Infidels, Idiots, Madmen and Children – The evolution of the acceptance of unsworn evidence of children

Presentation to Crown Prosecutors' conference 8 July 2016 by Jon White SC, ACT Director of Public Prosecutions

Introduction

The recent case of *The Queen v GW* shows how far the law has come in its treatment of the evidence of children. Historically, two strands of the law have run together to stand in the way of the acceptance of the evidence of child witnesses. One strand was the great hostility with which the common law regarded unsworn evidence. The other strand was the law's requirement that evidence which the common law regarded as suspect (and the evidence of children was so regarded) should be corroborated.

The change in the law's attitude to the evidence of children is explained both by a lessening of the relevance of religion to any concept of the reliability of evidence, and also to a deepening of the understanding of child psychology.

In this paper I will look at the development of the law's approach to the evidence of children, including the High Court's decision in *The Queen v GW*.

The Queen v GW

GW was tried on a charge that he committed an act of indecency in the presence of R, his daughter. R was 5 years old at the time of the offence, and 6 years old when she came to give her evidence.

R had given an "evidence in chief" interview to police, and was entitled have her evidence for the trial pre-recorded at a pre-trial hearing. Both parties and the judge accepted that R was competent to give *evidence*[1] – the question became whether the evidence would be given sworn or unsworn. The judge at the pre-trial hearing determined that R's evidence should be given unsworn. The recording of R's unsworn evidence was subsequently tendered at GW's trial. He was convicted.

At the trial, GW's counsel sought that the judge direct the jury to the effect that unlike the other witnesses who had given shown evidence, R's evidence was unsworn because she did not comprehend the obligation to tell the truth. The basis for the suggested direction seems to have been s13(3) of the *Evidence Act 2011* (ACT) (a uniform Evidence Act) which provides:

> (3) A person who is competent to give evidence about a fact is not competent to give sworn evidence about the fact if the person does not have the capacity to understand that, in giving evidence, the person is under an obligation to give truthful evidence.

[1] Cf *Evidence Act 2011* (ACT) s13(1).

The trial judge refused to give such a direction and GW appealed - successfully - to the ACT Court of Appeal. The Court of Appeal concluded that a direction should have been given and ordered a re-trial. Court of Appeal held:[2]

> R was the key witness in the prosecution case. The most fundamental and most difficult task that the jury had to undertake was to assess the reliability of her evidence. With a view to bolstering the reliability of evidence given in courts, the *Evidence Act* gives primacy to sworn evidence and makes it clear that unsworn evidence is acceptable only from a witness who is not competent to give sworn evidence. In those circumstances, it was important for the jury to understand the difference between sworn and unsworn evidence and take that difference into account when assessing the reliability of R's evidence. The jury should have been directed accordingly.

The ramifications of such a direction in cases of child sexual assault are clear. By its very nature, child sexual offences usually occur with just two people present – the perpetrator and the child. Were the direction posited by the Court of Appeal to be given – and it would have to be given in every case – each case would become a contest between the unreliable unsworn evidence of the child and the more reliable sworn evidence of the alleged perpetrator.

The Crown appealed. The High Court held[3] that there was no requirement for a direction to the effect that unsworn evidence was of a kind that may be unreliable, either under the Evidence Act or at common law. The High Court held that "the Evidence Act does not treat unsworn evidence as of a kind that may be unreliable". [4] The Court noted "the appellant is correct in submitting that the Evidence Act is neutral in its treatment of the weight that may be accorded to evidence whether it is sworn or unsworn".[5]

The High Court upheld the appeal and restored GW's conviction. The case represents a significant development in the acceptance of unsworn evidence and is underpinned by the law's greater understanding of the evidence of children.

I will now examine the law's evolution towards a secular test for competence.[6]

Mrs Maden's disbelief

In *Maden v Catanach*[7] the plaintiff Mrs Maden was about to be sworn as a witness when the defendant's solicitor sought to examine her upon the *voir dire*, for which purpose she was sworn. In the course of the *voir dire* it was elicited from Mrs Maden that she did not believe in a god and or in a future state of rewards and punishments, but she nevertheless did feel morally bound to speak the truth. She was rejected as a witness. An appeal to the Court of

[2] [2015] ACTCA 15 at [103].
[3] ***The Queen v GW*** [2016] HCA 6
[4] [2016] HCA 6 at [56].
[5] At [46]
[6] Cf Law Reform Commission, *Evidence*, Report No 38, 1987, Appendix C, [3}, where the Commission noted that recent case law highlighted "the need for a secular test for psychological competence".
[7] (1861) 7 H & N 360

Exchequer was dismissed. Pollock CB said "by the law every witness must be sworn according to some religious ceremony; or, if that is to be dispensed with, it can only be done with the authority of an Act of Parliament".[8]

The illogicality of the result in the case has been remarked upon. As Judge Parry noted, the judgment "involved the absurdity of ascertaining Mrs Maden's disbelief by accepting her own testimony on the subject and then ruling that she was a person incompetent to speak the truth".[9]

Given that at common law the ability to give evidence depended on competence to take an oath, children, particularly young children, were at a disadvantage. The common law rule was enunciated in *Brasier's case,* where it was said: [10]

> That no testimony whatever can be legally received except upon oath; and that an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the Court, to possess a sufficient knowledge of the nature and consequences of an oath, for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence; but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the Court; but if they are found incompetent to take an oath, their testimony cannot be received.

Of course a consequence of this rule was that those who sexually preyed on children of an age where they are unable to give sworn evidence were effectively immune from prosecution, as long as they did it in private.

The title of this paper comes from *Buller's Nisi Prius,* cited by Dixon J in *Cheers v Porter*: [11]

> In *Buller's Nisi Prius* persons who may not be witnesses are classified into "such who are excluded for want of integrity or discernment". Among those disqualified for want of integrity are included "infidels... i.e. such who profess no religion that can bind their consciences to speak truth". But infants belong to the second class. "As to those who are excluded from testimony for want of skill and discernment, they are idiots, madmen and children...".

But the impediments for children giving evidence went further.

The inherent unreliability of women and children

Not only were there difficulties in children being accepted to give sworn evidence, given their inability to understand the impiety of falsehood, such evidence as they did give was viewed with suspicion by the common law, which required corroboration before their evidence could be accepted.

In the case of *Dossi*[12] a child gave evidence on oath that the accused committed acts of indecency on her. The accused was convicted and appealed, arguing a defect in the

---

[8] At 366.

[9] Referred to in *Cheers v Porter* (1931) 46 CLR 521 at 538, per Evatt J.

[10] (1779) 1 Leach 199 at 200; 168 E.R. 202, at 202, 203.

[11] At p531 footnotes omitted.

corroboration warning given by the trial judge. The Court of Criminal Appeal of England noted: [13]

> There can be no doubt that in cases of this kind the jury are entitled to act on the uncorroborated evidence of a child who is able to give evidence on oath, but judges must warn juries not to convict a prisoner on the uncorroborated evidence of a child except after weighing it with extreme care.

The Court held that the evidence of children was even less reliable than the evidence of women, and both required corroboration warnings. The Court upheld a direction in the following terms concerning women:[14]

> I should always practically tell a jury that they must not convict on the uncorroborated testimony of a woman of full years, because it is so easy to make charge, for purposes that you can well imagine, either against the wrong man when there is a right man, or against a person who has had no dealings with her at all, or for the purposes of blackmail.

However the Court criticised the Judge for saying that children were less susceptible to lying than women, noting:[15]

> ... small children are possibly more under the influence of third persons – sometimes their parents – than are adults, and they are apt to allow their imaginations to run away with them and to invent untrue stories.

These twin concerns of common law – a refusal to accept unsworn evidence and a suspicion that children were unreliable – conspired against the admission of children's evidence.

The common law rule which prohibited the reception of evidence other than on oath was gradually abridged by statute. However, statutory amendments permitting children to give unsworn evidence were generally accompanied by statutory requirements that corroboration was required and corroboration warnings be given. The rationale for this requirement came out of the common law's view that the evidence of children belonged to one of the categories of suspect witnesses.

The suspicion directed to the evidence of children was remarkably persistent. As recently as 1973, Lord Diplock, citing as his authority nothing less than "common sense, the mother of the criminal law", referred to "certain categories of witnesses whose testimony as to particular matters may be unreliable": such witnesses included "those alleging sexual acts committed on them by others, because experience shows the danger that fantasy may supplant or supplement genuine recollection".[16] Those remarks were apt to refer to children, although they were not so confined.

---

[12] (1918) 13 Cr App R 158.
[13] At p160.
[14] At p161.
[15] At p161.
[16] R v Hester [1973] AC 296, 324.

Even more recently in *Longman v the Queen*[17] both Deane J and McHugh J made similar observations, Deane J warning "the possibility of child fantasy about sexual matters ... cannot be ignored".[18]

Gradually, however, corroboration warnings have been abolished, most notably by section 164 of the uniform Evidence Acts.

Apart from abolishing corroboration warnings, the uniform Evidence Acts also depart from the pre-existing law regarding children's evidence, reflecting the modern psychological research about children's evidence.

In *JJB v The Queen*[19] Spigelman CJ strikingly referred to this research when criticising the observations of Deane J and McHugh J in *Longman.* His Honour noted:

> [3].Their Honour's observations are based on assumptions about child psychology which are widely held but which are not necessarily well founded. Many judges share a conventional wisdom about human behaviour, which may represent the limitations of their background. This has been shown to be so in sexual assault cases. (See *R v Johnston* (1998) 45 NSWLR 362 at 367-368.)
>
> [4] Legislative intervention was required to overcome the tendency of male judges to treat sexual assault complainants as prone to be unreliable. The observations of Deane J and McHugh J in *Longman* reflect a similar legal tradition that treated children as unreliable witnesses. In the past both categories of witnesses required corroboration.
>
> …
>
> [6] There is a significant debate as to whether expert evidence should be admissible about the ability of children to give accurate evidence, especially in child sexual assault proceedings. See, most recently, *Uniform Evidence Laws Report* ALRC Report 102, NSWLRC Report 112, VLRC Final Report, December 2005 at 9.138-9.158; Criminal Justice Sexual Offences Task Force *Responding to Sexual Assault* Final Report, Sydney December 2005 pp165-176. These two recent reports refer to a range of earlier studies and reports. They also outline the legislation that already exists in some jurisdictions to permit such evidence and make recommendations for further legislative intervention.
>
> [7] There is a substantial body of psychological research indicating that children, even very young children, give reliable evidence. [references omitted] These are complex issues, as reflected in reviews of the research on the ability of young children to distinguish fantasy from reality [references omitted]. The same is true of research about a child's ability to accurately recall stressful events [references omitted].

This research recognised that "there is no psychological evidence that children are in the habit of fantasising about the kinds of incidents that might result in court proceedings or that children are more likely to lie than adults".[20]

---

[17] [1989] HCA 60; 168 CLR 79 ("*Longman*").
[18] At 101.
[19] [2006] NSWCCA 126; 161 A Crim R 187 ("*JJB v The Queen*").
[20] ALRC and HREOC, *Seen and heard: priority for children in the legal process*, Report no 84, 1997, [14.22] (citations omitted) ("ALRC Report 84").

Not only have the uniform Evidence Acts abolished the corroboration requirement by s164, there are now prohibitions on warnings about children as a class of witnesses: ss165(6) and 165A.

One era's distilled wisdom and common sense is another era's junk science, it would seem.

What is the difference between sworn and unsworn evidence?

So what is the present position?

Most witnesses who give unsworn evidence in our Courts will be children. Most of those children will be giving evidence of sexual offences that they have either experienced themselves or witnessed perpetrated on others.

It is for this reason that the High Court's finding in *The Queen v GW* that the Evidence Act is neutral in its treatment of the weight that may be accorded to sworn or unsworn evidence is so significant. Further it follows from the High Court's decision that there is no difference at common law between sworn and unsworn evidence.[21]

In those jurisdictions in which lack the benefit of the uniform Evidence Act, the position varies.

South Australia has a specific provision (s9(4) of the *Evidence Act 1929*) which, when a witness gives unsworn evidence, requires a judge to explain to the jury the reason the evidence is unsworn and, where a party requests it, the judge must give a mandatory warning of the need for caution in accepting the evidence and the weight given to it. Rather bizarrely the ACT Court of Appeal in *GW v The Queen* seemed to be influenced by that South Australian statutory provision in its interpretation of the uniform Evidence Act. Of course that was wrong.

Western Australia also has a provision relating to weight and credibility to be given to evidence without the sanction of an oath or affirmation – *Evidence Act 1906* s100A(2).

Conclusion

The High Court's decision in *The Queen v GW* comes at an opportune moment.

The scrutiny that has been placed upon child sexual offending by the Royal Commission into Institutional Responses to Child Sexual Abuse will undoubtedly lead to an increase in the number of allegations of child sexual offending being tried in our courts. At least in those jurisdictions covered by the uniform Evidence Act, the sensibilities of our courts are now entirely secular, and notions of the impiety of falsehood obsolete. Further, a deepening understanding of child psychology has led us to reject a notion that children are somehow inherently unreliable.

[21] At [56].

Those who prosecute sexual offences against children know just how pernicious and difficult to bring to account such offending is. From the point of view of front line prosecutors, the incidents of offending can seem almost like an epidemic.

While there is no abatement of the epidemic in sight, it is gratifying that the law has advanced its understanding of this complex problem.