communication and examining the witness through an approved intermediary. (There is also provision for cross examination and re examination to be

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[13] Re J (Child Giving Evidence) [2010] 2 FLR 1080 a case, which was reported after Re W and involved teenage twin brothers who accused their mother of physical violence. One of the boys chose to give oral evidence against her and the other did not wish to give evidence, and yet sat and supported his brother through the process.

video recorded but there are no plans to bring this into force.) The 1999 Act also allows witnesses of any age to give unsworn evidence in criminal proceedings unless it appears to the court that they are unable to understand the questions put or to give intelligible answers..."[14]

The challenge for practitioners now will not only be working out the circumstances in which the court will order a child to give evidence but ensuring that we create the best forum/conditions every time. The case law provides a helpful checklist and even draws our attention to some of the special measures that can be deployed but leaves which measures are actually put in place to the professionals and the judges, to be determined on a case by case basis.

<u>Practical guidelines for case management.</u>

The checklist in the caselaw does not provide a clear steer of what minimum standards/measures should be in place when a child is to give evidence and thus cannot guarantee a uniformity in the approach that is likely to be adopted across the board. Without a such clarity, the system runs the risk that serious further harm may be caused to the children who are brave enough to give evidence.

The importance of "getting it right" cannot be underestimated. In June 2011, the Nuffiled report[15]on how well the criminal justice system was serving young witnesses was published. The report is a progress report on "Measuring Up?" prepared in 2009. The 2009 report provided an evaluation of those government initiatives that had been implemented and whether the commitments made to improve had materialised.

The 2011 Nuffield Report highlights the following:

a. That the numbers of children giving evidence was increasing "dramatically" and although there are no official figures of those who actually gave evidence, in 2008/09, 48,000 were called to court as compared with 30,000 called in 2006/07;

b. That in 2009, the authors of the report had concluded that "the reality faced by young witnesses in court fell short of the standards set out on government policies and made 42 recommendations for improvement";

c. That there have been many initiatives that have been implemented that have undoubtedly improved the experience of young witnesses. The particular improvements noted are: the variety and extent of support offered pre, during and post trial which have been tailored to the specific needs of the young witnesses involved and as well as appropriate action being taken by professionals and the court to ensure the young witnesses feel safe and remain well informed of the process. There is beginning to be a sense that the safeguarding of young witnesses is a collective responsibility;

d. There remain areas where the state is still failing to ensure that the young witnesses are able to provide their best evidence and this was particularly significant in the continued lack of agreed training for lawyers in child development, the lack of a checklist or code for the questioning the young, the lack of information about the

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[14] Re W (Children) (Abuse: Oral Evidence) [2010] 1 FLR 1485 at 1490

[15] "Young Witnesses in criminal proceedings", a progress report on Measuring Up? (2009) dated June 2011 prepared by Nuffield Foundation and the NSPCC

particular child's development and communication skills and the continued delays in cases coming to trial.

The report concludes thus:-

"Some recommendations require funding that is unlikely to ge forthcoming in a time of public spending cuts. However, a core message from ***Measuring Up?*** *Is that outcomes in young witness cases could be improved without additional costs. Unless our...justice process responds appropriately to the needs of young witnesses, this vulnerable and much victimised group will continue to be denied full access to justice. Enabling the evidence of young witnesses through support, effective pre-trial and trial management and the control of unfair questioning are vital aspects of that response."*

In her recent article, Penny Cooper, Professor at City Law School, London[16] advocates

a. The greater use of Registered Intermediaries whose remit *"is to facilitate communication with vulnerable witnesses in the criminal justice system...they are facilitating questioning by the police officer, lawyer or judge..."*

b. Greater training for lawyers: *"professional legal training does not teach lawyers how to question children in a developmentally appropriate way. Lawyers are not taught about children's intellectual, emotional and social development and how this affects their communication.*"

The calls for greater clarity and steer were answered in December 2011, when Lord Justice Thorpe's Working Party of the Family Justice Council (FJC)[17] produced comprehensive guidelines in relation to children giving evidence in family proceedings. The aim of the guidelines is to provide advice on the factors that should be considered whenever the issue of a child giving evidence arises and have been endorsed by Sir Nicholas Wall, the President of the Family Division, and been circulated to members of the judiciary.

The key elements of the new guidelines are as follows:-

i. If it is likely that a child's oral evidence may be required in any case, that issue should be considered as early as possible in the proceedings;

ii. The onus of bringing that issue to the court's attention falls on all the parties and not just the party(s) with the greatest interest in challenging the child's account;

iii. Once the issue is raised, the matter should be listed for an interlocutory hearing where the court should look carefully at where the balance falls between two primary considerations, namely the advantages of the child's oral evidence assisting with determining the truth versus the risk of harm that that process will cause the child. The guidelines list a number of factors, which are by no means

[16] Child Witnesses in Family Proceedings: Should Intermediaries be Showing Us the Way? April [2011] Fam Law 397

[17] The Family Justice Council was established in 2004 and is an independent body created to bridge the gap between the government and the family courts. Its role is to "promote an inter-disciplinary approach to family justice, monitor how effectively the system delivers the service the Government and the public need and advise on reforms necessary for continuous improvement.

exhaustive but nevertheless helpful, for the court to have regard to when undertaking this balancing exercise[18];

iv. At that interlocutory hearing, the court should also consider the timing of the questioning (always aiming for it to occur as soon after the incident as possible) and whether any such questioning should be put to the child on an occasion separate from the substantive hearing;

v. Once the decision is made that a child will give oral evidence, the court needs to consider and take account of any practical steps that "will improve the quality of the child's evidence and minimise the risk of harm to the child". The guidelines provide a comprehensive list which cover ways to best manage the process on the one hand (for example the use of special measures specific to the particular case/child/ allegations to advance judicial approval of the questions proposed) to ways to best manage the child him/herself (for example ensuring that the child is familiar with the court room before the hearing and is always accompanied and supported throughout their time at court); and

vi. At the hearing where the child gives evidence, practitioners and the court are reminded to take into account the Good Practice Guidance in the Nuffield Report (referred to above) as well as the Court of Appeal's guidance in R v Barker [2010] EWCA Crim 4 paragraph 42 which stresses the importance of adapting advocacy *"to enable the child to give the best evidence of which he or she is capable"* and lists examples of how the pace and type of questions can be used to achieve this.

Conclusion

In the end, the Supreme Court's ruling in Re W is that the decision to order that a child should give evidence should always be balanced with the accused adult's right to a fair trial. I would like to think that this is what the courts have been doing anyway but the provision of a formula should bring some greater uniformity of approach.

Will there be many more cases where children give evidence? I think many more applications will be made for the court to consider the question and whilst it could lead to more, I think the reality is that, the balance will fall in favour of not calling the child. However, the experience of our own criminal justice system tells us that the family courts must concentrate on facilitating special measures and precautions of all types to ensure that its core function of protecting the young and the vulnerable, and its commitment to enable young witnesses to give their best evidence, is achieved. The guidelines produced by the FJC Working Party

[18] The factors listed in the guidelines are: the child's wishes and feelings (especially whether they are reluctant to give evidence); the child's particular needs and abilities; the issues that need to be determined; the nature and gravity of the allegations; the source of the allegations; whether the case depends on the child's allegations alone; corroborative evidence; the quality and reliability of the exiting evidence; the quality and reliability of the ABE interview; whether the child has retracted the allegations; the nature of any challenge a party wishes to make; the age of the child (generally the older the child the better); the maturity, vulnerability and understanding, capacity and competence of the child, this may be apparent from the ABE interview or from professionals discussions with the child; the length and time since the events in question; the support or lack of support for the child; the quality and importance of the child's evidence; the right to challenge evidence; whether justice can be done without further questioning; the risk of further delay; the views of the child' Guardian (who is expected to have had discussions with the child, if appropriate) and those with parental responsibility; if there has been/likely to be criminal proceedings, the risk to the child of giving evidence twice; and what impact any findings will have on the proceedings.

certainly go someway to ensure that that protective function will be realized more often than not.