LORD CHIEF JUSTICE OF ENGLAND AND WALES

Half a Century of Change: The Evidence of Child Victims

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John Toulmin was my friend. He was a man who had many friends. Their vast number did not diminish the depth of friendship enjoyed by each and every one of us. His friends came from all over the world. Friendship with him knew no bounds of distance or nationality or race. Among many institutions and organisations which enjoyed his support, he gave distinguished service to King's College London. I am indebted to the College, but if I may say so even more to Carolyn Toulmin for doing me the honour of inviting me to give the first lecture in celebration of the memory of a distinguished jurist and a fine man.

I have chosen to use the occasion to offer some reflections on the way in which the approach to the evidence of children, and in particular children who are the victims of crime have changed during the last 50 or so years since John and I were called to the Bar. Children is used broadly, to cover children who are very small and teenagers too – all separate individuals, of course. And perhaps I should add that the focus of this lecture is the child victim of crime, usually sexual crime, but sometimes violent crime and sometimes neglect.

Perhaps I may be allowed to begin by repeating thoughts I have expressed on earlier occasions. Whether you approach the issue from the traditional common law "adverserial" process, or the equally traditional continental "inquisitorial" process (and that is a lecture in itself) justice cannot be done without witnesses. In Deuteronomy there is a passionate call for "heaven and earth to witness against you this day if you did evil in the sight of God". Heaven and earth now includes all kinds of modern technology, including, for example, CCTV cameras, and DNA profiling, both sources of evidence which were inconceivable in biblical times. And there will be advances in technology which, like the prophet who wrote Deuteronomy, we have not begun to contemplate, but for the present and the immediate future certainly, accurate and honest witnesses are required for justice to be done.

It is not an accident that one of the Ten Commandments prohibits the bearing of false witness. As drafted, it prohibits the false allegation. No one should be criminalised by falsehood.

We do all remember the precise wording of the seventh Commandment, don't we? "Thou shall not bear false witness "against", or as it is sometimes written, "on" thy neighbour. Read like a statute it does not expressly prohibit the bearing of false witness by the false denial of a truthful allegation. But surely, if not within the express language of the Commandment, it should follow by necessary implication. But does it? There is a problem here. For the guilty defendant, and there are very few guilty defendants of any smattering of acuity who do not know they are guilty of molesting a child, the truth is not always the objective. Many plead "not guilty" when they know perfectly well that they are. For such a defendant the objective is that truth should not emerge. So, the administration of justice requires honest and accurate witnesses to secure the conviction of the guilty defendant, but the guilty defendant has no obligation to be honest and accurate. He should be – of course, he should be, but his objective is to escape justice.

Yet, and it is a very important yet, not every defendant is guilty. An innocent defendant does want the truth to emerge. False allegations are sometimes made. Sometimes indeed they are made by children. We cannot avoid that stark reality. (EXAMPLE) The defendant is deemed to be innocent until proved guilty. There can be no compromise with that principle, and when we examine the myriad of problems attached to the evidence of the child victims of crime, we cannot even by implication compromise with that principle. The object of any reforms and improvements in our processes is not directed to "getting the defendant convicted", but to doing the best we can to make sure that the guilty defendant, and only the guilty defendant is convicted.

So our trial processes when John and I started in practice, and our trial processes today have this much, if not a great deal more, in common. They must cater for the truthful and the untruthful child witness and the guilty and the innocent defendant. And the processes mean that those vested with responsibilities for making these decisions do not know in advance which is which. This constant collision of crucial interests has always, and I believe will inevitably always continue to be integral to any system for the administration of criminal justice, and each generation is always seeking to do its best to reconcile the divergent interests.

And there is a separate crucial problem about any process designed to bring the criminal who has molested a child to justice. Assume that the child is telling the truth, which is the better course for the child, the court process, with an uncertain outcome if there is to be a trial, or appropriate psychiatric or psychological treatment for the child – and if both are appropriate, in which order should they take place? Which consideration should have the priority? And similarly, if the child is not telling the truth, who to assuage the consequences for the untruthful child, who sometimes honestly believes by the time he is giving evidence that he has been telling the truth, as well as the child witness who for whatever reason has deliberately lied. And how to address the consequences of such events for the innocent defendant, wrongly charged and facing conviction and prison.

For lawyers the focus has tended to be the court process, not for its own sake, but for the sake of justice, and the sake of bringing the process to an end in a verdict. For the psychiatrist, of psychologist, the focus is the welfare of the child, unless of course the psychiatrist of psychologist has an innocent defendant as his patient.

I believe that this is an area where high quality research is needed. Do we know, indeed has anyone ever bothered to find out, how the child sees it all, not at the point when the decision is being made, but say, 10 years later. Which would have been the better course? I

am told by my good friends Joyce Plotnikoff and Richard Woolfson that no research in this country has yet examined the impact on child witnesses years after their court appearances. There is a study as long ago as 2005 in the USA which followed up 200 young victims of sexual assault 12 years after trial. The broad findings were that the extent of distress while waiting to testify and while actually testifying predicated poor psychological adjustment in later life. But I am not sure that this is very surprising. Work has been done into the more or less immediate aftermath of the trial process, but I am thinking of the long term, and whether, for example, there may be a level of maturity or immaturity, or whether the level of seriousness of the offence described by the child, provide indicators about which process should come first. Of course such long term research would be extremely difficult and sensitive, and many victims will not want to resuscitate the past, whether the experience of being molested or indeed giving evidence. They may have formed new relationships, and not told their partners of what happened in their youth. All that said, I believe the reality is that we do not know – actually know - what is best. What I am prepared to say for certain is that the quicker the court process is completed, the better for the long term interests of the child.

Let me go back to those early days. As a young barrister at Quarter Sessions or Assizes my very strong impression remains that there were relatively few trials of sexual crime: relatively, that is to today, when many such cases crowd into our Crown Court lists, a significant proportion. Nowadays there are cases of historic sexual allegations, which in themselves are an indictment of the processes which discouraged or effectively disenfranchised the young from coming forward. We are, I believe, catching up with the consequences of the problems ignored or created by earlier generations. So our lists are filled up not only with contemporary crimes involving our current generation of children, but with the generations of child victims, now mature adults, who for whatever reason did not come within the purview of the criminal justice system contemporaneous with their childhood.

Perhaps I can give an example from my own very early experience. I was briefed to defend a father charged with committing incest with his daughters. The sequence is not pleasant to relate but in the course of a lecture like this the reality cannot be avoided. The case came from a very remote part of the country. After the wife had borne many children, effectively with her acquiescence the father started using his daughters as his sexual outlet. Three girls, he started on each when they reached about 15. When he was arrested he made a full confession. I still remember their arrival at court – everyone through the same entrance, you will remember, and on this occasion mother father and three young women, the oldest of who was now about 19 or 20. My client rejected my advice that he should face up to the responsibilities he had accepted when interviewed. The case was called on. He went into the dock. The first young woman was called into the witness box……..

And so this family all returned back together to their remote village. To this day I wonder whatever became of them, and their children in turn. No doubt other cases contributed to my profound sense that we were getting it wrong and the commitment that I made to myself that I would offer such support as I could to those who identified the need for changes.

Some are here tonight, and I regard them with personal affection and professional respect.

Let us just go back to those days, and ask ourselves why so many historic sexual abuse cases are now emerging. In part at least it is because those who were children then were not

listened to. Are any of you old enough to remember that "children should be seen and not heard"? Of course this was to do with manners, to do with children not showing off, and so on, but maybe, just may be this line of thinking encouraged the thought that children were not worth listening to, and not to be believed when they made allegations of sexual molestation which earlier generations refused to countenance as a reality. Let us assume that the child had got past all the woes and tribulations of actually getting someone in authority to even begin to accept the possibility that their complaints were true. Let us come to court. Rules of admissibility designed, of course, as a safeguard to protect the innocent from wrongful conviction simply closed the door to many of them. If one looks through the reported criminal cases of the 60s 70s and indeed the 80s, very few involved cases of child sexual abuse. That is a combination of two factors. The first is that so few cases were brought, and the second that when they were brought, so few resulted in convictions. And indeed if you look yet more closely, you will find that many of the appeals involving this kind of case were directed to the problems of corroboration, and its complexities.

The Law Reports reflected the reality. Do you remember the competency test? Children below some notional fixed age could not give evidence. It was said one of my predecessors, Lord Goddard, just a few years before John and I came into practice, it is ridiculous to suggest that a jury could attach any value to the evidence to a five year old child. Notice, "ridiculous": "any value". Indeed the same point was repeated as recently as 1987. And if they were older than whatever the notional age was, they were tested to see whether they understood the importance of telling the truth, and the test had religious connotations.

My much admired friend Professor John Spencer of Cambridge University, highlighted the way in which our remoter ancestors decided whether a child was competent by finding two examples. I shall read these to you, not only because one of them is shocking, but also because it is so shocking that it is difficult not to titter. But if you do titter you will not titter in fun, you will titter in shock.

It was not until the Criminal Justice Act 1988 that it was appreciated, and became the law that a proper understanding of the duty to speak the truth was just as valuable to the process as an understanding of the nature of the religious oath.

If during the police investigation it was thought that the child would pass these tests, they arrived at court. A building into which they had never been before, walking through the same door as the man they were accusing, and waiting in the same public area as that man, and his family if they were there, and in some cases if the man in question was, say, a stepfather, far too often with their mother on his not their side. They were called into court, into the witness box. Sometimes they could only just see over the edge, and when they looked, close by, because that was the design in courts those days, the defendant could be seen watching them, and then months after the incident or incidents, without being allowed to read or be reminded of their original statements, and which would not be looked at by the jury at any stage unless, extremely foolishly, counsel for the defendant "put them" in evidence – which you never did – they gave their accounts of what happened. As Professor Spencer points out this meant that having first been questioned by someone who wanted them to say one thing, they were then cross-examined by another person who wanted to make them say the opposite. All that surmounted, the judge then had to give the jury a corroboration warning which was couched in language which inevitably meant that he was reminding the jury that the evidence of the child was to be treated as untrustworthy. Judges incanted observations like it was "dangerous to convict" or "you must exercise very great care indeed", and "these allegations are easy to make and difficult to refute". Distress, if any

were seen, did not provide corroboration. The jury was warned to be very careful about distress, it could be easily feigned, and the only complaint made by the child that could be admitted must have been made very close, "recently", to the offence, otherwise it was "hearsay" and even when it was admitted as "recent" evidence, it did not constitute corroboration, but rather showed consistency, only consistency. And one unsworn child could not corroborate another. It is awful to say it but if you were a paedophile with an interest in very young children, no matter how many of them there were, they could not corroborate each other.

Some of you may think that all this is exaggerated: I assure you that it is not.

And let us just keep going round to the end of this cycle. Nothing in the court process amounted to any encouragement to the process of investigation if and when the child made a complaint. And I hate to imagine how many children there were who complained of molestation or who were or knew that they would be, if they did complain, subjected to corporal punishment of one kind or another for telling lies about nice old Mr so and so, the history master.

In 1990 Lord Lane, with his usual penetrating analysis, overruled the decision of Lord Goddard in 1990, observing

"… a change of attitude by Parliament, reflecting in its turn a change of attitude by the public in general to the acceptability of the evidence of young children and of increasing belief that the testimony of young children, when all precautions have been taken, may be just as reliable as that of their elders".

As ever with Lord Lane one needs to concentrate on the message. He was saying that the public generally did not or have not been prepared to accept the evidence of young children, and doubted whether their evidence would or could be as reliable as that of adults. And the reality is that there were still plenty of intelligent educated adults about in this country for whom this light had not dawned.

With the solemn ritual of investigating competence, with reference to God in an age in which such references were not always comforting, taking place in a solemn building with solemn people all around, all significantly older, all looking and indeed being people in authority over them, the belief was that children would be so compelled with the solemnity of it all that they would solemnly tell the truth. No one, or at any rate no one articulated any concern about how much more likely the child would be to freeze up or, no better, to become confused. Nor did anyone reflect that perhaps the very last thing any child who had been sexually molested would wish to do would be to tell a whole crowd of strangers in an unfamiliar place about something dirty and nasty that had happened. Forgive me making this personal, but just think about how embarrassing it was for everyone of you to talk about sexual matters to your parents. I can remember my very dearly beloved father being deeply embarrassed as he tried to explain the facts of life to me. Looking back on it I had no idea what he was talking about. My point however is that he, the adult, was embarrassed at the conversation. And children, and that is what I was, sense these things without being told.

We do of course have to remember that they were living then and we are living now. It was not very long since incest had been criminalised. In law a man could not rape his wife. A husband could claim damages for adultery from a man with whom his wife had an affair or began to live. I remember….

You could only get divorced if you could prove a matrimonial offence. And if you had committed adultery yourself, you had to ask the Court to exercise its discretion in your favour.

So perhaps my most solemn warning to all of us here tonight is this: we may be horrified about what happened then, but we need a little humility ourselves. We need to be very sure indeed that our grandchildren, 50 years from now, may not be astounded, and appalled, at the way we do things now. What we are doing reflects what we believe to be the best that we can, or perhaps putting it another way, we are striving to do the best that we can. 50 years from now they may not see it this way. Like us, our forefathers were acting in the best of good faith. They were just wrong.

Perhaps our forefathers either did not or could not believe that these things happened. As Lord Lane observed, perhaps they started with an assumption that a complaint was untrue. How much did they know of children anyway? For very many years, certainly in the time my father and many of your fathers were children, everyone believed that because children had no memory of events that happened to them before they were 3 years old, whatever did happen to them did not matter. Very few realised that those first 3 years of childhood were absolutely crucial to a child's development. And the difference between being cocooned in love or cocooned in misery at the start of life leaves indelible marks on character and personality.

You know perfectly well that I cannot and would not comment on any individual case. But does it come as any surprise that really from all over the world awful stories about mistreatment of youngsters are beginning to be allowed to emerge, and I include this country, and the United States, and the Republic of Ireland – and all credit to those who are prepared to allow for the fact that the older generation got it wrong, and that children were indeed subject to dreadful abuse, both physical and sexual, and of course emotional abuse without redress have, at last, as adults, found their voices. And let us not be foolish: men, and a few women, with a perverted sexual interest in children and youngsters are born in every country of the world. In some of them these sad stories have not yet begun to emerge.

And yet, as a case I have done recently underlined for me, for some victims, even years later, having a voice at last represents some kind of therapy – being believed, is invaluable – and there will be others who were forced into silence in those days, for whom even having to think about finding a voice, creates painful memories which they do not wish to reopen. You will find cases where 3 or 4 members of a family were abused years earlier, and when one decides to tell the story, one or more of his or her siblings will tell their own story, and yet one or more of the other siblings will not. Many of those families are deeply divided all these years later, all part of the ongoing consequences of the earlier abuse and either disbelief in the complaint, of fear of making it.

I have a vivid memory of one case, but it exemplified many where the complainant, a woman in her early 30s made a complaint, not because she really had any wish to have her stepfather, now an old man, sent to prison for many years, but because she wanted her mother, to whom she had complained when she was very young, to acknowledge that she, the mother, should have supported her daughter, not her husband.

Recognising some of the deficiencies of the old system is, of course, but a first step: recognition is not improvement. Can we just cast about into the 1980s? Few of you here will remember the phenomenal battle that went on before we introduced into the interrogation process by police officers of a suspect that rather simple outdated device called a tape recording machine. My clients, interviewed by police officers, tended to produce entirely coherent statements of confession, with a middle, a beginning and an end, all in their own language, all unprompted, and my clients turned out to see me, and somehow were so intimidated that they were inarticulate, virtually illiterate, quite incapable of stringing a sentence together. Nevertheless, although everyone knew something was going wrong, there was profound suspicion of and objection to the use of the tape recorder. We now take it, and a video recording of the defendant being interviewed entirely for granted. We know exactly what he said, the precise context in which he said it, and the question he was answering. Much the same battle raged over the possible use of a video- link for children's evidence. I reminded myself of an article written by John Spencer in 1987. As ever he delivers knock out blows with a humorous punch. The arguments against the use of a live video-link were that to do so would be "alien to the traditions of British justice – which, as ever lawyer knows, is the Envy of the World" which John describes as a "puzzling observation". But he was making a more simple point. If, as they just had, two Israeli security officers were allowed to give evidence from behind a thick oak screen against a terrorist who attempted to blow up a Jumbo Jet then surely that could be permitted when a "terrified little child" would be giving evidence. He ended:

"If the basic traditions of British justice really require (a notorious paedophile who sexually assaulted and murdered a child aged 4 years) to confront their 4 year old accusers face, even if this makes it impossible to get a word of evidence out of them, it is the traditions of British justice which need re-examining, not the video-link proposal".

This conservatism formed part of the context. So you have to see the opposition as part of the context in which Tom Pigot, the Common Serjeant of London was invited to write a report on the use of video recordings of interviews of child victims to be treated as admissible evidence at criminal trials. With his team in 1989 he produced a seminal report, a wake up call, remarkably clear about its recommendations and prescient for the future. Recommending the admissibility of video recording he and his Committee suggested "that a fundamental change of attitude towards children in the legal context is now required". They added that the courts should be "more receptive to children". I have little doubt that they influenced the remarks made by Lord Lane shortly afterwards. Nevertheless they went on to point out that there were very many practical, legal and penal issues which would require re-examination in the light of modern conditions and research.

If I may jump ahead we now know that the video recording of the account given by very young children indeed – not their oral testimony in the witness box in court – can provide very compelling evidence, perhaps not least, because many of them are too young to be guileful.

The take up for the Pigot reforms was slow, not wildly enthusiastic, and some were directly opposed. I remember a huge debate, still continuing, about whether allowing a child to give evidence through a screen diminished the impact of his or her evidence, thus leading juries to acquit when, so it was contended, if the child had given evidence from the witness box, they might have well convicted. Research suggested otherwise, but I believe that much the most significant feature was the quality and size of the screen available in the particular court. Over the years, with support from learned academics energetic campaigners and

enthusiastic researchers, with weight added by the NSPCC and Victim Support, judicial training, and lawyers practising in this field, very many improvements have taken place. Society has changed: the attitude of society to complaints by children has changed. People recognise in a way they did not that these things, sadly, unfortunately, do happen. And that they can cause devastating damage. All this is admirable, and 25 years from now I suspect that there will be fewer historic cases from the present needing trial in about 2030 than there are now, which go back to the 1970s and 1980s.

You will not be helped by a recital of the arrangements for the evidence of children. You will find them in all the text books under the rubric "Special Measures". I am no longer very happy with describing them in this way. That was fair enough when we were trying to bring home the importance of addressing these new measures which were, at that time, special. Now they are a perfectly normal ordinary part of the procedural safeguards provided for vulnerable witnesses. In effect, by statute, all witnesses under 18 are entitled to them. They include
Video recorded evidence in-chief
Giving evidence by live-link, accompanied by a supporter
Screening the witness from the defendant
Giving evidence with the Court in private, with limited exceptions
Removal of wigs and gowns
Examination through an intermediary
Provision of aids to communication

Of course the anonymity of the child witness is now long established, and there are significant changes to the layout of courts, so that the child does not come through the same door as the defendant, and is kept in a place where the child can neither see or be seen by the defendant and his supporters.

All this has made for dramatic improvement. Along side the growing public recognition that children could give reliable evidence, the processes to enable them to do so have been greatly improved. But the process is not complete.

We are talking about a lot of children going to court. We do not actually know precisely how many young witnesses give evidence, and from the statistics we do have, we do not know how many of the witnesses were themselves victims of the alleged crime, or witnesses to crimes in which other people, including adults of course, were victims. In 2008/9 the CPS statistics indicated that about 48,000 children were called to give evidence at court: a couple of years earlier the Witness Service supported over 30,000 young witnesses at court in England and Wales. In 2012 the joint inspection report on the experience of young victims and witnesses suggested that in a 12 month period about 33,000 children and young adults under the age of 18 years would be involved in giving evidence at a criminal trial. So we are not talking small numbers. Let us take the lowest figure, 30,000. Let us postulate what I believe to be the absurdity that half of them will suffer no concern or long term effect from giving evidence. That still leaves a very large number of individual children who will have been damaged. It does seem to me, however, that we really should have properly gathered statistics of the number of child victims who are involved in the criminal justice process. And they should be divided into those who make complaints and provide evidence, which are followed by a confession and early guilty plea: those who provide the same evidence, and attend court and are then greeted by a last minute guilty plea: and most important of all, those who provide evidence and attend court and give live evidence at a trial. Desirable although this is, on Budget Day particularly, I should perhaps add a footnote: staff at court

have been cut: staff in the CPS have been cut: everywhere there are budgetary restraints. We have to beware of the temptation to think that because improvements are desirable they come at no cost for those responsible for their implementation.

This lecture is already too long, and I have in mind to develop some of the themes which I am going to address in a law reform lecture in the autumn. I suggest that in these 50 years of change, what we have actually recognised is that there are many different ways of enabling the evidence of a child witness to be fairly considered by a court, without representing any change to the proper protections available to the defendant. I do mean "proper" protections: I discard artificial protection. Just because a change does not coincide with the way we have always done things does not mean that it should be rejected. We should be considering each individual child as the individual he or she is, at the age and with the levels of the maturity that he or she has, alleging whatever form of crime he or she has been the victim. Do proposed changes cause unfair prejudice to the defendant?: if so, of course, they cannot happen. If however they make it more likely to enable the truth to emerge, whether favourable or unfavourable to the defendant, then let it be done. The truth is the objective.

There is an urgent need to address what is sometimes described as Pigot 2, the second half of the recommendation that the whole of the child's evidence, in-chief, and then, after a fair opportunity for that evidence to be considered by the defendant and his legal advisors, immediate cross-examination, video recorded and in due course presented to the jury. I have heard numerous objections and obstacles. Yes, it is true that in a few cases, proper disclosure at a later stage in the process may reveal information about which the cross-examiner was ignorant at the time. But surely all we need to do is to introduce a measure of flexibility. If the interests of justice require a further cross-examination, so be it: as to when and where it should take place, appropriate arrangements can be made. I shall be astonished if Section 28 of the 1999 Act (which contains the necessary permissive provision) is not implemented within a few years. And we shall all be astounded about what all the fuss was about.

There are four brief further points. First we have yet to establish the full use of the intermediary systems in these cases. Second we have not yet fully answered the question whether it is necessary for the child witness ever to come to court at all, and whether for some of them, at any rate, attendance at trial cannot be arranged in a more congenial place, with necessary safeguards to ensure judicial control over the trial process and the safeguarding of the interests of the defendant. Third we have not yet, established full judicial insistence that questions of a young witness should be open ended. What are described as tag questions are unacceptable. Indeed the modern technique of cross-examination, which I deprecate generally, is particularly damaging in cases involving young witnesses. That is a long assertion, followed by "did he?" or "did you?" or sometimes not even a question, but raising the voice in an inflexive questioning tone. Fourth we must make sure that all the provisions which have been introduced as best practice are in fact implemented.

The end result is this: give or take a year or two, in John Toulmin's first 25 years in practice the way in which the evidence of children and teenagers was addressed remained rooted in the practices and misunderstandings which applied when he started in practice. During the last 25 years there have been remarkable changes, perhaps indeed if one compares the processes which obtained at the start of his career with those which are in place now, revolutionary changes. That is profoundly welcome. That is a very strange thing for a Lord Chief Justice to be saying, but the revolution in our processes, the necessary revolution in

our processes is not yet over. But then given that so much has been achieved without unfairly prejudicing the position of the defendant, we must confidently expect this revolution to continue.

I think that I have just heard John’s voice from over my shoulder saying “I entirely agree”.

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