

# Current Criminal Law

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## **Children and cross-examination: time to change the rules?**

**John R Spencer and Michael E. Lamb, Editors**

**Hart Publishing, Oxford (2012)**

**ISBN: 978-1-84946-307-2**

*Book Review by Sally Ramage*



### **Eminent editors and authors**

John R Spencer is Professor of Criminal Law at the University of Cambridge. He is a prolific author and editor, and some relevant titles are as follows:

Spencer, J.R. et al (1990) *Children's evidence in legal proceedings: an international perspective*, Cambridge, United Kingdom: Cambridge University Press;

Spencer, J.R. (2008) *Hearsay evidence in criminal proceedings*, Oxford: Hart;

Spencer, J.R. (2010) *Simester and Sullivan's criminal law: theory and doctrine*, Oxford: Hart; an

Spencer, J.R. (2009) *Evidence of bad character*, Oxford: Hart.

Michael E. Lamb is a Psychology Professor at Cambridge University<sup>1</sup>. The contributors are Joyce Plotnikoff; Richard Woolfson; Emily Henderson; Hal Jackson; Annie Cossins; Verena Murschetz and Trond Myklebust.

### **'Baby Peter Connelly' and his siblings**

The trigger for writing this book was the Baby Peter Connelly case, followed by the prosecution and conviction of Stephen Barker (one of the two men co-accused with the baby's mother, of the murder of Baby Peter Connelly) of the rape of Baby Peter Connelly's

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<sup>1</sup>My one criticism of this book is the introduction of a psychology professor into the argument, as it has been established that, as regards truth or lies. 'Psychology, as a formal academic discipline, offers neither any valid explanation of lying nor any practical help in its detection.' Stone, M. (2009) *Cross-examination in criminal trials* West Sussex: Bloomsbury Professional Ltd. See page 77.

then 3-year-old sister <sup>2</sup>who was three and a half years old when she was first interviewed by police after telling her foster carer about what Stephen Barker did to her. <sup>3</sup>



(Source: www.google.com)

The child's mother Tracy Connelly pleaded guilty to causing the death of Baby Peter Connelly in November 2008.

Her young daughter said she told her mother about the anal rape that Stephen Barker committed against her. The child appeared at Stephen Barker's trial for the offence of anal rape against her and she was cross-examined by Barker's counsel. <sup>4</sup>

The English statute, the 1999 Youth Justice and Criminal Evidence Act, includes a provision for children's evidence and cross-examination to take place out of court, yet in 2013, this provision (s.53) has not yet been brought into force.



**ASSOCIATION OF  
CHIEF POLICE OFFICERS**

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<sup>2</sup> In October 2006, the government announced that they would put in place Independent Sexual Violence Advisors as a help to victims. Nothing has come of it. See *Police Digest*, October 2006.

*'A new network consisting of 38 Independent Sexual Violence Advisors (ISVAs) was announced by the Home Office. The ISVAs will be based in Sexual Assault Referral Centres (SARCs) or in specialist voluntary centres across England and Wales and will work alongside victims from the point of crisis, such as initial contact with the emergency services. Assistance will continue throughout the legal process and beyond. In addition, the specialists will work with victims and survivors falling outside of the criminal justice system.'*

<sup>3</sup> It is surprising how many cues were not picked up by the police who interviewed this child, the victim of sexual abuse. When she told them that Barker lay on top of her (like two penguins would), she said her mummy came up and told him off severely. What made her mummy come up? Was it because she screamed- she did say that her bottom hurt all day.

<sup>4</sup> It is noted that the police interviewed this little girl but did not interview her two older sisters to enquire whether Stephen Barker did the same to them. It is to be noted that the police were very nonchalant about complaints made to them of baby Peter injuries. Yet the Association of Chief Police Officers had issued guidance on the subject of child abuse. Nor was the computer used by the adults in the house seized for child pornography offences.

Section 53 of the Youth Justice and Criminal Evidence Act 1999 provides:

*‘Competence of witnesses to give evidence*

*(1) At every stage in criminal proceedings all persons are (whatever their age) competent to give evidence.*

*(2) Subsection (1) has effect subject to subsection (3) and (4).*

*(3) A person is not competent to give evidence in criminal proceedings if it appears to the court that he is not a person who is able to –*

*(a) Understand questions put to him as a witness and*

*(b) Give answers to them which can be understood.*

*(4) A person charged in criminal proceedings is not competent to give evidence in the proceedings for the prosecution (whether he is the only person, or is one of two or more persons, charged in the proceedings).*

*(5) In sub-section (4) the reference to a person charged in criminal proceedings does not include a person who is not, or is no longer, liable to be convicted of any offence in the proceedings (whether as a result of pleading guilty or for any other reason).’*

Section 55 (2) (a) of the Youth Justice and Criminal Evidence Act 1999 provides that no witness under the age of 14 is to be sworn, and that witnesses over 14 years of age are eligible to be sworn only if they understand the solemnity of a criminal trial and that taking an oath places them with the responsibility to tell the truth.<sup>5</sup>

### **Charged with causing or allowing Baby Peter’s death**

Before this trial, Stephen Barker, his brother and Baby Peter’s mother were charged with causing or allowing the death of Baby Peter, contrary to section 5 of the Domestic Violence, Crime and Victims Act 2004 and the two men were tried and convicted on 11 November 2008. Baby Peter’s mother decided to plead guilty just before trial and so was spared cross-examination. Stephen Barker was sentenced to 12 years' imprisonment.

After Baby Peter died in 2007, his siblings were made wards of court and placed in a care home and it was to her foster carer that Baby Peter’s sister told what Stephen Barker used to do to her. Her foster mother contacted the police who later interviewed the little girl.<sup>6</sup> (It is what any normal mother would have done when she discovered that her boyfriend had

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<sup>5</sup> *‘Before trying to expose errors or unreliability in evidence, a cross-examiner must first decide that he will treat this witness as an honest person whose aim is to tell the truth as he/she understands it, but who is or may be mistaken in some way’.* See Stone, M. (2009) *Cross-examination in criminal trials*, West Sussex: Bloomsbury Professional Ltd. Yet defence barrister ‘badgered’ the little girl with questions about lying, psychologically making her query her own veracity, in this writer’s opinion.

<sup>6</sup> *‘Best practice guidelines for conducting investigative interviews of children emphasize the importance of obtaining free narrative accounts with the use of open-ended questions. However, research indicates that most investigative interviewers under-utilise open-ended questions. Even following intensive training in their use, these issues are a problem: (a) the specificity of the information required from children; (b) the unfamiliar nature of the open-ended discourse style; and (c) the complex distinction between open-ended versus specific questions. See Rebecca Wright and Martine Powell, (2006) ‘Investigative interviewers’ perceptions of their difficulty in adhering to open-ended questions with child witnesses’, International Journal of Police Science & Management, Volume 8, Issue 4, Isle of Man: Vathek.*

committed buggery on her three year old baby girl. Any sane mother would have thrown him out immediately and called the police immediately).

At court, the little girl gave evidence unsworn. But even unsworn evidence must be capable of providing intelligible testimony. A young child, even though competent, as in this case, is not compellable.<sup>7</sup> She was competent because she lawfully gave evidence. She was not compellable because she was not lawfully required to do so.

The law of evidence used to be much concerned with questions of the competence of witnesses. However over the last century, disqualification as a witness on the grounds of interest, want of religion and crime were all abolished. Incompetence through interest or by reason of conviction of crime was abolished by the Evidence Act 1843, section 1. The Oaths Act 1978, section 5, permits a person who objects to being sworn, to affirm instead of taking an oath. The prosecution must satisfy the court of the witness's competence beyond reasonable doubt and at common law, a child of tender years may be sworn in any English proceedings provided that he or she understands the nature of the oath and the obligation of telling the truth.<sup>8</sup>

### **The issue of children's evidence out of court**

Many lawyers are not at ease with the idea that a child will make a statement out of court and that this (now) documentary evidence will be introduced into court without the creator (even if not the physical creator but oral creator) being cross-examined. This issue highlights hearsay evidence. Having regard to the effective definition of hearsay in section 114(1) of the Criminal Justice Act 2003, any statement in a document will be hearsay and inadmissible if the purpose for which it is sought to tender it in evidence is to rely on the truth of the statement, unless the document can be brought within one of paragraphs (a) to (d) of that subsection.<sup>9</sup>

### **Presumption of innocence**

The presumption in criminal trials is that the defendant is innocent until proven guilty. A corollary of this principle is that the defendant in a criminal trial is entitled to confront witnesses giving evidence against him or her. The logic is that the prosecution may present witnesses who may have reason to fabricate or exaggerate evidence against the accused and they need to be subjected to cross examination from defence counsel in person to elicit the whole truth. Confrontation and the opportunity for cross-examination are of central significance to our common law adversarial system of trial.

### **Admissibility of evidence**

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<sup>7</sup> Unlike compellable witnesses as per the Police and Criminal Evidence Act, s.80 (2A) (b), ie, the mother of this child who could have been compelled to give evidence for the prosecution against Stephen Barker.

<sup>8</sup> *Brazier* (1779) 1 Leach 199.

<sup>9</sup> It is to be noted, however, that the Criminal Justice Act 2003 enacted new policies and programmes for Victims and reduced procedural and human rights protection for alleged offenders. See Bottoms, A. and Roberts J.V. (2010)

*Hearing the victim*, Devon: Willan Publishing, at page 74.

The common law is supplemented by a mass of legislation making specific provision for the admissibility in evidence of particular categories of document, or of copies. Many of the statutes also make specific provision as to the use which may be made of these documents.

### **Ten- the legal age of *responsibility* in the UK**

Of course we must not forget that, in the UK, the legal age of responsibility is the age of ten years, although the repealed section 38 of the Children's and Young Persons Act 1933 considered that, as in federal United States law, a child of a tender age was a child under the age of fourteen years of age) and permitted such a child to give evidence unsworn, if that child knew the difference between the truth and a lie.<sup>10</sup>

In the United States (U.S.) where the courts have grasped the point of children's evidence, there are many reported and unreported cases:

Children of two years old have given evidence (see *United States v Peneaux*<sup>11</sup>; *People v Geno*;<sup>12</sup> and *State v Fisher*.<sup>13</sup>)

Children aged three years old have given evidence (see *State v Scacchetti*;<sup>14</sup> *State v Bobadilla*<sup>15</sup>; *State v Buda*;<sup>16</sup> *State v Mack*;<sup>17</sup> and *State v Shafer*<sup>18</sup>).

Children of four years old have given evidence in the U.S. (see *People v Sisavath*<sup>19</sup> (the younger of the children was four and the older was eight; only the four-year-old's testimony was challenged because she was disqualified from testifying); *State v Justus*<sup>20</sup> at the time of the incident, the child was three, but by the time of the interview, she had turned four); *State v Blue*;<sup>21</sup> *State v Pitt*;<sup>22</sup> *Morales v State*;<sup>23</sup> *Rangel v State*,<sup>24</sup> (four at the time of the incident and six at the time of trial); *Lagunas v State*,<sup>25</sup> (four at the time of the incident and seven at the time of trial); *State v Price*<sup>26</sup> (four at the time of the incident and six at the time of trial); and *State v Vogelsberg*<sup>27</sup>).

<sup>10</sup> Since it had already been decided that the little girl would give her evidence unsworn, it must have been established that she knew the difference between the truth and a lie. It is therefore incomprehensible as to why Barker's barrister cross-examined this child so vigorously about truth and lies.

<sup>11</sup> 432 F.3d 882, 887 (8th Cir. 2005).

<sup>12</sup> 683 N.W.2d 687, 689 (Mich. Ct. App. 2004).

<sup>13</sup> 108 P.3d 1262, 1264 (Wash. Ct. App. 2005).

<sup>14</sup> 711 N.W.2d 508, 510 (Minn. 2006).

<sup>15</sup> 709 N.W.2d 243, 246 (Minn. 2006).

<sup>16</sup> 931 A.2d 735, 737 (N.J. Super. Ct. App. Div. 2006).

<sup>17</sup> 101 P.3d 349, 349 (Or. 2004).

<sup>18</sup> 128 P.3d 87, 89 (Wash. 2006).

<sup>19</sup> 13 Cal. Rptr. 3d 753, 755, 756 (Cal. Ct. App. 2004).

<sup>20</sup> 205 S.W.3d 872, 874, 880 n.9 (Mo. 2006).

<sup>21</sup> 717 N.W.2d 558, 560 (N.D. 2006).

<sup>22</sup> 147 P.3d 940, 942 (Or. Ct. App. 2006).

<sup>23</sup> No. 13-05-188-CR, 2006 WL 3234073, at 1 (Tex. Ct. App. Nov. 9, 2006).

<sup>24</sup> 199 S.W.3d 523, 529, 535 (Tex. Ct. App. 2006).

<sup>25</sup> 187 S.W.3d 503, 506, 512 (Tex. Ct. App. 2006).

<sup>26</sup> 146 P.3d 1183, 1183 (Wash. 2006).

<sup>27</sup> 724 N.W.2d 649, 650 (Wis. Ct. App. 2006).

Children aged five have given evidence (see *People v Soria*;<sup>28</sup> *People v Sharp*;<sup>29</sup> *In re E.H.*<sup>30</sup>; *In re Welfare of A.J.A.*;<sup>31</sup> *Foley v. State*;<sup>32</sup> *State v Brigman*.<sup>33</sup>

### ***R v Stephen Barker***



Stephen Barker -convicted for the death of Baby Peter Connelly. (Source: www.google.com).

In the case of *R v Stephen Barker*<sup>34</sup>, Stephen Barker was tried and convicted of the anal rape of this very young child.<sup>35</sup> This young child was subjected to cross examination in an English court. The child's mother was his co-accused and she was charged with the wilful neglect of her young daughter. Stephen Barker was sentenced to imprisonment for life with a specified minimum term of 10 years and he was made subject to a sexual offences prevention order, a notification requirement, and disqualified indefinitely from working with children. Barker subsequently appealed his sentence on the grounds that a young child gave evidence in his criminal trial and that it is not acceptable for a conviction, very heavily dependent on the evidence of a child as young as 4½ years at date of trial, this child brought to court to describe events allegedly when she was not yet 3 years old. The Judge had to decide whether the court would allow the little girl to give evidence and he made an executive decision. Barker's counsel argued therefore that Barker's conviction was unsafe and he was granted leave to appeal.

<sup>28</sup> No. B182682, 2006 WL 3060052, at 1 (Cal. Ct. App. Oct. 30, 2006) (unpublished opinion).

<sup>29</sup> 155 P.3d 577 (Colo. Ct. App. 2006);

<sup>30</sup> 823 N.E.2d 1029, 1031 (Ill. App. Ct. 2005).

<sup>31</sup> No. A06-479, 2006 WL 2474267, at 2 (Minn. Ct. App. Aug. 29, 2006) (unpublished opinion).

<sup>32</sup> 914 So. 2d 677, 682 (Miss. 2005).

<sup>33</sup> 615 S.E.2d 21, 25 (N.C. Ct. App. 2005 (1851) 2 Den 254, 169 ER 495.

<sup>34</sup> [2010].

<sup>35</sup> There was no time bar as in *R v J* [2005] 1 A.C. 562, HL.

### Previous child witness caselaw: *R v Powell*

*R v Stephen Barker* was not the first English case in which a young child witness at a criminal trial. In *R v Powell*, after considering a video recording of the child's evidence, as well as evidence of the officer responsible for the interview and expert evidence, the judge decided that a girl of 3½ years satisfied the competence test. Competency is concerned with who may lawfully testify as a witness. The court suggested that the competency issue should have been revisited, and that if it had been, the competency of the witness would not have been established. Accordingly the case should have been stopped.

### Previous child witness caselaw: *R v Malicki*

Also, in *R v Malicki* the complainant was 4 years 8 months at the date of the alleged indecent assault. The *video interviews* suggested she was competent. After cross-examination the question of her competence was re-visited. The judge said, however, that bringing such cases to trial, ‘*in cases involving very young children delay on its own does not automatically require the court to prevent or stop the evidence of the child from being considered by the jury*’ (at paragraph 50). The judge said at paragraph 52:

*‘The interview shows an utterly guileless child, too naive and innocent for any deficiencies in her evidence to remain undiscovered, speaking in matter of fact terms. She was indeed a compelling as well as a competent witness.’*

The judge dismissed Stephen Barker’s appeal.<sup>36</sup>

### Comparative analysis of the law related to child witnesses

The editors, by undertaking a comparative analysis of this topic in several jurisdictions, persuade us that the matter of reform of children’s evidence needs urgent attention.

We have seen above, the many reported and unreported cases of very young children giving evidence in the United States of America. Australia, also, has allowed young children to give evidence.

Comparing English law to Australian law, we see that very young children can give satisfactory evidence and do so in Australia where video link evidence can be made available from overseas under subsection 12(3) of the Mutual Assistance in Criminal Matters Act 1987 and under Part 3 of the Foreign Evidence Act 1994. The country of Australia has tackled the issue of ‘competence to give evidence’, as applied to witnesses of limited intellectual capacity and those witnesses of a very young age.<sup>37</sup> As such, in Australia, the Australian Law Reform Commission, in its Interim Report on Evidence, stated that a ‘test of

<sup>36</sup> It is to be noted that the child’s mother, imprisoned for the death of Baby Peter, was not convicted of conspiracy in this case of buggery of her very young daughter; the woman must be psychopathic to know that Stephen Barker abused her young family; all three causing the death of Baby Peter and not supporting this young victim – her own little daughter.

<sup>37</sup> Yet in civilized England, ‘the criminal procedure adopted in English courts has no component specifically dedicated to victims in their role as a victim. See Bottoms, A. and Roberts, J.V. (2010), *Hearing the victim*, Devon: Willan Publishing, at page174.

competence' is desirable. Today, in Australia all Australian jurisdictions have enacted legislation which makes it easier for children to be able to give evidence. The traditional test for competence is this:

*'A person taking the oath must understand its nature and consequences.'*

The Australian Commission had stated:

*'Without it, the courts would be faced, on occasions, with evidence of no probative value, thus adding to the cost and expense of the trial. However, the wrong balance is struck under existing law. It is most important for the fact finding exercise and for the fairness of the trial system that a person who can give relevant evidence be permitted to do so'.*

In New South Wales ('NSW') where unsworn evidence was first introduced by the Evidence Bill 1993 (NSW). This was significant in introducing the concept of unsworn evidence by a witness into that country. It is important to understand the difference between evidence given by way of an affirmation and evidence given by children unsworn, compared to evidence given under oath. In New South Wales there is no provision for unsworn evidence but in other states in Australia there is provision for unsworn evidence, though the groups of people which can give such evidence and the way it is to be treated (for example, whether there are corroboration requirements or not) varies from state to state in Australia.

### **Compelling reason for urgent legislation in English law**

The above has illustrated compelling reason to put this important matter on a firm legal footing, notwithstanding the United Kingdom's recent efforts to safeguard children and vulnerable adults from sex offenders- a particularly important area of criminal law. There has been a growth in the range of legal provisions that have been created to tackle the behaviour of sex offenders and the Safeguarding Vulnerable Groups Act 2006 and the Sexual Offences Act 2003 do help to combat such crimes but do not help very young victims.

### **Conclusion**

*Children and Cross-examination* is a very welcome criminal law publication and a very brave effort by Hart Publishing to bring this urgent matter to the public forum. Criminals who commit such heinous crimes as rape of a three year old girl, are often quick on the uptake of their rights and Stephen Barker falls into this category as he announced his appeal against his sentence from *R v Stephen Barker*.<sup>38</sup>

The Defendant, Barker, raped his victim, a little girl then just two years of age, and she, at nearly four years of age, was subjected to cross examination. The case law became a precedent because the victim was the youngest child to ever give evidence in a rape trial in the United Kingdom.

Lord Carlile in his article in the *Law Society Gazette* on 25 March 2013, said:

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<sup>38</sup> Susi Watson, 'Steven Barker, who raped Baby Peter's Sister to Appeal', *Online Publication*, 24 November 2009.

*'It takes immense bravery for sexually exploited children to relive horrific ordeals, and the law must protect and assist them at every stage. The director of public prosecutions has taken an important first step in making this possible in new guidance to be produced later this year with the Association of Police and Crime Commissioners and the new College of Policing. I hope this will encourage the police and prosecutors to look in more detail at the evidence brought by children, while also importantly concentrating on the behaviour of the perpetrator, not the behaviour of the victim....'<sup>39</sup>.*

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Current Criminal Law ISSN 1758-8405.

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<sup>39</sup> Lord Carlile, 'Safeguarding child victims', *Law Society Gazette*, 25 March 2013, at page 10.