

## ARTICLE

# A child psychiatrist's expert roles in the criminal court: children as vulnerable witnesses

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## SUMMARY

In this article three main issues are addressed using anecdotal and anonymised illustrations of situations in which the author has been engaged, during 35 years of medico-legal practice, to assist in the process of obtaining and analysing the evidence of children to facilitate decision-making by various authorities and tribunals. Those issues are: the competence of a child to be a witness in the Crown Court; the process by which a child's evidence has been elicited; and the use of an analytical approach to the content (verbal, behavioural and emotional) of a child's evidence as an aid to jurists who have the task of reaching a decision as to the child's reliability, as distinct from their competence.

## LEARNING OBJECTIVES

After reading this article you will be able to:

- understand the difference between witness competence and witness credibility
- understand the unique importance of the expert's roles
- understand the difference between process and content in objective analysis of recorded witness interviews.

## KEYWORDS

Psychiatry and law; children as vulnerable witnesses; witness competence; Crown Court expert; child interview validity and veracity.

In England and Wales, the number of prosecutions in both magistrates' courts and Crown Courts that involved a child as a witness during the year 2013–2014 was almost 15 900 and in 2017–2018 the total had fallen to just over 12 300 (Plotnikoff 2019). In the many cases where the child witness is also the alleged victim, the court has a vital role in protecting the child as far as possible while at the same time allowing for an objective analysis of the child's evidence. The court looks to experts in psychiatry and clinical psychology to advise on issues that are relevant to that process.

I have worked in the field of child and adolescent psychiatry since 1982 and was first instructed as an expert in 1983. Since then, I have been involved in assisting the courts in a variety of ways regarding children or vulnerable adults as potential witnesses and it is these real experiences that have informed the substance of this article. However, in the case illustrations I have only included vignettes where the child witness is giving evidence for the prosecution and is likely to be challenged by the defence.

I will describe the issues that commonly arise in the areas of:

- competence to give testimony
- reliability of testimony
- general approaches to assessing witnesses before a trial, including the points in the process when a 'child expert' may be instructed to assist.

Readers should note that, with the exception of case vignette 1, all the vignettes are composite illustrations that reflect my experience of typical situations that present problems for child witnesses – they do not describe actual cases.

## Issues of competence and reliability

### *Witness competence*

An important issue for expert opinion is the competence of vulnerable witnesses – who may simply be young or are in some specific way limited in terms of their capacity to understand or communicate effectively. Competence should not be confused with reliability or truthfulness; the literature on the reliability of children as witnesses has drawn on the expertise of psychologists, linguists and psychiatrists. Although there are helpful ways to assist with analysis of veracity, the expert's role was never intended to usurp the function of the jury. Therefore, it is not the role of the expert to opine on the veracity of witnesses, as this is an ultimate issue for the jury. As was held in *R v WC* [2012]: 'The truth and reliability of the evidence was a matter for the jury not for the expert'.

However, I have been instructed to report on the process of the investigation, including a child's

video-recorded interview. And on occasion I have been required to inform a jury as to the essential points for consideration of truthfulness – albeit in a general way, but this type of evidence has to be given with considerable care because, as was also held in *R v WC*: ‘Evidence given by experts which tends to convey to the jury the expert’s opinion of the truth or otherwise of the complaint is clearly inadmissible’.

It is difficult but not impossible to give such evidence without the expert revealing their own opinion as to the truthfulness or otherwise of the complaint.

In the law of England and Wales (Youth Justice and Criminal Evidence Act 1999, section 53) there is a simple test to assess the competence of a witness; a test that is not difficult to pass. There is no limitation as to the age of the witness but the two requirements are:

- (a) the witness must be able to understand the question; and
- (b) the witness must be able to give an answer that can be understood.

In *R v B* [2010] the following was held on appeal in respect of the cross-examination of a 4-year-old witness: ‘The witness need not understand every single question or give a readily understood answer to every question. Many competent adults would fail such a competency test’.

In a criminal case, expert opinion may be sought regarding the competence of a child who can give factual evidence of something they have seen or heard or otherwise experienced as an alleged victim/complainant.

### *The ABE guidance*

The UK government began to look at child abuse cases differently after the report into the death of Maria Colwell who, aged 8, was beaten to death by her stepfather in 1973. Increased awareness led the Home Office and Department of Health to develop systems such as the so-called Child Abuse Register. Non-fatal crimes against children that included sexual abuse led to the awareness that the prospect of children giving evidence of their experiences of victimisation could be seriously problematic. The need for extreme care in obtaining the evidence of children led to the publication of the Memorandum of Good Practice in 1992, in light of the massive increase in reporting of sexual crimes against children. This guidance was succeeded by a more formulaic approach, which was supported by specialist training schemes for social workers and police officers – the Achieving Best Evidence or ABE guidance (Smith 2011).

So nowadays, the evidence of children is usually elicited through an interview with a police officer who has been specially trained to work with child witnesses (Smith 2011). The ABE guidance for investigators has been updated twice since the first publication in 1992. Although the practice it promotes is logically constructed to ensure that witnesses are given the best opportunity to make a verbal statement of their experience, the investigator must remain objective and open to questions that will arise in the event of criminal charges ensuing. The impression that is gained through reading the ABE guidance in full may lead some to adopt a rigid and formulaic approach, but it remains open to an investigator to pursue this crucial task in an individualistic way – although any variation in approach will be subject to justification for tailoring the work in keeping with the witness’s special needs.

Interviews will have been recorded so the court has the benefit of seeing the child speak about their experience at a time close to the incident(s) under investigation. An expert may be asked to view the audio-visual recording of such an interview and express an opinion as to the issue of the child’s competence. It is helpful to bear in mind when undertaking this task another important judicial statement from *R v B*:

‘The question in each case is whether the individual witness is competent to give evidence in the particular trial. The question is entirely witness specific. There are no presumptions or preconceptions. The witness need not understand the special importance that the truth should be told in court and the witness need not understand every single question or give a readily understood answer to every question.’

### *Witness reliability*

The issue of reliability of a witness is quite distinct from competence, as will be seen in the discussion of veracity indicators below. A jury might be assisted with general points regarding a witness’s evidence and reliability factors, but it is never for the expert to opine about a specific witness and the truth.

This issue was prominent in a case that was decided eventually by the Judicial Committee of the Privy Council, *Pora v The Queen* [2015]. A forensic psychologist’s evidence was ruled inadmissible on the basis that, in trenchantly asserting that the appellant’s confessions were unreliable, he was supplanting the court’s role as the ultimate decision maker on a matter that was central to the outcome of the case (Rix 2020).

The court observed that the expert:

‘could have expressed an opinion as to how the difficulties that Pora faced might have led him to make false confessions. This would have allowed the fact finder to make its own determination to whether the admissions could be relied upon as a basis for a

finding of guilt, unencumbered by a forthright assertion from the expert that the confessions were unreliable.’

Thus, the issue of reliability is clearly at the heart of a case, especially where vulnerable witnesses may be, or have been, subject to biased influences before a trial. The expert may be required to indicate what effect such influences may have had in respect of reliability, notwithstanding the court’s acceptance of the witness as competent. But the court will not allow an expert to cross the line with a definitive opinion on reliability.

Reliability is a function of a child’s capacity for accuracy and even truthfulness in respect of events seen or heard. Such reliability can be influenced by factors in the child’s capacity for understanding what is required of them in the context in which the question is being asked. Their responses to enquiry may be affected by the degree to which they understand the consequences of what they are saying – or not.

### Special measures

In the early days before charges are brought against an alleged perpetrator, an investigation team may seek the services of an intermediary. A registered intermediary is a professional who has been recruited, trained and engaged by the Ministry of Justice. Under the provisions of the Youth Justice and Criminal Evidence Act 1999, section 16, the involvement of an intermediary is to assist in the task of helping a child witness to articulate their answers to questions and to intervene when the witness is struggling to understand. It is expected that an intermediary will be engaged at any point in the investigation process where a young child (under 11 years of age) is involved.

There are many special measures that may be considered appropriate in the management of eliciting the best evidence from children and vulnerable witnesses in the preparation for a contested trial.

The following case, which is in the public domain (*R v B* [2010]) illustrates that even pre-school children can be enabled to give evidence. In this case, the simple expedient of cross-examination via a video link was used.

#### *Case vignette 1 Evidence from a very young child*

This case study is drawn from my involvement in a case where a young child, known as X, gave evidence at various stages in the criminal investigation of sexual assault, including anal rape of herself by her stepfather B, which he was found (in a contested trial) to have committed when she was under 3 years of age.

Following his conviction, 33-year-old B appealed

both the conviction and his sentence of life imprisonment with a minimum of 20 years before consideration of his parole.

Matters had come to light after X and her two sisters were placed in foster care after the violent death of her brother. When getting dressed, X spontaneously remarked to her foster carer Mrs E that her dad rubbed her ‘fanny’. The conversation was noted and reported to Social Services, who involved a child protection officer, K. In a visit to the foster home, K spoke to X and asked about telling Mrs E about B touching her. There was some confusion and K finally asked whether B had touched her in her genital area – using hand gestures for clarification. X shook her head in response. The police file was closed then, in the absence of any verbal evidence from X.

However, some months later, during a hospital assessment in connection with care proceedings, the question of sexual abuse emerged again; X was just over 3 years old. In the presence of a consultant psychiatrist and her colleague, X made very clear references to experiences of a sexual nature involving her stepfather B, which she said were witnessed by her mother. Following a subsequent examination by a senior paediatrician when X had said that B hurt her, an ABE interview was conducted and recorded by officer K.

During that interview, X reiterated her account of sexual molestation and clearly indicated that, among other things, B had penetrated her anus with his ‘willy’ and that her mother told him to stop – ‘but he didn’t stop’. K asked her, ‘What did he do?’. X replied, ‘Put it back.’ K suggested, ‘In his trousers?’ X said, ‘No, back in here ...’, gesturing with her hand to point to her bottom.

Experts, including me, were engaged to provide an opinion as to X’s competence to act as a witness in a jury trial. The expert instructed by the defence team cited several reasons by way of challenge to the prosecution case – the limited ability of X to understand; her age; her developmental difficulties; the passage of time between her first complaint and the ABE interview; and her exposure to flawed interviews – but with the caveat that she appeared to understand questions that were put to her and to give answers that could be understood. My evidence that X had the capacity ‘to give cogent evidence of her own remembered experience’ was cited in the appeal judgment. The trial judge had found that this very young child was competent and after reviewing the evidence the appellate judges supported his finding.

During cross-examination via a video link, this 4-year-old child was tested at length about her understanding of truth and lies, she was reminded of officer K’s visit to the foster home before her third birthday, when she had indicated by shaking her head that B had not hurt her, and it was put to her that she was telling the truth then, when she had shaken her head. It was then put to her that her older sister had told her to tell lies. She denied that each time she was asked to admit it.

There came a point in the lengthy cross-examination when defence counsel asked her what B had done and she did not answer. I recall that this question was framed and re-framed several times, but X remained silent. The judge was invited to dismiss the child’s evidence as she could not provide an answer that could be understood. The judge disagreed and replied that it was open to the jury to interpret her silence.

**BOX 1 A checklist for assessing the validity of a child witness's evidence****Psychological aspects**

- Are there any cognitive limitations or emotional blocks to communication?
- Are the witness's mood and affective responses consistent with the material?
- Did the witness show a susceptibility to suggestion or seek guidance as to what to say?

**Interview characteristics**

- Was the interview compliant with terms of the guidance for ABE interviews? Was the interviewer faulty in terms of introducing distractions, rapport failure, not establishing a free narrative, failure to use open questions and apt follow-up questions? Were ambiguities resolved and inconsistencies addressed? Were other hypotheses explored?

- Were there any undue influences such as leading questions, suggestions, emotional or time pressure, props or any form of coercion employed by the interviewer?

**Motivational factors**

- Does the relationship of the witness to the accused or does any other factor imply that there might be a motive to give false information? Does the witness try to excuse or minimise the seriousness of the reports of alleged wrongdoing – unlikely to be a factor in false reports.
- Are there questionable elements of the original disclosure of any allegations? Inconsistencies?
- Are there any indications that the witness is under pressure from any other person by way of coaching or coercion?

**Investigative questions**

- Are any aspects of described events unrealistic or contrary to the laws of nature?
- Are there major elements in the statement (not inconsequential or peripheral details) that are inconsistent or contradicted elsewhere by this witness or another?
- Are there major elements in the statement that are contradicted by other objective evidence, including physical or other concrete evidence?
- Is the description of the alleged offence lacking in the normal details and general characteristics of this type of offence? Are there any factors disclosed that are contrary to the current understanding obtained through forensic and other relevant literature?

(Derived from Raskin & Esplin, 1991)

At the Court of Appeal hearing, the judges had the opportunity to review all the evidence. In an important observation the appellate judges found that, 'Despite justified concerns about some aspects of the way in which it was conducted, the ABE interview shows an utterly guileless child, too naïve and innocent for any deficiencies in her evidence to remain undiscovered, speaking in matter-of-fact terms. She was indeed a competent and compelling witness.'

**Expert commentary on the initial ABE interview video**

Police and social workers are specially trained to interview children with the aim of achieving best evidence, with clear written guidance towards achieving this objective (Smith 2011). The development of this practice in England and Wales has been informed by the work of US psychologists, among them Raskin & Esplin (1991), who have contributed research-based practical guidance on the reliability of children's evidence through observation of the interview process and the content of what the witness said and the way that they expressed it.

The work of Raskin & Esplin has led to the identification of two separate processes:

- (a) the issue of the validity of the interview, which considers interviewer performance and the professional's conduct of the interview process, as well as the perceived effect that interviewer style has on the witness; and
- (b) the verbal, behavioural and emotional content of the witness's account of the alleged events under investigation.

To assess the likely weight of a child's evidence, an expert may be asked by the investigating or prosecuting team to give an opinion about the recorded interviews before a suspect is charged. The two aspects outlined above can be objectively assessed using the instruments that Raskin & Esplin have developed: a validity checklist, which is set out in brief form in Box 1 (readers are advised to refer to the published source material), and criterion-based content analysis (Box 2), which addresses a set of essential considerations about the child's presentation for the assessor to consider before forming a reliable opinion. In practice, the expert will be contacted by the investigating police team at an early stage in the process, to request assistance with issues of the child's competence or the reliability of the investigation. Once instructed, the expert will be provided with relevant documentation that details the process of investigation to date, including any evidential material (which may inform the decision to prosecute an alleged perpetrator) and any audio-video recordings of the interviews of the witnesses.

Analysis of the material provided, including for example discussions with third parties such as a foster parent or social worker, may enable the expert to give an opinion regarding the competence of the witness and matters relevant to an assessment of the reliability of the child at the time of the investigative ABE interview.

**Approaches to assessment*****Pre-trial assessment of competence***

Experts may be instructed to provide an opinion as to a child's status in terms of competence to give

## BOX 2 Indicators for assessing the veracity of a child witness's evidence

- Is there a logical structure to the account? Is the statement coherent as a whole? Do the separate elements fit together even though there may be unusual or unexpected elements?
- The report in normal speech would be likely to be a bit disorganised, with normal digressions or shifts of focus while the witness is processing what they have to say. The account should be logically consistent but not mechanically formulaic.
- Details of specific elements should be present in the statement – such as place, time of day, persons near or present, specific objects and events that are related, such as special occasions.
- The account should be contextually embedded and may be connected to other routine events – bedtime, after school, etc.
- Does the statement include reports of interactions, conversation and reactions composed of at least three elements (an element can be a person or an action that relates to the allegation) involving the accused and the witness and any third parties who may or may not be involved in the alleged event? For example, 'Keep quiet or they will hear us!', 'Don't hurt me, I don't like it', 'You mustn't tell anyone', 'It's because I love you'.
- Is the reported speech presented in its original form of words? Unusual or unfamiliar terms or quotes are especially strong indicators of veracity, e.g. 'He told me to shut up or else' versus 'He said, "Just shut up you bitch!"'
- Was there an unplanned interruption or an unexpected complication or difficulty during the alleged incident? For example, 'I was sick over his shoes' or 'He got blood on his tee shirt so he hit me again'.
- Are there details of persons, objects or events that are unusual, yet meaningful in the context and highly unlikely to have been acquired by this witness independent of the alleged event? Such details must be realistic though.
- Are there superfluous or peripheral details included in the free narrative in connection with the alleged events that are not essential and do not contribute directly to the specific allegations?
- Did the witness describe an object or event but interpret it incorrectly because they do not have the means to understand the implication?
- Is there any reference to an event or conversation that is related in some way to the incident but is not part of the alleged offence?
- Does the witness describe feelings or thoughts that they experienced during or immediately after the alleged event? Such a report should arise in an open discussion rather than as a response to a direct question: 'How did that make you feel', not 'That must have hurt you, didn't it?'
- Is there any reference to the accused's feelings or thoughts during or immediately after the incident? These may be observations, interpretations or reports of speech, e.g. 'He was angry that I cried and he slammed the door'.
- Were there spontaneous corrections or additions to material previously provided in the statement? Did the witness spontaneously indicate lack of memory or knowledge of any aspect of the incident?

(Derived from Raskin & Esplin, 1991)

evidence in a forthcoming contested trial. The assessor may be given the data and recordings from the investigation, but this is only intended to provide the context behind the request.

It is important that the expert does not trespass into the details of the complaint or risk the appearance of coaching a witness before the trial. However, it is not unusual for there to have been a considerable lapse of time before a trial can be arranged – hence the need for an up-to-date assessment that tests the child's competence to understand questions and to give answers that can be understood.

To avoid the costs of time and travel, I developed an approach that mimics the court process without touching on the complaint directly. By using video-conferencing technology, it is easy, practical and effective for an expert to assess a child via video link, which has become more familiar as a way of maintaining contact with relatives during the COVID-19 pandemic. The child would be supported at their end by a parent and a police officer. The expert would initially describe the process to the adults out of the earshot of the child, and also determine, as far as possible, how the child is faring in the circumstances.

A discussion with the police officer would enlighten the assessor as to the child's expectations regarding the imminent assessment, as well as their understanding about the court plans for a

trial. It will be for the police officer to introduce the process to the child, which will be informed by the child's age, understanding and current emotional state. The assessor would introduce the idea of the child's capacity to remember things and their ability to talk about those things via the screen with a person they have never seen before. Because there will be no questions related to the allegations, the child can be reassured that what is to happen is like a memory game of questions and answers.

Questions would have been devised in advance with the help of the child's parent or supporter to elicit their competence in general and to observe how they respond to questions about recent events as well as memorable historic events such as a birthday or Christmas. As well as testing the child's competence in answering contemporary questions, their accuracy, or otherwise, may also lend a view as to their potential reliability. The interaction can be recorded for the benefit of all the parties.

### *Evaluating a child's evidence*

Many authors have described the problems in determining the truth within children's statements and their reliability in remembering accurately (e.g. Yuille 1993; Bull 1995; Saywitz 1995; Baker-Ward 2002; Ceci 2009). The determination of credibility or veracity is a matter for the jury in a contested trial and they have the duty to reach a

conclusion taking into account the submissions of both sides, with the burden of proof being 'beyond reasonable doubt'.

However, on several occasions I have been permitted to provide juries with an analysis of a child's statement as observed in the recordings of the ABE interviews. In cases where the psychiatrist does not give oral evidence before a jury, the pointers that are set out in the expert's report can then be incorporated into prosecuting and defending counsel's submissions.

Such guidance may also assist judges when directing a jury and may help jury members to consider the child's evidence in an informed way.

### The validity tests

In preparing to apply the validity tests, the expert should become familiar with all the relevant data that has arisen from the investigation. They should assess it with reference to the four areas listed in [Box 1](#), which fall into two groups: psychological aspects and interview characteristics, and motivational factors and investigative questions.

#### *Psychological aspects and interview characteristics*

As they view the video recording, they will begin to note the emotional presentation of the child and whether this is causing a difficulty in speaking. There may be cognitive difficulties and the extent to which these are interfering with the child's free narrative account will be noted. As well as a police officer, an intermediary may be present in the interview room, who may be effective in enabling the child to engage in the interview process. However, this should not bring pressure to bear on the child to comply with fixed expectations.

The expert will note whether the child's affect is consistent with the content of the discussion – in particular anxiety, embarrassment/awkwardness, aggressive resistance (e.g. 'I've already told you what he did!') and emotional freezing, which may signify a dissociative reaction linked to a flashback experience.

It will be important to note too whether the interviewee seeks guidance as to what they should say. If the child introduces their account by saying, for instance, 'Mum told me to say...', it should be noted how the interviewer enables appropriate separation by inviting the child to use their own memory of what happened.

The interviewer's competence at managing the meeting with the child will be addressed by their general demeanour and their ability to enable without influencing the child. It is vital that the child has the space to say what needs to be said without the officer commenting in judgemental

terms what they think of what the child has said or indeed by supposing how the child 'must have felt...'. Such comments may distract the child from the task of telling their version of events.

Follow-up questions for clarification or to encourage fuller details should be open questions that do not indicate an expected or preferred response. Ambiguities should be resolved as they arise, as once the moment has passed it is usually too difficult to recover the opportunity and the evidential trail may then be affected by a lingering doubt.

#### *Motivational factors and investigative questions*

Expert review will identify whether there has been any undue pressure or coercion. While taking any allegations seriously, the expert or the investigating team will also need to consider whether there are any factors that might suggest that there is a motive for false or exaggerated reporting. However, where the interviewee tries to downplay their account or expresses concern for the accused, the possibility of false reporting is less likely. It will be important to ascertain whether the child is being influenced or coached by a third person.

The investigation should be able to determine whether the events that are described seem unrealistic or even obviously against the laws of nature. Significant inconsistencies and contradictions will need to be considered, including objective physical evidence that refutes the allegations and therefore the likelihood of a genuine report. However, when drugs that may distort perceptions are involved, this needs to be considered before dismissing unusual oral evidence as unreal.

The following fictitious case vignette is intended to illustrate aspects of working with partial disclosures of abuse where a child has been groomed to feel responsible for the welfare of a perpetrator.

#### *Case vignette 2 – A covert and partial disclosure of incestuous child abuse*

A teacher became concerned about a 9-year-old child, Jenny. An outgoing and confident child, she had changed suddenly to become quiet, distracted and seemingly unable to engage in lessons or with the other children in playtime. She seemed tired and pale and withdrawn. She was noted to be preoccupied with the contents of her desk.

Looking through Jenny's desk while the children were at lunch break, the teacher found a home-made diary. It was assumed that the diary was Jenny's own work. On some pages Jenny had drawn pictures resembling male genitals in an aroused state and had written words that were sexual in nature and badly spelled – Jenny was an excellent speller as a rule. The teacher photocopied the pages and replaced the book in Jenny's desk.

The teacher brought her concerns to the designated child protection teacher, who initiated the routine child protection procedures. Jenny's mother was

asked to come to the school as a matter of urgency, where she met the duty social worker and the designated teacher, who explained their concerns and showed her the written material.

Jenny's mother denied all knowledge but she confirmed that Jenny had been sullen, quiet and nervous at home. She was sleeping poorly and had been found hiding in a kitchen cupboard late at night. Jenny was brought to the meeting room and her mother explained what it was all about. Jenny was silent for a few seconds before she denied any knowledge of the diary: 'It must be someone else's'. She clammed up and refused to speak or respond to any approach.

A joint police and social work investigation included a search of her bedroom, where more sheets of paper with sexual words and drawings were found hidden under her bed. An ABE interview was arranged and Jenny came with her mother. She denied knowing about the writings found in her bedroom: 'They must be someone else's'. She refused to speak and her face remained blank; her gaze was fixed. The interview was terminated and I was contacted to consult to the child protection team.

After discussion with the mother, who was a single parent with three children older than Jenny, the question was raised as to Jenny's safety at home or in the immediate environment and she was moved to stay with her maternal aunt. All four children would stay over at weekends at their father's small flat, taking turns one at a time. This had been the pattern since Jenny was 5 years old, when her parents split up. Jenny's contact with her dad was suspended during the investigation.

She continued to attend school and other children would report that Jenny was crying in the toilets. Jenny's teacher reminded her that she could come and talk about her worries any time and she gave her a code word to use when she wanted to talk.

A further ABE interview was arranged and I helped to plan the process but remained behind the glass of a two-way mirror. Jenny's aunt attended with her and remained in the room, facilitating the process of building rapport. It was stated that the meeting was needed to help Jenny to help the others in Jenny's family to keep her safe. The writings and drawings had been found and they seemed to be a way for Jenny to get help. She was asked who in her family – brothers, sister, mum, dad – would be able to make the best guess as to what was going on. She began crying, and she asked whether her dad had been told anything. Was that a problem for her? Still crying she said she had promised her dad to keep a secret and he would kill himself if she told – and that would be her fault. So, she couldn't say anything. Her father was arrested and he denied any wrongdoing and he 'knew nothing about any secrets'.

Having been a consultant to the investigation team, I prepared a report dealing with Jenny's competence as a witness, her mental health risks if she were to be called to give evidence and her reliability.

During the 15 months awaiting trial, a senior social worker spoke to Jenny and explained that, although she hadn't broken her promise, it would be really important to talk about her worries about anyone, even her dad, and that if people knew for sure about who had done what, then they could be helped and looked after, because nobody needed to die. Jenny tearfully agreed to make a full statement in another interview.

I studied the recording of this last interview to deal with the defendant's complaint regarding undue influence on the part of the social worker. Given the evidence from Jenny's writings and her concern for her father's life, coupled with her determined refusal to articulate what had already been implied, it was argued that the child could not recover her well-being without such an intervention.

The clarity of her account of the sexual abuse by her father during her monthly visits to his flat was effective in confronting him and enabling him to admit to the offences that he had committed progressively over a 1-year period. Jenny was spared the ordeal of being cross-examined and feeling responsible for her father.

### Criterion-based content analysis and veracity indicators

In using this format to analyse the verbal statements of adults, the forensic psychologist would tally up the number of positive indicators to see whether they meet the threshold mark. This is not a practicable approach with children and adults with significant cognitive limitations. However, even with quite young children, the veracity indicators in Box 2 can be applied so as to identify relevant features of their evidence which can usefully be drawn to the jury's attention.

The following case vignette represents my experience in a number of situations in which I have been asked to assess a child's competence and to give general notes on indicators of veracity, and it should be understood as an illustration rather than a particular case.

### Case vignette 3 A child in care

A 10-year-old boy from a Nigerian family based in the UK, Joseph had been in foster care for 3 years. He had infrequent contact with his mother, who was serving a prison sentence related to illegal drug supply. His older sisters were placed with a maternal aunt and he enjoyed his visits to them and frequently asked if he could live with them – but they were lacking sufficient space to take him in. He was unhappy in his foster home and complained to everyone – teachers, aunt, mum, social worker – that the older children in the family bullied him with racist names. This was always denied by his carers, who were Ugandan Asians, and the assumption that the placement was a good cultural fit lent support to the carers' assertions that he was lying.

On his return to school after the Easter break, he approached his class teacher and tearfully told her that he had been made to do bad things in the foster home. He gave no details to the teacher. The child protection team set up an ABE interview after speaking to the foster parents, who denied all knowledge and suggested that this was just another tactic by Joseph to get a move to his aunt's home.

Joseph was very anxious about giving his account of 'the bad things' because he was afraid of how he would be treated when he went home to the foster family. A new placement was arranged as an emergency with a White British family. Duly reassured,

Joseph told the child protection officer about being forced to perform sexual acts by two teenage boys who were the sons of the foster carers. These acts amounted to torture as he described them.

He said that he screamed for help, but his foster dad called out to him to make less noise and never came near to find out why he was screaming. In great distress he gave details of the things he was made to endure. He thought they had filmed him and said they would put the pictures on the internet. He said they told him he was being punished for calling them bullies.

Medical examination revealed bruising that was consistent with his account of being tied and strangled. The doctor also noted some cuts on his forearms, which he admitted that he had done to himself.

The teenage boys were arrested and duly charged. The male foster carer was also charged with neglect of his duty of care.

I was asked to consider the evidence arising from the investigation, including the ABE interview, and express an opinion as to Joseph's competence as a witness and his emotional vulnerability in the context of a trial where he would be subjected to cross-examination. I was also asked to give general notes for a potential jury on indicators of veracity. Joseph was certainly competent, and the analysis of the evidential material did not reveal any flaws in the investigative processes. All the accused denied the charges.

In the event, Joseph was cross-examined by video link. He was accused of making up lies and deliberately bruising himself to persuade the social workers to move him to join his sisters. He broke down under this pressure.

The accused teenagers did not go into the witness box, but their father did. He was very persuasive and in his defence he relied on his long-standing reputation as a foster carer with many positive references in support.

The jury found all the accused not guilty.

The impact of those verdicts on Joseph was profound in respect of his mental health (especially self-harming) and he required a great deal of support until his mother's release from prison – which allowed him to live with her again.

## The witness perspective

Research (Plotnikoff 2004, 2009, 2019; Crawford 2006; Hayes 2011) has shown that witness fears include fear of emotional breakdown during cross-examination as well as being in the presence of the accused. Some children fear that it is they who are on trial and they hold an imaginary fear that if they are not believed they will be sent to prison themselves.

After the child has given evidence, the emotional sequelae may include feelings of guilt and failure, especially if they stumbled or were made to feel disbelieved during cross-examination. Some of the challenging questions and submissions that are presented on behalf of the defendant may leave the witness with a strong feeling of angry resentment which cannot be resolved in the aftermath.

Children of all ages will fare better in the longer term if they have maternal support available to

help them cope with the distress after the trial has concluded. Clearly this cannot occur if the mother is a defendant or dead or not emotionally available.

The next case vignette is an illustration of disclosure, the capture of evidence and case management in such a situation and contains elements of several cases from my experience.

### *Case vignette 4 A child with severe learning difficulties*

A 13-year-old girl, Suzy, with severe cognitive impairment (IQ in the low 50s) ran away from home to her aunt's home nearby. She was in a very distressed state and she was without underwear. She showed her aunt where her dad had beaten her back and where he had hurt her genital area and anus. Her language was poorly developed; she struggled to convey her meaning verbally.

Her aunt called the police. Several days passed before a child protection investigation got under way. Suzy's teacher from her special school was prepared to support Suzy during an ABE interview. During the interview in an unfamiliar place, even with her teacher's support, Suzy struggled to speak at all.

Suzy had been medically examined promptly, before this interview, to ascertain whether there was any DNA present, and the forensic examiner reported that Suzy had scarring on her back and buttocks and anal scarring consistent with previous anal abuse. The examination had disturbed Suzy, who became overwhelmed with panic. Tests did not find any DNA evidence.

Notwithstanding the challenge that such an interview would create, the interviewing officer, social worker and teacher spent time establishing rapport by engaging Suzy in simple discussion about ordinary things – what were her favourite things, the names of her friends in class, etc. They established the words for different parts of the body using an illustrated educational cartoon book that was neutral in tone and did not reference any form of abuse. The injuries that had been found on her body indicated that some pattern of physical abuse, including anal abuse, had a significant history, but they decided to focus on the most recent events that had caused her to run away.

This was concentrated work which had a slow pace and at times Suzy would freeze as if she were re-experiencing her pain. The temptation to lead her was avoided and using the newly found words, Suzy was able to convey what her father had done to her. She was asked to recall any words her dad said to her. She remembered the words but did not know their meaning. She was asked whether her mother knew about it. She said dad would lock the door to keep mum out. She added that he told her to stay quiet, to make no noise.

I was instructed to review the evidence and provide an opinion as to Suzy's competence as a witness. Because of the use of visual material to enable Suzy to make her statement during the ABE interview, I was asked to comment on whether this had compromised the validity of the interview. The lawyer from the Crown Prosecution Service (CPS) anticipated difficulties in proceeding to trial and doubted whether Suzy would cope emotionally with cross-examination as a witness to fact.

I prepared a detailed report to substantiate his opinions in relation to witness competence and process validity and added guidance notes to give indicators



of veracity, which might assist the jury in the event of a contested trial.

Suzy's father denied the charges. He did not go into the witness box and he relied on Suzy failing to convince the jury.

The judge ruled on the special measures to be implemented – which included a video link, the use of an intermediary during cross-examination, the removal of wigs, agreed timings to give Suzy sufficient breaks in case of her distress, and cross-examination questions prepared in conjunction with the intermediary in advance, for approval by the judge. (It should be noted that the role of the intermediary is to facilitate the witness responses but intermediaries are independent of both sides and do not act to support or reinforce the witness's case.)

In the event, the jury found the defendant guilty on all the charges against him and he was sentenced to 13-year imprisonment. My report was also provided to the family court to assist with care proceedings.

The successful outcome of cases involving children with special vulnerabilities, be they physical, sensory or cognitive/emotional, demands that special measures are considered as essential from the outset. An expert in the type of disability should be consulted as a matter of course, to advise from the outset how the case can be best managed objectively and what supports the witness will need throughout the process. In my experience, it is simply wrong to dismiss the prospect of an investigation or even a prosecution because of the intrinsic difficulties that may arise.

Similarly, careful thought needs to be given to the management of such a witness in a contested trial, especially during the challenge of cross-examination, when the judge needs to take some control regarding the approach that is to be used.

The final case vignette is intended to be an illustration of situations when a young child might be put forward as a witness of fact to support a presumption of guilt or innocence by the CPS or the defence team. It is based on an actual case that has been modified with elements drawn from other similar cases.

#### *Case vignette 5 A baby died at home*

A single mother of two young children – a 4-year-old girl and a 6-month-old boy – called 999 to get help for the baby, who had 'stopped breathing'. The mother was the only adult at home – her first language was Somali. Her husband had been killed over a year ago when they were refugees fleeing the fighting. Her English was poor. The ambulance team arrived promptly but their attempts at resuscitation were unsuccessful.

At post-mortem, the findings in the baby's brain suggested injury caused by extreme shaking. When questioned with an interpreter, the mother said they had all been watching children's TV on the settee and the baby got up and fell onto a rug on the floor – hitting his head. The only other witness was the little girl.

The mother denied shaking her baby and would only say that the baby got up and fell on the floor. She was distraught and the interview was frequently interrupted by the interpreter, who was partisan to the mother.

The little girl, who was present when the incident took place, was interviewed 2 months later and I was asked to review the video recording. Her English was adequate and she seemed to understand what the police officer was saying. She was fidgety and easily distracted. She did not know where the ambulanceman and the lady had taken the baby. She did not seem to know the baby was dead. She remembered them arriving and she saw them on the floor with the baby – 'kissing him and pushing his tummy'. She said that mummy said the baby got up and fell. She said the baby was crying before he fell on the floor. She did not see him fall.

The interview was conducted well and the interviewer resisted the temptation to ask leading questions. When asked 'What did mummy do?', the girl said, 'Mummy was shouting on the phone that the baby fell down – come quick!' She was asked 'What did the baby do?' – she replied, 'He was crying too much. He was a naughty baby – mummy said ...'.

Because the mother's account was not supported by the forensic findings in the baby and the evidence pointed to a shaking injury, the mother was charged and brought to trial. She pleaded not guilty. The explanation she gave was unlikely to be true as the baby was only 6 months old and therefore unlikely to have 'got up' of his own volition.

I had formed an opinion that the little girl was a competent witness and that at interview she was able to recall elements of the situation leading to and after the baby's death that could be helpful in determining what had occurred.

Before the jury was shown the child's evidence, the court heard the evidence of the Crown's expert pathologist, who was less certain, when challenged, of the significance of the post-mortem findings and the trial went no further. The doubt that his new evidence created was reason for the judge to direct the jury to acquit.

In cases such as those outlined in the vignettes above, reference to the validity and veracity checklists would enable the development of opinions based on an organised approach rather than random commentary. The logical and objective aspects of this framework create a unique space where all the relevant elements can be addressed and duly weighted. The practice of following a disciplined review will establish greater confidence in the expert in the role of witness in any court.

## **Conclusions**

Every jury is different and in cases where children are involved as witnesses or complainants, there are complexities that require jurors to become 'experts' in the matter at hand. The professional experts can assist on a case-by-case basis to provide relevant information, without leading the jury, in a way that no one else in the case can. It is not the role of the judge or counsel to 'train' a jury, but there have been occasions where a judge has

given license to professional experts to impart relevant knowledge during examination in chief.

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## Declaration of interest

None.

ICMJE forms are in the supplementary material, available online at <https://doi.org/10.1192/bja.2020.84>.

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## Cases

- Pora v The Queen* [2015] UKPC 9.
- R v B* [2010] EWCA Crim 4.
- R v WC* [2012] EWCA Crim 1478.

### MCQ answers

1 c 2 d 3 b 4 d 5 c

### MCQs

Select the single best option for each question stem

#### 1 A psychiatric expert can:

- tell a jury in a criminal trial that a witness is being truthful
- advise the judge about sentencing an offender
- give an opinion about a witness's competence to give evidence
- also act as a treating doctor for the child witness
- question a child witness about the allegation when testing for competence.

#### 2 A witness can be said to be competent if:

- they are over 10 years old
- they can show that they know what truth means
- they have an average IQ or above
- they can understand the question
- they know how to tell the time.

#### 3 Before a trial takes place, an expert witness may be asked to:

- test a child witness's recall of the crime
- advise on any special measures that would benefit a vulnerable witness
- have a private conversation with the judge
- hold a joint meeting with a defence expert and produce an agreed statement
- meet with prosecuting and defence counsel to rehearse the evidence that will be given to the jury.

#### 4 During a trial, an expert witness may:

- be invited to give guidance on aspects of veracity
- be asked to comment on the defendant's demeanour
- request an adjournment
- interrupt the cross-examination of a child witness
- refuse to answer a question during cross-examination.

#### 5 When an intermediary is involved:

- they can instruct a vulnerable witness how to answer a question
- they can only help with children under the age of 11
- they are usually registered by the Ministry of Justice
- they can direct counsel on both sides how to phrase their questions
- they can appeal to the Judge if they think someone is being mean to the witness.