Still Waiting for a Meeting of Minds: Child Witnesses in the Criminal and Family Justice Systems

By

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Still Waiting for a Meeting of Minds: Child Witnesses in the Criminal and Family Justice Systems

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The approach of the courts to children as witnesses has changed dramatically in the last 25 years. In particular the advent of special measures has seen the criminal courts make significant procedural adaptations so as to facilitate the giving of evidence by children, even the very young. The authors describe developments in the law and practice in the criminal courts in relation to child witnesses then compare and contrast the family justice system’s approach to child witnesses. The authors argue that, notwithstanding the Supreme Court judgment in Re W there is still no “meeting of minds” about how to handle the evidence of child witnesses. In the absence of a statutory regime for special measures in the family courts, family judges can and should rely on their inherent jurisdiction to order special measures for child witnesses, including intermediaries, where necessary. In addition, it is clearly time for both criminal and family lawyers to agree best practice for advocates who handle child witnesses.

Introduction

The approach of the law to children giving direct evidence in court has altered significantly in recent years. Criminal courts are highly likely to hear direct evidence from the child who is the victim of an alleged offence. Special measures legislation has enabled the court to hear that evidence in a way that causes less stress for the child witness, but nonetheless allows that evidence to be tested through cross-examination. Evidence may be given by a child of any age and in B the oral evidence of a four-year-old, concerning events when she was just two, was of central importance. The position with regard to children giving oral evidence is not the same in the family courts.

It is rare for courts dealing with care proceedings to hear direct evidence from the child or children concerned and, until the 2010 decision in Re W, the family courts operated a presumption against the child giving evidence. This presumption was founded on the belief that such involvement in the court proceedings was likely to have a detrimental effect on the child’s welfare.

There are many differences between the civil and criminal courts, rules and practice relating to evidence being just one. The difference in approach to children giving evidence is however particularly perplexing given that the very same circumstances which give rise to care proceedings (when a local authority could seek to remove the child permanently from the parents’ care) may also demand prosecution of the perpetrator of abuse in the criminal courts. An obvious example would be where physical abuse inflicted on a child is prima facie evidence of “significant harm” under s.31 of the Children Act 1989 and also of an assault occasioning actual bodily harm under s.47 of the Offences against the Person Act 1861.

The Court of Appeal in Re W unanimously agreed that the practice with regard to calling children to give oral evidence in care proceedings should be reviewed. Two-and-a-half-months later the Supreme Court, when considering Re W, unanimously determined that there should no longer be a presumption in family cases that a child should not give oral evidence. However, the Supreme Court judgment leaves it open to the family courts to determine, on a case by case basis, the instances in which it would be appropriate for a child to give evidence and what practical steps should be put in place to accommodate this. If Re W does signal a move towards a closer synergy in the approaches of the criminal and family courts, (and not all practitioners will welcome this as a positive development), then we argue that it will be necessary for the family court to learn from criminal practice and, in the absence of a statutory scheme of special measures, use their inherent jurisdiction to order special measures.

This article first considers the background to and the introduction of the scheme for special measures introduced by the Youth Justice and Criminal Evidence Act 1999 with a focus on the newest and possibly least well understood special measure, the “intermediary”. The article then considers the arguments in the case of Re W and the potential impact of an extension of special measures, including intermediaries, into family law cases.

**Special measures legislation and child witnesses in criminal cases**

Twenty-five-years-ago the criminal courts approach to children giving evidence was almost unrecognisable compared to today; “a number of features of the rules of criminal evidence conspired to ensure that child witnesses went unheard, or if they were heard, were disbelieved”. However, case law and legislation have “made important adjustments to the ‘adversarial package’” such that now, in place of the child’s live examination in chief, the court watches the tape of the child’s earlier

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5 J.R. Spencer, “Child witnesses and cross-examination at trial: must it continue?” (2011) Arch. Rev. 7
video-recorded interview. The child is then cross-examined over a TV link and so does not have to appear in the actual courtroom. Adaptations for children and other vulnerable witnesses have been put on a firm statutory footing in the criminal courts.

A statutory scheme of “special measures” was introduced by the Youth Justice and Criminal Evidence Act 1999 (the Act) and it created a sea change in the criminal courts approach to children and other vulnerable witnesses. The Act was introduced in the House of Commons in April 1999. The then Home Secretary, Jack Straw, spoke of its aims:

“[T]he function of the criminal justice system must be wider than merely dispensing justice. We must re-establish the system so that proper dignity and respect are given to the victim and to the community, both of whom are directly and indirectly victimised by crime. The victim must have a proper role to play in the system”.

Amongst other matters, the Act sets out a regime of special measures for vulnerable or intimidated witnesses (as defined in ss.16 or 17 of the Act) to enable them to give their best evidence and in some instances to be heard in court at all. Section 16 defines “vulnerable witnesses” as those who are broadly either vulnerable on account of their age (child witnesses) or by virtue of mental disorder or physical disability.

This regime of special measures incorporates screening the witness from the accused (s.23), evidence by live link (s.24), evidence given in private (s.25), removal of wigs and gowns (s.26), video recorded evidence in chief (s.27), video recorded cross-examination or re-examination pre-trial (s.28), examination through an intermediary (s.29 and discussed in detail below) and use of communication aids (s.30).

The use of a special measure for a witness requires the approval of the court through a “special measures direction” from the judge either on an application by the party who is calling the witness or on the court’s own initiative (s.19). The court is obliged to decide first whether any available special measure or combination of them would be likely to improve the quality of the evidence given by the witness. If it decides that quality would be improved, it identifies the special measure(s) and then makes an appropriate direction.

Section 28, (video recorded cross-examination or re-examination pre-trial), sometimes referred to as “full Pigot” has never been implemented. However, probably as a result of sustained and persuasive academic argument, it now seems

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7 “Pigot” is a reference to the Report of the Advisory Group on Video Evidence (Home Office, 1989). The Chairman was H.H. Judge Thomas Pigot Q.C. and the report became known as the Pigot report. It considered the effects upon children of giving evidence in criminal cases.

8 See for instance J. Spencer, “Children’s Evidence: the Barker Case, and the Case for Pigot” (2010) Arch. News 3, 5–8. Professor Spencer also spoke at the Nuffield Foundation seminar, held on June 10, 2010: “Questioning young witnesses and incorporating good practice into advocacy training”. Professor Spencer and Professor Michael Lamb organised and hosted (with sponsorship from the Nuffield Foundation, the Metropolitan Police, the Cambridge Centre for European Legal Studies and the the John Hall Fund of the Cambridge Law Faculty) a one day conference held on April 14, 2011: “Children’s Evidence in Legal Proceedings”: Attendees included senior judges, legal practitioners, police officers, psychologists, psychiatrists, intermediaries, witness supporters, representatives of the Ministry of Justice, academics and researchers.
that the once strong objections of some criminal barristers have subsided (and in some cases turned into moderate enthusiasm) and the Ministry of Justice may soon pilot the introduction of s.28.

Amendments designed to further improve the impact of special measures provisions are contained in the Coroners and Justice Act 2009. They:

“[R]aise the upper age limit of child witnesses automatically eligible for special measures from those under 17 to include those under 18; provide child witnesses with more choice and flexibility about how they give their evidence; make specific provision for the presence of a supporter to the witness in the live link room; extend the automatic eligibility for special measures to witnesses in certain gun and knife crimes; relax the restrictions on a witness giving additional evidence in chief after the witness’s video-recorded statement has been admitted as evidence in chief; make special provision for the admissibility of video-recorded evidence in chief of adult complainants in sexual offence cases in the Crown Court”.

Section 104 of the Coroners and Justice Act 2009 will allow for certain vulnerable defendants to give evidence with the assistance of an intermediary. However, unlike the amendments described above, its implementation has been deferred by Ministers such that, at the time of writing, no date has been set for its introduction. Vulnerable defendants’ legal advisors can, at present, rely only on the court’s inherent jurisdiction to ensure a fair trial when arguing for special measures.

Few would argue against the use of measures to support vulnerable and intimidated witnesses to give evidence but actual practice has varied across the country and is not without criticism. The government responded to some areas of concern in a consultation paper in 2007 and the shortcomings of this review have also been noted. One particular criticism is that the practice of using special measures does not adequately take account of the child’s wishes and views about

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10 See R. (on the application of C) v Sevenoaks Youth Court [2009] EWHC 3088 (Admin); [2010] 1 All E.R. 73, where it was held that since the special measures legislation did not cover defendants, the court could use its inherent jurisdiction to ensure a fair trial to make a direction for the defendant’s communication to be assisted by an intermediary. See also the endorsement of the use of intermediaries in Walls [2011] EWCA Crim 443; [2011] 2 Cr. App. R. 6, Thomas L.J.:

“(ii) There are available to those with learning disabilities in this age, facilities that can assist. Consideration can now be given to the use of an intermediary under the court’s inherent powers as described in the Sevenoaks case, pending the bringing into force of s.33BA (3) and (4) of the Youth and Criminal Evidence Act 1999 (added by the Coroners and Justice Act 2009). Plainly consideration should be given to the use of these powers or other ways in which the characteristics of a defendant evident from a psychological or psychiatric report can be accommodated with the trial process so that his limitations can be understood by the jury, before a court takes the very significant step of embarking on a trial of fitness to plead” [37(ii)].

Note, this statement could suggest that the court has confused the intermediary’s role as a communication facilitator with that of an expert witness, which the intermediary is not.


12 Office for Criminal Justice Reform, “Improving the Criminal Trial Process for Young Witnesses: A Consultation Paper”.

their use. Hall (2009) also found that the experience of giving evidence via video link from cell like rooms distanced from the courtroom may not be the best way to present their evidence.

Whilst some criticism of emerging developments in practice is inevitable, and the experience of being cross-examined in particular can still be unpleasant for the child witness, it appears that the introduction of special measures has had some success in its objective of facilitating better evidence from vulnerable and intimidated witnesses. A particular strength of the scheme appears to be the role of intermediaries, as one of those special measures, and the aspect upon which we concentrate.

“Intermediaries” under the Act and the advent of “Registered Intermediaries”

Section 29 of the Act allows for examination of witness through an intermediary:

“(1) A special measures direction may provide for any examination of the witness (however and wherever conducted) to be conducted through an interpreter or other person approved by the court for the purposes of this section (“an intermediary”).

(2) The function of an intermediary is to communicate—

(a) to the witness, questions put to the witness, and

(b) to any person asking such questions, the answers given by the witness in reply to them,

and to explain such questions or answers so far as necessary to enable them to be understood by the witness or person in question”.

This section of the Act was implemented through the introduction of the Witness Intermediary Scheme (WIS) through which Ministry of Justice Registered Intermediaries (RIs) now operate. RIs are communication specialists recruited, selected and accredited by the Ministry of Justice and whose services are paid for directly by the police force or CPS area which engages them based on agreed rates of remuneration. RIs should not be confused with a non-registered intermediary who could be someone operating outside the WIS. Non-registered intermediaries can be used in criminal cases but they would be appointed outside the WIS scheme.

Between February 2004 and June 2005, the government initiated six RI pathfinder projects (West Midlands, Thames Valley, South Wales, Norfolk and Devon) which were the subject of a two-year evaluation. Key findings included:


15 Nor should RIs be confused with the term “intermediary” when used to describe a professional assisting witnesses in other jurisdictions. In England and Wales the RI facilitates complete, accurate and coherent witness communication by advising the police interviewer, judge and lawyers how best to communicate with the witness. For instance, the RI will step in if she feels that there is miscommunication and advise how to reframe a question. She is an advisor. Contrast the “intermediary” in other jurisdictions who may take over the questioning and act in place of the judge or lawyer for example. For an excellent overview, see E. Henderson, “Children’s Evidence In Other Jurisdictions” [2011], a paper presented at the 2011 international conference at Cambridge University, “Children’s Evidence in Legal Proceedings” (see fn.8).

“Almost all those who encountered the work of intermediaries in pathfinder cases expressed a positive opinion of their experience and provided specific examples of their contributions. There were a number of reported emerging benefits, including the potential to: assist in bringing offenders to justice; increase access to justice; contribute to cost savings; assist in identifying witness needs; and inform appropriate interviewing and questioning techniques.”

Following the report the scheme was rolled out across all 43 police forces in England and Wales.

At March 2011 there were 112 actively practising RIs. Prospective RIs are recruited and selected for training by the Ministry of Justice (MoJ) based on their existing expertise in communication (most but not all are qualified speech and language therapists). All RIs then undergo a Masters level professional development training course at The City Law School, City University London and must pass the assessment in order to become accredited by the MoJ. RIs are then engaged by police forces through the WIS run by the National Policing Improvement Agency. Intermediary practice is set out in the Registered Intermediary Procedural Guidance Manual (MoJ, 2011), now in its third edition.

Recent statistics from the MoJ show that intermediaries are oft-used in the criminal courts. There have been approximately 5,000 requests for an intermediary appointment in the criminal justice system since this special measure was implemented in 2004. This figure includes appointments for assessments of witnesses’ communication needs where the matter does not necessarily proceed to trial. This figure also includes requests for vulnerable adult witnesses as well as child witnesses. Statistics produced by the NPIA for the MoJ show that between October 2010 and March 2011, 608 requests were received for a RI.

Whilst it is true to say that the “debate about the use of intermediaries has been both vigorous and polarised ever since the publication of the Pigot Report in 1991”, the debate has subsided as Registered Intermediary usage becomes more widespread and therefore better understood. There were around 48,000 child witnesses in 2008–09 according to the most recently available data and “[c]ommunication problems among children in the general population are more

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17 Information provided by email to P. Cooper from the Ministry of Justice, April 15, 2011.
18 The Registered Intermediary training course is led by P. Cooper and D. Wurtzel who also co-write The Registered Intermediary Procedural Guidance Manual (see fn.19).
20 These figures were provided by the Ministry of Justice, Better Trials Unit, on December 20, 2010. The Better Trials Unit is responsible for intermediary policy and regulation.

“Numbers of young witnesses in criminal cases (many of whom are also victims) are increasing dramatically. There are no official figures for the number of children who actually give evidence, but around 48,000 were called to court in 2008–09, compared to around 30,000 in 2006/7, an increase of 60 per cent.” See http://www.nuffieldfoundation.org/sites/default/files/files/Young%20witnesses%20in%20criminal%20proceedings_a%20progress%20report%20on%20Measuring%20up_v_FINAL.pdf [Accessed October 1, 2011].
prevalent than previously recognized”, therefore it is clear that RIs are still only used in a very small proportion of the criminal cases involving child witnesses. There may also be underuse of RIs for child witnesses because it is not sufficiently realised that a child witness does not have to display a “disability” to qualify for an intermediary; they can be used for the normally developing child who nevertheless requires assistance communicating in court because of his age-related communication limitations. This is particularly true of younger children, however even for a very young witness an RI is not always used as the case of B (below) demonstrates.

**Case law on child witnesses in criminal cases**

The Court of Appeal decision in B\(^2\) now stands as the definitive judgment on children as witnesses in criminal cases.

On May 1, 2009 at The Old Bailey, B was convicted of anal rape of a girl “X” who was less than three years old at the time of the offence. She was four and a half years old when she gave evidence. At the trial counsel for B cross-examined X over the court TV link. At the conclusion of all the evidence B was convicted and later appealed. The Lord Chief Justice summarised the grounds of appeal as follows:

“Although it was not quite how Mr Bernard Richmond QC advanced it, stripped to essentials, the argument at the heart of this application is that it is not acceptable for a conviction, very heavily dependent on the evidence of a child as young as 4.5 years, describing events said to have occurred when she was not yet 3 years old, to be regarded as safe: more formally, the competency requirement was not satisfied.” ([2])

The Lord Chief Justice’s judgment at [37] makes it clear that s.53 of the Youth Justice and Criminal Evidence Act 1999 sets out the test for witness competence. The witness is not competent:

“[I]f it appears to the court that he is not a person who is able to (a) Understand questions put to him as a witness and (b) Give answers to them which can be understood.”

This competency provision applies to all witnesses in criminal proceedings, including children. There is no special test for children and no presumption should be made about a young child’s inability to give evidence because he or she is too young:

“We emphasise that in our collective experience the age of a witness is not determinative on his or her ability to give truthful and accurate evidence. Like adults some children will provide truthful and accurate testimony, and some

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will not. However children are not miniature adults, but children, and to be treated and judged for what they are, not what they will, in years ahead, grow to be.” ([40])

The judgment contains a number of extracts from the transcript of the child who was cross-examination by counsel for B. Some questions perplexed the witness. For instance at [20]:

“Q. What about if you thought Y (her older sister) was going to get into trouble? Would you tell a fib then to help her?
A. (Witness shakes her head)
Q. What about to help Z (her younger sister)?
A. (Witness shakes her head)
Q. Never? Do you remember Curly Kate [the police officer] asked you a question? When she saw you one time, she asked you whether Stephen had ever touched you. Do you remember?
A. (Witness nods)
Q. You shook your head, didn’t you? Do you remember? Do you remember that?
A. (Witness nods)
Q. She touched down here and said: “Did you ever get touched by Stephen there?” You shook your head, didn’t not? That is right, isn’t it? Do you remember?
A. (Witness nods)”

Though the judgment makes reference to intermediaries, no intermediary was used in this case.

“The trial process must, of course, and increasingly has, catered for the needs of child witnesses, as indeed it has increasingly catered for the use of adult witnesses whose evidence in former years would not have been heard, by, for example, the now well understood and valuable use of intermediaries”. ([42])

Extracts of the cross-examination of the child, raise the question, “Could an intermediary have assisted counsel to cross-examine the child?” It was inevitably an extremely difficult task bearing in mind the age of the child witness, the nature of the allegations made against the defendant and defence counsel’s duty to put his client’s case.

The Lord Chief Justice’s reference to intermediaries at [42] should not be taken to mean that intermediaries only assist communication with adult witnesses with disorders or disabilities. They can and do assist communication with child witnesses as well.

Similarly no intermediary was used in the case of R v W and M. 25 The judgment was given by Hughes L.J., the Vice President. The case concerned “what physically had occurred when three children of primary school age were playing together outside during half term. The two defendants, both boys, were children of 10 years of age” ([4]) and “The complaint of the prosecution was that in the course of

The levels occasion questioning. The have questions been playing together and with a little girl neighbour of eight, all those three children had looked at each other’s private parts, but then that the boys had gone on to put their penises into the girl’s vulva and anus, or at least had tried to do so.” ([8])

At [30], the Vice President says:

“It is particularly important in the case of a child witness to keep a question short and even more important than it is with an adult witness where it also matters to avoid questions which are rolled up and contain, inadvertently, two or three at once. It is generally recognised that particularly with child witnesses short and untagged questions are best at eliciting the evidence. By untagged we mean questions we [sic] do not contain a statement of the answer which is sought.”

As in B, this judgment reveals transcripts of complex cross-examination questions to the complainant. As with B, it is suggested that an intermediary would have been able to advise appropriate ways in which to question the child witness. The RI would have agreed with both judge and counsel the “ground rules” for questioning the child witness.36

The intermediary special measure was utilised in Watts.27 It was the “first occasion on which the evidence of complainants suffering from such profound levels of disability has been brought to the court’s attention” ([17]). The defendant was charged with sexual assaults on women with mental disorders who lived in a care home. He was convicted and appealed.

Mackay J. gave the Court of Appeal’s judgment and in so doing emphasised the difference between competence and communication skills:

“The parliamentary intention which emerges from the 1999 Act is that those who are competent to give evidence should be assisted to do so. It is well understood that competence is not the same as reliability (see MacPherson [2006] 1 Cr. App. R. 30; B [2010] EWCA Crim 4). Provided the court is satisfied that the witness is able to understand the question put to him (or her) and give answers to them which can be understood, the competency test is satisfied. The Act further contemplates the reception of evidence in circumstances where a witness who satisfies the statutory test as to competence, may nevertheless lack sufficient communication skills to give evidence without the use of an intermediary. The use of intermediaries forms an integral part of the structure of the special measures regime. In the present case, as will be seen, two of the complainants gave evidence with the assistance of an intermediary (one of whom was not registered) by means of a process which was seen by the jury. Although arrangements were for a registered intermediary to be available to assist at trial, if required, Miss Munro decided that she should not cross-examine the complainants. The judge described that decision as understandable, but the opportunity for cross examination (with all the attendant difficulties) was available, at least in relation to JR and JB.” ([18])

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36 See CPR r.29.3 and 29.10 and Special Measures Application Form, s.F1, Crim PRC(10)02(a): ground rules must be discussed between the court, the advocates and the intermediary before the witness gives evidence.

As Hoyano and Keenan have noted:

“To say that the questions put to a child witness in court must be appropriate to the child’s age and linguistic, cognitive and emotional development is to state the obvious, but nonetheless examples abound in every jurisdiction of judges and counsel confusing the witness (and themselves) with their lines of questioning”. 28

Research shows that questioning of children in court is generally poor, yet repeated calls for proper training of advocates have not yet resulted in any comprehensive training or guidance specifically for lawyers 29 though criminal justice practitioners can find much of relevance in the good practice guidance for police officers, which is set out in Achieving Best Evidence (ABE), discussed below. The 2011 edition of ABE includes comprehensive advice on intermediaries and other special measures for children and vulnerable witnesses.

Comparing the family justice system’s approach to child witnesses

The presumption against children and young people giving evidence in care proceedings in the family courts can be traced back to a decision of Butler-Sloss L.J., R v B County Council, Ex P, 30 where it was stated that a witness order would not be made if it would be oppressive, ([475E]), and urging caution before allowing alleged abusers to require children to give evidence. In this case the court refused to order a 17-year-old to give evidence about sexual abuse. Further, in Re P (Witness Summons), 31 concerning a 12-year-old girl, Wilson L.J. suggested that for a child of that age or younger:

“[T]he court would favour the absence of oral evidence even though the concomitant were to be the weakening, perhaps the fatal weakening of the evidence against the adult” (454G–H).

In contrast, LM v Medway Council 32 was a civil case where a 10-year-old girl gave evidence by video link. The court endorsed the earlier decisions however, and made the following important statement:

“The correct starting point in my view (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.” ([44])

The following year a statement of Hughes L.J., delivering the Hershman-Levy Memorial Lecture, encapsulates the issue of concern here and questioned the continuing acceptance of this practice:

“... [I]n a criminal case, which is about punishment, it will invariably be required that a child complainant give evidence in person, albeit by recorded interview and cross examination through a video link. By contrast, if the identical issue arises in a Children Act case, private or public, the almost universal practice is not to do more than read the transcript of what the child has said, and unless there has already been cross examination in a parallel criminal case, not to engage in any further questioning at all. That is because in a jurisdiction which is geared to child protection it behoves us to be astute not to risk adding more abuse to any there may already have been, by requiring detailed questioning in semi-public. But there should be, I would suggest, no hard and fast rule. Some teenagers, male or female, can perfectly well withstand giving evidence, especially via a video link. There will quite often be at least some questions that really ought to be answered. And to see the child complainant and to see the questions answered may well help the Judge a good deal to decide, either way, about the truth of what is being said.

Resolving disputed litigation needs, in every field, a sound foundation in fact. Until you have that you cannot progress. And to get it you need the best evidence — always providing that you can properly have it without doing more harm than good. In other words, the litigation is indeed different - but not as different as all that.\textsuperscript{33}

The case of \textit{Re W (Children)}\textsuperscript{34} provided the opportunity for the courts to examine the circumstances envisaged by Hughes L.J. in that lecture.

The facts of \textit{Re W} are as follows. Care proceedings commenced in respect of five children. The four younger children aged between 18 months and 8 years were born to mother and father. The older child, aged 14 and known as Charlotte (C) had a different biological father, but lived in the family home with her mother and step father, who throughout the judgment is referred to as father (F). She made serious sexual allegations against her step father (some of which were later withdrawn) and as a result he was charged with 13 criminal offences. The care proceedings application was founded almost entirely on these allegations and related not only to C but also to F’s four younger children.

It was originally agreed by all parties, and with the agreement of C herself, that she would give oral evidence in the care proceedings. The local authority then changed its position and intended to rely on the interview which C had given to the police under the ABE guidance. As a result F made his application to the court for C to be called to give evidence in the care proceedings. The judge refused his application and the Court of Appeal\textsuperscript{35} upheld that refusal, though with some marked reservations.

F’s argument was essentially that the practice whereby it was considered undesirable for a child to give evidence had become elevated into a presumption and failed to respect the rights of family members under the European Convention on Human Rights, particularly arts 6 and 8.

\textsuperscript{33} The full transcript of the lecture, from which this quotation is taken, is available on the Association of Lawyers for Children website http://www.alc.org.uk [Accessed October 1, 2001]. It is also published in a slightly expanded form in, Rt Hon Hughes L.J., “The Children Act 1989: A Different Sort of Litigation?” [2008] \textit{Family Law} 1008.

\textsuperscript{34} \textit{W (Children), Re} [2010] UKSC 12; [2010] 1 W.L.R. 701.

The Court of Appeal dismissed the appeal and found that the judge at first instance had based her decision on a correct application of the existing jurisprudence and although the courts had not directly considered the application of art.6 it was clearly aware of the right of the accused adult to have a fair trial. The Court of Appeal did note in reviewing the current state of the law that:

“At the moment there is in effect no meeting of the minds between the criminal and the family lawyers. Care and criminal proceedings, of course, have different procedures and different rules of evidence. Nonetheless it seems to us (at least at first sight) to be unsatisfactory to have such diametrically opposed procedures within one overall system of justice” [25(c)].

The judgment also stated:

“[W]e believe that the time has come for a wider consideration of the issue in relation to family proceedings than is possible in the light of the doctrine of precedent” ([27])

and:

“We propose to send our judgment and the forceful judgment of Rimer L.J. on this appeal to the President of the Family Division. It will be for him to decide whether to take the issue further; but one course open to him would be for him to refer it to the Family Justice Council, which might indeed see fit to set up a multi-disciplinary subcommittee to look into it” ([30]).

The findings of this working group into children giving evidence in family cases have yet to be announced.

*Re W*36 was taken to the Supreme Court and Baroness Hale gave the judgment of behalf of the five Supreme Court Justices who heard it. Her opening paragraph states, “At issue in this case are the principles which should guide the exercise of the court’s discretion in deciding whether to order a child to attend to give evidence in family proceedings” ([1]). This reminds us that the court has control over who gives evidence and uses the crucial word, discretion.

The case advanced by the father was that the family courts, in exercising this discretion to call a child to give evidence, have used ‘a “starting point” of undesirability, placing the burden upon the person wishing to cross-examine a child to show some “particular justification for doing so” ([3]). This starting point approach, it was argued, “gives insufficient weight to the Convention rights of all concerned”. The issues at stake, if the parties do not receive a fair hearing are serious and potentially life changing, “the parents who stand to lose their children if allegations of abuse are made out, the children who stand to lose their parents if allegations of abuse are made out, but also stand to suffer abuse or further abuse if they are left at home because those allegations cannot be proved” ([3]). Thus it was argued that the “starting point” approach should be abandoned.

In addressing the central question, “whether the current practice of rarely calling children to give live evidence can be reconciled with the Convention rights or even with the elementary principles of justice” ([16]), Baroness Hale concluded that the:

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“presumption against a child giving evidence which requires to be rebutted by anyone seeking to put questions to the child … cannot be reconciled with the approach of the European Court of Human Rights, which always aims to strike a fair balance between competing Convention rights …. Striking that balance in care proceedings may well mean that the child should not be called to give evidence in the great majority of cases, but that is a result and not a presumption or even a starting point” ([22]).

Having dismissed the “starting point”, Baroness Hale then outlines guidance on how the court should exercise its discretion, starting with the key test:

“When the court is considering whether a particular child should be called as a witness, the court will have to weigh two considerations: the advantages that that will bring to the determination of the truth and the damage it may do to the welfare of this or any other child” ([24]).

Several factors will be relevant for the court in considering the advantages of the child giving evidence; whether it needs to make findings on particular allegations; the quality of other evidence; the quality of any ABE interview and the nature of any likely challenge to it; the age and maturity of the child and the time elapsed since the events in question. Sometimes there will be nothing useful to be gained from the child’s oral evidence” ([25]).

It is in regarding the second consideration, risk of harm to the child caused by giving evidence, that the extension of special measures could be significant. The court noted that it should look at levels of support the child has, the child’s wishes and feeling about giving evidence and other views including that of the guardian and holders of parental responsibility, the risk of delay and whether the child may have to give evidence twice if there are criminal proceedings. In the instant case, it is significant that C was willing and indeed wanted to give evidence. There are many reasons why this will not always be so and the court stated, “We endorse the view that an unwilling child should rarely, if ever, be obliged to give evidence” ([26]).

The court also recognised that there are ways in which the quality of a child’s evidence may be improved and the risk of harm to the child decreased, but courts need to be realistic about “evaluating how effective it can be in maximising the advantage while minimising the harm” ([28]).

Baroness Hale recognised that:

“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” ([9])

and:

“The family court will have to be realistic in evaluating how effective it can be in maximising the advantage while minimising the harm [to the child witness]. There are things that the court can do but they are not things that it is used to doing at present. It is not limited by the usual courtroom procedures
or to applying the special measures by analogy. The important thing is that the questions which challenge the child’s account are fairly put to the child so that she can answer them, not that counsel should be able to question her directly. One possibility is an early video’d cross examination as proposed by Pigot. Another is cross-examination via video link. But another is putting the required questions to her through an intermediary. This could be the court itself, as would be common in continental Europe and used to be much more common than it is now in the courts of this country” ([28]).

Baroness Hale’s references to special measures and intermediaries signaled to family judges an opportunity to learn from practice in the criminal courts and to develop new ways to facilitate, clearly not in all but in appropriate cases, the giving of evidence by children. While Baroness Hale was making a clear reference to practice in “continental Europe” where the inquisitorial proceedings require the judge to question the child, it should be recognised that intermediaries are working well in the criminal courts so as to facilitate adversarial cross-examination and could be used similarly in the family courts if a child were to give evidence.37

It is the responsibility of the family judges to take these initiatives on a case-by-case basis as and when required, though they would be acting in the absence of a properly funded statutory regime for family courts; for the time being none exists and none is on the political or parliamentary horizon though there is a Family Justice Council looking into a family court regime.38 As things stand a family judge would be reliant on the inherent jurisdiction (as per the current equivalent position for defendants in criminal cases)39 to order family court special measures for a child witness.

It is not clear how the family courts would implement special measures for child witnesses in the absence of a defined regime. It is suggested that, procedurally speaking, the family court would need an equivalent of the criminal court application for special measures at which point the intermediary report, if there is one, is considered and ground rules for questioning are set. However, before even getting to the question of “What special measures, if any?” the family judge has to have first determined that it is appropriate for the child to give evidence. It is suggested that an intermediary’s report would be required at this first step to help assist with what is possibly one of the most challenging of all applications for directions. RIs already report to criminal courts to indicate whether the witness has the ability to communicate to give evidence and, if so, whether the use of an intermediary is likely to improve the quality (completeness, coherence and accuracy) of the evidence of the witness. They also make recommendations generally as to special measures to enable the best communication with the witness.40 An intermediary report such as this could be invaluable to the family judge at both step one and step two.

37 For a discussion of how Registered Intermediaries could be used in the family courts see P. Cooper, “Child Witnesses in Family Proceedings: Should Intermediaries be Showing Us the Way?” [2011] Fam. Law 397.
39 See fn.10 regarding the Sevenoaks Youth Court case.
Baroness Hale has opened up the door to family judges ordering special measures but without a scheme in place it is likely that family judges will be nervous about walking through it. Baroness Hale also reminded family judges that they are not limited to special measures by analogy with the criminal courts. Unassisted but also unconstrained, as things stand, by a statutory scheme, the family judge could for instance order that the questioning of the child witness by the parties is pre-recorded in a non-court environment and carried out through a child communication specialist. Where there are concurrent criminal proceedings involving the child as a witness, the judges and the legal practitioners would need to work closely to ensure that they are not pulling in opposite directions. However, if a direction for special measures by analogy is a bold move for a family justice judge, then a direction under the inherent jurisdiction for a brand new type of family court special measure seems even less likely.

While the starting point is no longer a presumption that children do not give evidence, the lack of a family court statutory scheme of special measures surely works against a judge determining that the child should be called, even in cases such as Re W41 where the child expressed a wish to give evidence.

Some five months after the decision in Re W, Hughes L.J. gave a judgment in Re M (A Child)42 which seems to illustrate the chasm that still exists between the criminal and family courts’ approaches. The father was appealing a finding in the family court that he had been sexually abusive towards three children, of one of whom he was the father. There were five children ranging in age from ten to four years old. The father’s appeal was based on his complaint that the key evidence against him, including what had been allegedly disclosed by the children, was worrying in that it was hearsay.

Hughes L.J. stated:

“[Father’s counsel] also referred in writing, but not before me this morning, to the recent decision of the Supreme Court in W (Children) [2010] UKFC 12, in which Baroness Hale in particular giving the judgment of the court considered carefully the impact of the potential weaknesses of hearsay evidence upon the question of whether and when child complainants ought to be expected to give oral evidence and be subject to questioning in court. There the child in question was a 14-year-old girl. Whilst I am grateful to the reference to W (Children), whatever it may say about a necessary change in practice in relation to the starting point in relation to children of that age, I have no doubt at all that there would never have been and should not be even now any question of any of these children being expected to give oral evidence, at least in a family court. Indeed elsewhere the criminal courts have had to consider on numerous occasions the real difficulties which arise where in criminal cases young children have to give evidence, and it is quite apparent, for example from B [2010] EWCA Crim 4, that the criminal courts as well as the family courts need to adjust to recognise the profound limitations that court proceedings and conventional cross examination have in relation to very young children” ([5]).

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A small number of Registered Intermediaries report that they have assisted in family cases. The MoJ does not have statistics on either the number of children giving evidence in family cases or the number of intermediaries used. The MoJ’s policy is that they will provide an intermediary from the WIS for family court proceedings only where there is a direct link with a criminal case in which the witness is involved and where a RI has already been used and provided for that witness and only where the RI used in the criminal trial is available and doing so does not impact on the provision of RIs under the Act. It is likely that the lack of a funded scheme in family cases is in practice a barrier to their increased use and thus deters judges from permitting children to give evidence in family cases. Arguably the lack of such a scheme in the family courts would not withstand art.6 (fair trial) and art.8 (right to respect for private and family life) scrutiny should a child appeal a court’s decision refusing her permission to give evidence.

Achieving Best Evidence and guidance for lawyers

Long before the introduction of a statutory special measures scheme for children and vulnerable witnesses in criminal cases, lawyers struggled with the practice of taking evidence from children for legal proceedings. Twenty-five-years-ago the 1987 Report of the Inquiry into Child Abuse in Cleveland addressed the failings of the professional agencies who pursued child protection investigations in relation to over 100 children in Cleveland who, it was suspected, had been sexually abused. One of the effects of the Cleveland Report was changes to police and social work practice on interviewing children. In 1992 the Home Office issued The Memorandum of good practice for video-interviewing children (DoH) and 10 years later in 2002 it was superseded by the Home Office guide Achieving Best Evidence (2002) which accompanied the implementation of the majority of the special measures provided for by the Youth Justice and Criminal Evidence Act 1999. A revised edition of ABE was published in 2007, and now in 2011 the third edition takes into account amendments to the Youth Justice and Criminal Evidence Act 1999 contained in ss.98–103 and 105 of the Coroner’s and Justice Act 2009. The new ABE was issued on March 21, 2011 by the Ministry of Justice: Achieving Best Evidence: Guidance on interviewing victims and witnesses, and guidance on using special measures replaces all previous editions. ABE, stretching now to 243 pages, is a comprehensive, well researched, detailed guide for police officers that has become required reading for criminal lawyers. ABE “does not constitute a legally enforceable code of conduct” but “significant departures from the good practice advocated in it may have to be justified in the courts” ([1.1]).

ABE advises on how police and social care should work together. For instance:

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“Having responsibility for the criminal investigation does not mean the police should always take the lead in the investigative interview. Provided both the police officer and the social worker have been adequately trained …[it depends on] who is able to establish the best rapport with the child”([2.22]).

The typical basic ABE interview training for police and social workers lasts 10 days. ABE is not simply about interviewing witnesses; Chs 4 and 5 cover vulnerable witness support and preparation and witnesses for criminal courts. There is no equivalent ABE guidance on preparing and supporting children and other vulnerable witnesses in the family courts. While the family lawyer can look to ABE for relevant guidance,45 this absence of an ABE equivalent represents a deplorable gap in the family justice system.

It is heartening that the ATC Working Group report on questioning vulnerable witnesses and defendants, “RAISING THE BAR: The Handling of Vulnerable Witnesses, Victims and Defendants in Court”,46 addressed its mind to family as well as criminal practitioners and recommended training for all in the handling of vulnerable witnesses. At the end of the report, at pp.53–63, there is a basic toolkit to assist barristers and a list of “common problems” for the advocate and “suggested solutions” when handling child witnesses. It is a good start but those responsible for developing thorough guidance and training for lawyers could presumably draw upon the research and expertise of the ABE writing team and contributors to develop more comprehensive and detailed guidance. Developing such guidance might act as catalyst for the sort of meeting of criminal and family minds that has yet to take place.

Conclusions

As a result of the Youth Justice and Criminal Evidence Act 1999, including its comprehensive legislative regime of special measures, the criminal law now focuses more on how young children give evidence. In family proceedings the court has first to decide whether the child should give evidence at all before any consideration of the best way for the child to do so.

If the family court judge decides that a child should give evidence, there is no regime, statutory or otherwise, to fall back on. Resources simply are not in place so, for example, the family court would presumably have to “borrow” a criminal court with video link equipment and use court funds to pay for the services of an intermediary. The family lawyer who seeks court approval for special measures for the child witness is also approaching the matter on a case by case basis with very little legal, procedural or bespoke guidance on preparing child witnesses or handling their evidence in the family court.

Re W47 removes the presumption against children giving evidence in family cases and replaces it with a call for the family courts to consider in each particular case whether it might be appropriate for a child to give evidence. While the criminal law system is not without criticism we would argue that its special measures regime at least presents a model which can and should be adapted by ground-breaking

46 The ATC working group report can be accessed at http://www.advoacaytrainingcouncil.org/ [October 1, 2011].
family judges who, having considered the appropriateness, take the opportunity to permit children to give evidence. Intermediaries, having demonstrated their value and being used frequently in criminal cases, are likely to be of great assistance to the family judges deciding if and how a child should give evidence. With or without a statutory scheme for the family courts, a family justice equivalent of ABE is urgently required. Perhaps the Advocacy Training Council’s recently announced plans to train all advocates (specialising in family law as well as criminal law) will lead to a much needed vehicle for a “meeting of minds”.