

Child witness essay

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The Bar Vocational Course Full-Time 2002/2003 _____

EVIDENCE LG 10 _____ THE EVIDENCE OF CHILDREN

_____ Bristol

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Author: Liz © Bristol Institute of Legal Practice Bristol Institute of Legal Practice EVIDENCE LG 10 The Bar Vocational Course COMPETENCE AND COMPELLABILITY OF WITNESSES THE EVIDENCE OF CHILDREN The purpose of this handout is to combine in one document all the provisions relating to children, whether the child is a witness or an offender. CRIMINAL CASES You should bear in mind a number of things: 1. doli incapax a) children aged under 10: it is irrebuttably presumed that a child under the age of 10 is incapable of committing a crime.) children between the ages of 10 and under 14: until 1998, there was a rebuttable presumption that a child over 10 but not yet 14 was incapable of committing a crime, and the crime could only be established if the prosecution could prove, in addition to establishing the actus reus and mens rea of the offence, that the child had a “mischievous discretion”. This presumption was abolished by the Crime and Disorder Act 1998 s34, which provides as follows: “ The rebuttable presumption of criminal law that a child aged 10 or over is incapable of committing an offence is hereby abolished.

2. Competence In relation to children, two issues of competence are raised i. e. (a) competence to give evidence at all; (b) competence to give evidence

on oath; and (c) competence to give evidence unsworn. (a) competence to give evidence In relation to the child’s competence to give evidence at all, the general rule applies i. e. that all witnesses are competent. See Youth Justice and Criminal Evidence Act 1999 [YJCEA] s53(1): “ At every stage in criminal proceedings all persons are (whatever their age) competent to give evidence.

This is subject to s53(3): “ A person is not competent to give evidence in criminal proceedings if it appears to the court that he is not a person who is able to _____

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Author: Liz © Bristol Institute of Legal Practice Bristol Institute of Legal Practice The Bar Vocational Course (a) (b) Note: 1 understand questions put to him as a witness , and give answers to them which can be understood. the issue of competence may be raised by either party or the court and determined by the court: s54(1) 2 the party calling the witness must prove to the court on a balance of probabilities that the witness is competent: s54 (2) 3 4 (b) any proceedings to determine competence takes place in the presence of the parties but the absence of the jury: s54(6) and s54(4) Expert evidence may be received: s54(5) competence to give evidence on oath. Competence to give sworn evidence is dealt with in s55. The test is whether the child is aged 14 or over and appreciates the solemnity of the occasion and the particular responsibility to tell the truth. His appreciation of those matters is presumed if he is able to give intelligible testimony, and he is able to give intelligible testimony if he is able to understand questions put to him

as a witness, and give answers which can be understood. See S55: “(2) the witness may not be sworn for that purpose [i.

e. giving evidence] unless (a) the he has attained the age of 14, and b) he has a sufficient appreciation of the solemnity of the occasion and of particular responsibility to tell the truth which is involved in taking an oath.

(3) The witness shall, if he is able to give intelligible testimony, be presumed to have a sufficient appreciation of those matters if no evidence tending to show the contrary is adduced (by any party).

(8) For the purpose of this section a person is able to give intelligible testimony if he is able to (a) understand questions put to him as a witness, and (b) Notes: give answers to them which can be understood. ”

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Author: Liz © Bristol Institute of Legal Practice Bristol Institute of Legal Practice 1 2 3 4 5 The Bar Vocational Course The issue may be raised either by a party to the proceedings or by the court of its own motion: s55(1).

It is a matter for the judge, in the absence of the jury, if there is one: s55(5).

The burden of proving competence lies on the party seeking to call the witness that proof being on a balance of probabilities: s55(4). Expert evidence may be received: s55(6). Any necessary questioning of the witness shall be done by the court in the presence of the parties: s55(7). competence to give evidence unsworn (c) Where the witness is not sworn under s55(2) he shall give evidence unsworn: s56(1) and (2): (1) Subsection (2) and (3) apply to a person (of any age) who (a) is competent to give evidence in criminal

proceedings, but (b) (by virtue of section 55(2)) is not permitted to be sworn for the purpose of giving evidence on oath in such proceedings.

2) The evidence in criminal proceedings of a person to whom this subsection applies shall be given unsworn. ” Notes: 1 As to whether unsworn evidence should be received from the child witness, the test is the general test of competency in s53(3); “ A person is not competent to give evidence in criminal proceedings if it appears to the court that he is not a person who is able to (a) (b) 2 understand questions put to him as a witness , and give answers to them which can be understood. ” No appeal shall be founded on the basis that a person giving unsworn evidence should, in fact, have been sworn: s56(5). Special measures 3.

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Author: Liz © Bristol Institute of Legal Practice Bristol Institute of Legal Practice The Bar Vocational Course YJCEA 1999 Part II, ss16-33, provide for a series of special measures which the court can order in respect of vulnerable witnesses of which child witnesses would constitute an important category.

A child witness is one who is under the age of 17 at the time of the hearing: s21(1)(a). The primary rule in relation to child witnesses is set out in s21(3): “ The primary rule in the case of a child witness is that the court must give a special measures direction in relation to the witness which complies with the following requirements - (a) it must provide for any relevant recoding to be admitted under s27 (video recorded evidence in chief: and (b) it must provide for any evidence given by the witness in the proceedings which is

not given by means of a video recording (whether in chief or otherwise) to be given by means of a live link in accordance with s24. Under s24, the primary rule is subject to certain limitations, the most important of which are: (i) (ii) the application of the special measures are subject to availability: s21(4)(a) the rule does not apply to the extent that the court is satisfied that compliance with it would not maximise the quality of the witness's evidence: s21(4)(i); unless the witness is a child in need of special protection: s21(5) iii) other limitations are explained in relation to the special measure as listed below: The special measures are: (a) (b) screening the witness from the accused: s23; giving evidence by a live TV link: s24 In addition to s24, s32(1) and s1(A) CJA 1988 provides for the reception of evidence by live TV link, in the Crown Court, the Youth Court and appeals arising out of such proceedings, where the witness is outside the UK: (c) excluding from court during the giving of the witness's evidence persons of any description other than the accused, his legal representatives, and any interpreter appointed to assist the witness: s25 ordering the removal of wigs and gowns while the witness is giving evidence: s26 admitting a video recording of an interview with the witness to be admitted as the evidence in chief of the witness: s27; unless the court is of the opinion that, having regard to all the circumstances that in the interests of justice the recording ought not to be admitted: s27(2). (d) (e) _____

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Practice (f) The Bar Vocational Course here an order is made under s27, the order may include admitting a video recording of the cross-examination and

re-examination where the evidence in chief of the witness has been video recorded: s28; examination through an interpreter (known as an “intermediary”) of a young or incapacitated witness: s29; provisions of aids to communication for a young or incapacitated witness: s30 (g) (h) A child witness “in need of special protection” is one where the offence (or any of them) is a sexual offence or one involving kidnapping, assaults etc: s21(b). Where the child witness is in need of special protection, the court, in addition to any other special measure, must direct that s28 applies, unless that measure is not available or the witness indicates that that he does not want the special measure to apply to him: s21(6) and (7). 4.

Corroboration Prior to 1988, the evidence of an unsworn child had to be corroborated as a matter of law. The evidence of sworn children had to be corroborated as a matter of practice, and the jury had to be warned about the dangers of acting on the uncorroborated evidence of a sworn child. These corroboration requirements were abolished by s34 CJA 1988, as amended by CJPOA 1994, which provides as follows: “(1) The proviso to subsection (1) of section 38 of the Children and Young Persons Act 1933 (under which, where the unsworn evidence of a child of tender years admitted by virtue of that section is given on behalf of the prosecution, the accused is not liable to be convicted unless that evidence is corroborated by some other material evidence in support thereof implicating him) shall cease to have effect. 2) Any requirement whereby at a trial on indictment it is obligatory for the court to give the jury abrogated. ” See R v Pryce [1991] Crim LR 379: a direction to treat the evidence of a 6 year old with caution was not required as it amounted to a re-introduction of the rule. However,

some judges continue to give a warning, in the exercise of their discretion, but there is no rule of law to that effect.

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In civil cases the Children Act 1989 s96 provides that the child may give unsworn evidence if not understanding the nature of the oath, he understands the duty to tell the truth and has sufficient understanding to justify his evidence being heard: “(1) Subsection (2) applies where a child who is called as a witness in any civil proceedings does not, in the opinion of the court, understand the nature of an oath. (2) The child’s evidence may be heard by the court if, in its opinion (a) he understands that it is his duty to speak the truth and (b) he has sufficient understanding to justify his evidence being heard. ” This test was that laid down in criminal cases, before it was changed by s33 CJA 1988.

The test is therefore in the criminal case of R v Hayes [1977] 1 WLR 238: Bridge LJ “ It is unrealistic not to recognise that, in the present state of society, amongst the adult population the divine sanction of an oath is probably not generally recognised. The important consideration, we think, when a judge has to decide whether a child should properly be sworn, is whether the child has a sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth, which is involved in taking an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct”. Notes: 1 The question of competency is a

matter for the judge, depending on the particular child who is before him. 2
As a general rule, if the child is aged 14 or over, the judge will allow him to be sworn without question. If the child is below the aged of 14, the judge will hold an enquiry as to his competence to take the oath.

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