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# COMPETENCE AND COMPELLABILITY

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## Definitions

**Competence** The ability to give evidence at trial.

**Compellability** The extent to which a witness can be forced to give evidence at trial, even if they do not wish to do so.

**Affirmation** Secular equivalent of an oath, and with the same legal consequences, for those who do not wish to invoke a divine sanction when giving evidence.

## 1. Competence

### Introduction

\* e law pertaining to competence governs the ability of a witness to give evidence at trial, ie it determines whether or not he can be 'heard' by the court. As will be seen, that regulating compellability governs whether the same witness can be *forced* to testify, even if he does not wish to do so, in the sense that he will be punished if he does not appear to give evidence when required. Historically, at common law, many groups of witnesses were deemed not to be competent to give evidence, and so could not testify, even if they could provide potentially important information. Among them were: atheists, convicted felons, and 'interested' parties to both civil and criminal litigation (ie the litigants themselves). Additionally, spouses could not normally give evidence for or against each other. A variety of reasons lay behind this rather restrictive situation.

For example, atheists were barred from testifying as they would not be able to take an oath, or fear its religious sanction if they did. The rationale for the (perhaps surprising) incompetence of interested parties was based on a pervasive fear that, without it, litigants might be encouraged to manufacture evidence to support their cases. When it came to marriage, the law viewed married couples as being almost a single entity, the wife's legal identity being subsumed in that of her husband under the doctrine of *coverture*. Since a defendant was (at that time) incompetent

to testify, it was logical that a wife could not testify if her husband was on trial, even as a defence witness, unless she was the victim of her husband's crime of violence (where, for practical reasons, an exception was made).

All of the witnesses listed above became competent to testify as the result of a series of Victorian statutes, the enactment of which were influenced by the earlier work of Jeremy Bentham and a growing recognition of the value of such evidentiary sources. Additionally, in the modern era, under s 80 of the Police and Criminal Evidence Act 1984 (PCEA 1984), as amended by Sch. 4 to the Youth Justice and Criminal Evidence Act 1999 (YJCEA 1999), spouses are always competent to give evidence in criminal trials for both the prosecution and defence. As a result of these reforms, the vast majority of adult witnesses are competent to testify. \* is 'inclusive' approach was further encouraged by the publication of *Speaking Up For Justice*, a Home Office Report from 1998. \* is suggested that only wholly unintelligible testimony should be withheld from a criminal tribunal, and influenced subsequent reform.

**Speaking Up for Justice: Report of the Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System, Home Office, June 1993, paras 11.25–11.26**

11.25 If the basic principles of evidence are that relevant evidence is included and that it is for the tribunal of fact to weigh it, it could be argued that public policy should allow for its inclusion in all but the most exceptional of cases. This would involve reviewing both the present system of exclusions by category based on what we now consider to be outdated assumptions of human nature as well as the assumptions on the jury's ability to understand, weigh, and consider evidence where the manner of its expression may be difficult or unusual.

11.26 This approach would retain the right of the jury or tribunal of fact to test the credibility and weight of the evidence. It would also be right to allow the jury to hear expert evidence as to the ability of the witness to give reliable evidence based on the witness's faculties while not usurping the jury's function by testing the evidence. However, unless incoherency is such that it renders the witness' evidence without appropriate aid wholly unintelligible, the option would be based on a presumption that in the case of all witnesses over the age of 14 years evidence will be called to be tested by the jury as best it can. The oath can be dispensed with in such cases but the need to tell the truth will be explained to the witness, who will be required to provide some form of acknowledgement.

## Competence in Criminal Cases

\* is encouragement of general competence in criminal matters is reflected, to a degree at least, in the presumption contained in s 53(1) of the YJCEA 1999, which provides that: 'At every stage in criminal proceedings all persons are (whatever their age) competent to give evidence.' However, the Act itself allows for two exceptions to this general rule. One of them, a lack of mental or intellectual competence, whether occasioned by retardation, mental illness or infancy, has occasioned problems for centuries. Even in the 1700s, it was appreciated that some 'ideots, madmen, and children under the Age of common knowledge' were unable to give evidence because of their 'want of skill and discernment' or because they were 'incapable of any sense

of Truth'.<sup>1</sup> This remains the case today, at least in some situations. Additionally, defendants are not competent to give evidence for the prosecution.

### **Section 53 of the YJCEA 1999, 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 subsections (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 subsection (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).

## Determining Competence in Criminal Cases

By s 54 of the YJCEA 1999, it is for the court to decide (in a criminal case), whether on a motion by either party or of its own accord, if a tendered witness is competent to give evidence. However, it is for the party calling the witness to satisfy the court that s/he is competent, albeit only on the balance of probabilities, under s 54(2) of the Act. It must do so in the absence of the jury, if the trial is on indictment, and expert evidence may be called on the issue. For example, this might include the evidence of a child psychiatrist called to testify that a tendered (infant) witness can give intelligible answers to questions.

When making a decision as to competence, a court must also consider whether a special measures direction issued under s 19 of the YJCEA 1999 would assist in making the prospective witness competent, for the purposes of the Act, in a 'best case' scenario. Thus, when deciding whether a child would be able to give intelligible answers to questions, the court must decide whether he would be able to do so if, for example, he gave his evidence in chief via a video recording, and were cross-examined via a video-link, rather than testifying in open court.



### **Cross-reference Box**

A range of special measures directions, most issued under the YJCEA 1999, have been introduced to reduce the trauma of testifying and with a view to enhancing the quality of such evidence. These provide alternatives to testifying in open court for certain witnesses, especially, for example, children and sexual complainants. For more information on special measures directions go to pp 406–419.

<sup>1</sup> *ibid* at 147.

## The Test for Mental/Intellectual Competence

In the modern era, under s 53(3) of the YJCEA 1999, a person is not competent to give evidence in criminal proceedings if it appears to the court that he cannot understand questions put to him as a witness, and cannot give answers to them that can be understood. \* is might be, for example, because of mental defect, insanity or infancy.

\* is two-part regime replaced the complicated mixture of common law and statutory rules that had previously governed this area of the law. As a result, the 1999 Act repealed, *inter alia*, s 38 of the Children and Young Persons Act 1933 and s 33A of the Criminal Justice Act 1988. Whether or not the test set out in s 53(3) is satisfied appears to be a question of degree, as can be seen from the following case, which involved the ability of a woman, the victim in a rape case, who was 81 years old and suffering from the effects of Alzheimer's disease, to give evidence at trial.

**R v Sed** [2005] 1 Cr App Rep 55, CA

### Auld LJ

Mr Carter-Stephenson's second point was that, unless the complainant understood all the material questions put to her and all her material answers were understandable, she could not qualify as competent within the terms of s 53. It should be noted that s 53 does not, in terms, provide for 100 per cent mutual comprehension of material exchanges giving rise to potential evidence. And, in our view, depending on the length and the nature of the questioning and the complexity of the matter the subject of it, it may not always require 100 per cent, or near 100 per cent, mutual understanding between questioner and questionee as a pre-condition of competence. The judge should also make allowance for the fact that the witness's performance and command of the detail may vary according to the importance to him or her of the subject matter of the question, how recent it was (in this case the interview took place within two days after the alleged attempted rape) and any strong feelings that it may have engendered. It is thus for the judge to determine the question of competence almost as a matter of feel, taking into account the effect of the potential witness's performance as a whole, whether there is a common and comprehensible thread in his or her responses to the questions, however patchy—bearing always in mind that, if, on critical matters, the witness can be seen and heard to be intelligible, it is for the jury and no-one else to determine matters of reliability and general cogency.

In *DPP v R* [2007] EWHC 1842, a 13-year-old girl, who was severely mentally handicapped, was the complainant in a sexual assault case. Her initial police interview about the incident was video-recorded and was considered to be coherent. \* is was tendered at trial as her examination in chief (under a 'special measures' direction). However, when it came to cross-examination, the girl was unable to recall anything about the incident at all. The question then arose as to whether this lack of independent recollection of the incident that had brought her to court rendered her incompetent. \* e Divisional Court concluded that it did not. \* e girl satisfied the test set out in s 53 of the YJCEA 1999, in that she could understand and answer questions coherently, even if her answer was limited to saying that she did not remember anything.

**DPP v R** [2007] EWHC 1842, DC**Hughes LJ**

This was not a case, on the Justices' findings, of incompetence. The girl may have had her learning difficulties. Her evidence may have needed treating with some care in consequence, but the problem at trial was not capacity to understand or to give intelligible answers, it was loss of memory. Recollection is quite different from competence. Of course, absence of recollection may, in some cases, co-exist with absence of competence, but they do not necessarily run together. Persons who have no recollection for an event may be perfectly competent. A simple example is the witness who is knocked out in the course of whatever happened which founds the charges, and has absolutely no recollection of what occurred, but is otherwise fully functioning.

**Pause for reflection**

Did this decision afford the defendant a proper opportunity to test the complainant's evidence?

## Competence and Children

\* The wording of s 53(1) means that children of any age are, potentially, competent to testify in criminal trials, unless, under s 53(3), they cannot understand questions or give comprehensible answers to them. \* The Court of Appeal has interpreted this as meaning that the child witness must be able to understand what is being asked of them and their answers must be of a nature that a jury could understand. \* Thus, the words 'put to him as a witness' under s 53(3)(a) meant the equivalent of 'being asked of him in court'. An infant who can only communicate in baby-language with his/her mother would not normally be competent: *R v MacPherson* [2006] 1 Cr App R 30. In this case, the Court of Appeal went on to make some important observations about the working of the section.

**R v MacPherson** [2006] 1 Cr App R 30, CA**Forbes J**

We also accept the submission that there is no requirement in the Act (which is commendably clear in its language) that the witness in question should be aware of his status as a witness. Questions of credibility and reliability are not relevant to competence. Those matters go to the weight of the evidence and might be considered, if appropriate, at the end of the prosecution case, by way of a submission of no case to answer.

Until late in the twentieth century, the courts were reluctant to receive evidence from very young infants, especially those who were below seven years of age. For example, in comments made in the Court of Appeal, in *R v Wallwork* (1958) 42 Cr App R 153, Lord Goddard deprecated the

calling of a five-year-old girl in an incest case, and expressed the hope that it would not occur again. Nevertheless, nowadays, and partly as a result of the new means whereby a witness (especially children) can testify pursuant to a 'special measures' direction (such as via a video-link or with the use of an intermediary), and partly because of psychological research that suggests that the evidence of infants is often of considerable value, and not necessarily inherently unreliable, younger children are sometimes allowed to testify. It is also recognized that there is often a strong public interest in allowing them to testify, particularly in child abuse cases, where they may be the only witness available.

Indicative of the potential value of children's evidence can be considered the information provided by 'Susie', a three-year-old girl who had been abducted in 1983, sexually assaulted and then abandoned for dead in a cesspit, and who gave an account of her experiences shortly after she was found. Subsequent investigation established that she had given a remarkably accurate narrative of what had occurred, though her recollection of what happened subsequently deteriorated very much faster than would be the case with an older child.

### **D Jones, 'The Evidence of a Three-Year-Old Child' [1987] Crim LR 677 (Extract)**

This case report illustrates that a child as young as three can provide a convincing account of a traumatic event which she had experienced. Additionally she could correctly identify her assailant. Part of the video taped assessment at day 14 consisted of assessments of her general reliability as well as the reliability of her ability to identify from photographs. In this case the information obtained from the child's account was able to be matched with the defendant's eventual confession. Susie's account and the defendant's show that this little child, at least, was a reliable informant. The 'account' itself consisted of demonstration with toys, her observed behavioural reactions as well as direct statements that she made.

As a result of a change in attitudes engendered by such research, in *R v C.A.Z.* (1990) 91 Cr App R 203, a six-year-old was allowed to give evidence against her father in a sexual abuse trial. Even more notably, in *R v Dean* (2007), *The Times*, 13 January, a five-year-old girl gave evidence, using an ABE (Achieving Best Evidence) video recording, followed by cross-examination via a live link, to the effect that she had been raped by the defendant, who was also her babysitter, when she was only three. In *R v Barker* [2010] EWCA Crim 4 the evidence of a four-and-a-half-year-old child, about events that took place when she was three, was also received, in another rape case, and the safety of the verdict upheld on appeal.



#### **Pause for reflection**

In what circumstances would you be willing to convict on the evidence of a five-year-old?

Even so, there are, of course, still limits on the ages at which *most* infants can give evidence without falling foul of s 53(3). In *R v Powell* [2006] Crim LR 781, for example, a three-and-a-half year-old sexual complainant was initially treated as (just) competent to give evidence, in the light of her pre-recorded police video, which was both coherent and relevant. However, when it came to cross-examination, via a live link, it was apparent that she was a much less

satisfactory witness than the video suggested; she failed to articulate many answers and, at one point in the process, appeared to be accepting the defence case. It was held that what was relevant to the judge's decision on admissibility was competence at the time of trial, and, in the light of the complainant's cross-examination, it was apparent that she was not competent to testify. As a result, the trial judge should have reversed her initial decision and rejected all of the infant's evidence, including the video. As this suggests, it is now well established that the competence of infants may be reconsidered at the end of their evidence: *R v Barker* [2010] EWCA Crim 4.

***R v C.A.Z.* (1990) 91 Cr App R 203, CA**

**Lord Lane CJ**

So far as Wallwork is concerned, that decision, some considerable number of years ago, in 1958, has really been overtaken by events. First of all it will be seen from the words of Lord Goddard that part of the concern which he expressed was concern over the position of the child itself in court, when he mentions the fact the court was cleared so far as it was possible to have it cleared. That particular problem has now to a great extent been cured by the system of video links, which of course in Lord Goddard's days were not even imagined. But more recent developments... [indicate] 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.

However, where an infant has been deemed to be competent, their evidence is like that of any other witness, and can found a conviction like that of any other witness, without requiring any supporting evidence.

***R v Barker* [2010] EWCA Crim 4, CA**

**The Lord Chief Justice**

There remains the broad question whether the conviction which is effectively dependent upon the truthfulness and accuracy of this young child is safe. In reality what we are being asked to consider is an underlying submission that no such conviction can ever be safe. The short answer is that it is open to a properly directed jury, unequivocally directed about the dangers and difficulties of doing so, to reach a safe conclusion on the basis of the evidence of a single competent witness, whatever his or her age, and whatever his or her disability. The ultimate verdict is the responsibility of the jury.

In former years, the competence of a child (or any other witness) to give evidence (whether on oath or not) was normally determined in the presence of the jury, on the basis that this would also assist jurors when it came to weighing his/her testimony if they were (ultimately) permitted to give evidence. However, this is no longer the case, such questions usually being determined in the absence of the jury, as a matter for the judge alone.

In *R v Deakin* [1995] 1 Cr App R 471, the victim and proposed prosecution witness was a woman with Down's Syndrome, who had been indecently assaulted by a care assistant. At the competency hearing, the judge heard from her in the presence of the jury and also took expert testimony from two psychologists, whose opinion was that the woman was capable of telling the truth. The defendant appealed on the basis that this evidence should not have been heard in front of the jury, who might have been influenced by the experts' acceptance of the complainant's story. \* The Court of Appeal agreed, at least insofar as the experts were concerned (although applying the proviso and dismissing the appeal). This applies equally to children and extends to the witness's examination by the judge, as can be seen from the following extract.

***R v Hampshire*** [1995] 2 Cr App R 319, CA

**Auld LJ**

It follows, in our judgment, that a judge who considers it necessary to investigate a child's competence to give evidence in addition to or without the benefit of an earlier view of a video-taped interview under section 32A of the 1988 Act, should do so in open court in the presence of the accused because it is part of the trial but need not do so in the presence of the jury. The jury's function is to assess the child's evidence, including its weight, from the evidence he or she gives on the facts of the case after the child has been found competent to give it. The exercise of determining competence is not a necessary aid to that function.

## Defendant Competence for the Prosecution

\* The previous and long-standing rule whereby a defendant was not competent to give evidence for the prosecution in his own trial, or in that of any co-defendant charged in the same proceedings, has also been preserved by dint of s 53(4) of the YJCEA 1999. What this means is that (obviously) an accused person cannot give evidence for the Crown against himself, nor, when two or more defendants are being tried together, can he be called by the prosecution to give evidence against one of his co-defendants. However, under s 53(5), the definition of a person who is 'charged in criminal proceedings' does not include someone who is no longer liable to be convicted (rather than sentenced). Most commonly, as the provision itself suggests, this state of affairs might be occasioned by the relevant individual pleading guilty. Having done so, he could then be called to give evidence for the prosecution against a former co-defendant.

Such a situation could also be achieved by some other mechanism, or for 'any other reason' to quote the statute. \* This could be done, for example, by the Attorney General entering a *nolle prosequi* against the defendant, that is, a writ bringing the prosecution to an end. Converting a joint trial into separate trials of the individual co-defendants would also have this effect. However, cynical attempts to do this purely as a way of ensuring that co-accused become competent to give evidence against each other have usually been deprecated by the courts. In theory, an accused person may be called (though he cannot be compelled) to give evidence for the defence of a co-defendant, though, if he does so, he will, of course, be liable to be cross-examined about his own involvement in the alleged crime, making such a scenario highly unlikely.



## Competence in Civil Cases

An adult witness will be competent to testify in a civil case if he can take the oath/affirm prior to doing so (see below). There is no power to allow an adult to give evidence except on oath (unlike the situation in criminal matters), so that competence and the ability to be sworn are synonymous. A child witness in civil matters who does not 'understand the nature of an oath' *can* testify without being sworn, provided he satisfies the test set out in s 96(2) of the Children Act 1989, which is that he understands the duty to speak the truth and has sufficient understanding to justify his evidence being heard. The duty to speak the truth is, presumably, the duty to be truthful in 'normal' social intercourse (rather than the added duty imposed when on oath). For these purposes, s 105 of the Children Act provides that 'children' are young people under the age of 18 years. The 1989 statute was the first to allow unsworn evidence from children in civil matters.

Nevertheless, adults in civil cases who are, in some way, so mentally defective that they cannot meet the test for taking an oath, cannot give unsworn evidence, even if they meet the same standard of understanding as children testifying under s 96(2) of the Children Act 1989 or, for that matter, unsworn adults giving evidence in criminal matters pursuant to s 53(3) of the YJCEA 1999. This could, in theory, produce some strange results. Thus, a slightly mentally backward 17-year-old might be able to testify (unsworn) on one day, but could not do so a month later, after he had turned 18. Of course, not all forms of mental disturbance will preclude a witness from reaching the requisite level of understanding to take an oath. Thus, in *R v Hill* (1851) 2 Den 254, the inmate of an insane asylum, who believed that he was occasionally being spoken to by spirits, but who, despite this delusion, had a clear understanding of the duty imposed by an oath, was allowed to be sworn and testify on a manslaughter charge; the same principle would apply to a civil matter.

## 2. Testifying on Oath/Affirming

### Introduction

When a party in a case calls a witness to give evidence, the witness will normally either take the oath or, alternatively, affirm, before testifying. Indeed, for adult witnesses in civil trials the test for competence and that required to take the oath/affirm are synonymous, though this is not the case for children in civil matters, or for adults and children in criminal trials. An affirmation will occur if the witness is not religious, is of a faith that cannot be readily accommodated by the court (perhaps because it lacks the requisite holy text) or because, like members of the Society of Friends (Quakers), they do not believe in swearing a religious oath. Nowadays, in most urban courts, all of the major religions found in modern England are catered for, with copies of the Bible (both Old and New Testament), Koran, Gita, etc, being available. However, if an arcane religious belief cannot be catered for, the witness can be asked to affirm. Counsel should not normally challenge a witness who has affirmed on the basis that they are, in reality, religious, and should have taken an oath on the appropriate holy book, suggesting an intention not to tell the truth: *R v Majid* [2009] EWCA Crim 2563.

\* The terms of the oath and affirmation are set out in s 1(1) of the Oaths Act 1978 and have the same legal effect *vis-à-vis* subsequent prosecutions for perjury. \* The former is: 'I swear by Almighty God that the evidence I shall give shall be the truth, the whole truth and nothing but the truth.' \* The terms of the affirmation are: 'I do solemnly and sincerely and truly declare and affirm that the evidence I shall give shall be the truth, the whole truth and nothing but the truth.' In his 2001 report, Lord Justice Auld suggested that, although it was necessary to mark the beginning of a witness's evidence in some manner, a solemn promise to tell the truth would be superior to the current oath/affirmation regime, with its combination of 'archaic words' and (in the case of the oath) the invoking of God, which were, nevertheless, often uttered in a perfunctory manner. An inadvertent failure to administer the oath to a witness who ought to have been sworn is not a mere technicality, one that can usually be ignored on appeal, as such a witness may have given different evidence if they had testified on oath: *R v Sharman* [1998] 1 Cr App R 406.

### **R v Sharman** [1998] 1 Cr App R 406, CA

#### **Mantell LJ**

It might be said that it is extremely unlikely that had P been sworn she would have deviated in a single instance from the answers which she returned to questions both in chief and cross-examination. But for the court to make that assumption would be to diminish the requirement that evidence be sworn or affirmed to the point where the procedure becomes virtually meaningless. As Evans L.J. said in *Simmonds*: 'The courts proceed on the basis that the oath imposes a sanction, temporal if not religious, and for those reasons the courts do not receive un-sworn evidence except where it is expressly permissible for them to do so.' So as Evans L.J. went on to say in that case: 'The evidence ostensibly given was not evidence at all.' That means and can only mean in the present case that the evidence received from P *viva voce* was inadmissible.

## Oaths in Criminal Cases

In criminal matters, the criteria set out in s 55 of the YJCEA 1999 now determine whether or not a witness is to be sworn. In particular, it should be noted that, under s 55(2)(a) and (b), only a person aged 14 or more years can be sworn, and that, to do so, he must have a sufficient appreciation of the solemnity of the occasion and of the particular responsibility to tell the truth which is involved in taking the oath.

\* This means that the Act provides a statutory definition of competence to give sworn testimony, replacing that which previously existed at common law (though it is largely the same as the test that developed in the 1970s), and which still applies in civil cases. If the witness is able to give intelligible testimony, ie he can understand questions and answer them so as to be understood, he will be presumed to be able to give sworn evidence unless there is evidence (which may include expert evidence) to the contrary: s 55(3). However, once such evidence is adduced, for example, by the opposing party demonstrating that the witness may not understand the responsibilities inherent in taking an oath, the calling party must persuade the court, on the balance of probabilities, that the witness is competent to be sworn, ie that they are over 14 and appreciate the requirements of the oath: s 55(4) of the Act. This will usually be determined on the *voir dire* procedure (see chapter 1).

\* The question as to whether or not an oath has been lawfully administered does not appear to rest on the theological intricacies of the particular religion of the witness concerned. For example, in *R v Kemble* [1990] 1 WLR 1111, it was held that the fact that a Muslim witness took an oath using the New Testament did not constitute a material irregularity in the course of the trial, even though this was contrary to Islamic rules on oath taking. The witness had been properly sworn.

***R v Kemble* [1990] 1 WLR 1111, CA**

**Lord Taylor CJ**

We take the view that the question of whether the administration of an oath is lawful does not depend upon what may be the considerable intricacies of the particular religion which is adhered to by the witness. It concerns two matters and two matters only in our judgment. First of all, is the oath an oath which appears to the court to be binding on the conscience of the witness? And, if so, secondly, and most importantly, is it an oath which the witness himself considers to be binding upon his conscience?

So far as the present case is concerned, quite plainly the first of those matters is satisfied. The court did obviously consider the oath to be one which was binding upon the witness. It was the second matter which was the subject so to speak of dispute before this court. Not only did we have the evidence of the professor, the expert in the Muslim theology, but we also had the evidence of the witness himself. He having on this occasion been sworn upon a copy of the Koran in Arabic gave evidence before us that he did consider himself to be bound as to his conscience by the way in which he took the oath at the trial. Indeed he went further. He said, 'Whether I had taken the oath upon the Koran or upon the Bible or upon the Torah, I would have considered that to be binding on my conscience.' He was cross-examined by Mr. Banks in an endeavour to show that that was not the truth, but we have no doubt, having heard him give his evidence and seen him give his evidence, that that was the truth, and that he did consider all of those to be holy books, and that he did consider that his conscience was bound by the form of oath he took and the way in which he took it. In other words we accept his evidence.

## Oaths in Civil Cases

As already noted, adult witnesses in civil cases must give evidence on oath, so the test for the oath and that for competence is the same. Children in civil cases can also give evidence on oath, provided they meet the requisite test to do so. Historically, at common law (which still governs civil cases), to have a sufficient understanding of the oath to justify being sworn required an appreciation of its divine sanction: *R v Brasier* (1779) 1 Leach 199. In the modern era, however, a time when religious belief is less prevalent, this has been replaced by the more secular test enunciated in the criminal case of *R v Hayes* [1977] 1 WLR 234, which still governs the situation in civil matters (the principle has been reduced to a similar statutory formula, in criminal cases, under s 55 of the YJCEA 1999). \* This asks whether the witness has a sufficient appreciation of the solemnity of the occasion, and the added responsibility to tell the truth, which is involved in taking an oath.

Normally, *Hayes* suggests, infants below the age of eight will be too young to take an oath, while most children over 10 will be able to do so; the most keenly contested cases will fall in

the two-year watershed between these ages. However, each case will turn on its own facts; an immature child of 11 might not be sworn, a very 'advanced' child of seven might be able to take an oath. \* The case also made it clear that the Court of Appeal will not lightly interfere with a judge's exercise of his discretion in this respect, given that he has the advantage of seeing the boy or girl. Usually, an inquiry as to whether children are capable of taking an oath will only be carried out on those who are under the age of 14: *R v Khan* (1981) 73 Cr App R 190. (Although this was a criminal case, the principle survives in civil matters.)

***R v Hayes* [1977] 1 WLR 234, CA**

**Bridge LJ**

It is unrealistic not to recognise that, in the present state of society, amongst the adult population the divine sanction of an oath is probably not generally recognised. The important consideration, we think, when a judge has to decide whether a child should properly be sworn, is whether the child has a sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth, which is involved in taking an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct.

## Unsworn Evidence

As will be appreciated from the above, competence in criminal matters, and an ability to give sworn evidence, are not synonymous. As a result, s 56 of the YJCEA 1999 permits the reception of unsworn evidence that is given either by witnesses who are under the age of 14 or by older witnesses who do not appear to understand the solemnity of the proceedings required in taking an oath (perhaps because they have a mental handicap) but who can, nevertheless, still give intelligible testimony (ie they are competent under the Act).

In *R v Hampshire* [1995] 3 WLR 260, Auld LJ suggested that, where a young child gives unsworn evidence, a judge might find it appropriate to remind him/her, in the presence of the defendant and jury, of the importance of telling the truth. For example, he might say: 'Tell us all you can remember of what happened. Don't make anything up or leave anything out. \* is very important.' Under s 57 of the YJCEA 1999, it is an offence to give false unsworn evidence in circumstances that would constitute perjury, had the evidence been given on oath, though, for those under 14, the penalty is limited to a fine not exceeding £250. A deposition of unsworn evidence may also be taken, pursuant to s 56(3). In civil matters, unsworn evidence can be given by children who satisfy the test set out in s 116 of the Children Act 1989 (discussed above).

**Section 56 of the YJCEA 1999, Reception of unsworn evidence (Partial extract)**

- (1) Subsections (2) and (3) apply to a person (of any age) who—
- (a) is competent to give evidence in criminal proceedings, but
  - (b) (by virtue of section 55(2)) is not permitted to be sworn for the purpose of giving evidence on oath in such proceedings.

- (2) The evidence in criminal proceedings of a person to whom this subsection applies shall be given unsworn.
- (3) A deposition of unsworn evidence given by a person to whom this subsection applies may be taken for the purposes of criminal proceedings as if that evidence had been given on oath.
- (4) A court in criminal proceedings shall accordingly receive in evidence any evidence given unsworn in pursuance of subsection (2) or (3)....

## 3. Compellability

### Introduction

Compellability determines whether or not a witness can be legally forced to testify, irrespective of his personal wishes. \* This can be done by a relevant party securing a subpoena, witness order or witness summons, requiring him to attend to give evidence, depending on the forum in which the witness is asked to testify. If the witness then fails to obey it, if he does not attend court, refuses to enter the witness box when called or, having done so, is unwilling to answer specific questions, he risks being found to be in contempt of court and punished accordingly (which can include imprisonment) or, under s 3 of the Criminal Procedure (Attendance of Witnesses) Act 1965, sentenced to a maximum of three months' imprisonment. Additionally, under s 67 of the Criminal Procedure and Investigations Act 1996, judges have the power to issue arrest warrants for witnesses who fail to attend to give evidence at the Crown Court. \* The Court of Appeal has periodically stressed the importance of witnesses co-operating with the courts, warning that if a witness chooses to ignore a summons they can 'expect to be punished': *R v Yusuf* [2003] 2 Cr App R 32. Nevertheless, the sanction of contempt is very rarely used with regard to children under the age of 16 who refuse to testify.

Normally, any witness who is competent to give evidence is also compellable to do so, in both civil and criminal cases. However, there are a limited number of exceptions to this general rule, some of which are quite arcane. For example, the Queen and diplomatic ambassadors are competent but not compellable to testify. Additionally, no judge, of whatever level, including masters of the Supreme Court, can be compelled to give evidence in relation to their judicial functions (though they are competent to do so). For example, a District Judge cannot be compelled to give evidence as to the extent of a wife's undertaking in matrimonial proceedings conducted in the County Court: *Warren v Warren* [1997] QB 488. Much more important, in practice, is the position of spouses in criminal cases.

### Spousal Compellability in Criminal Cases

A spouse, although always competent for the prosecution against their husband or wife in a criminal matter, cannot normally be compelled to give evidence against their partner. This is unlike the situation that prevails in civil proceedings, where spouses are usually treated like any

other type of witness.\* The very limited number of situations in which a spouse can be compelled to give evidence against their husband or wife in a criminal trial are governed by s 80 of the Police and Criminal Evidence Act 1984, as amended by Sch 4 of the YJCEA 1999.

### **Section 80 of the Police and Criminal Evidence Act 1984, Competence and compellability of accused's spouse or civil partner**

- (2) In any proceedings the spouse or civil partner of a person charged in the proceedings shall, subject to subsection (4) below, be compellable to give evidence on behalf of that person.
- (2A) In any proceedings the spouse or civil partner of a person charged in the proceedings shall, subject to subsection (4) below, be compellable—
- (a) to give evidence on behalf of any other person charged in the proceedings but only in respect of any specified offence with which that other person is charged; or
  - (b) to give evidence for the prosecution but only in respect of any specified offence with which any person is charged in the proceedings.
- (3) In relation to the spouse or civil partner of a person charged in any proceedings, an offence is a specified offence for the purposes of subsection (2A) above if—
- (a) it involves an assault on, or injury or a threat of injury to, the spouse or civil partner or a person who was at the material time under the age of 16;
  - (b) it is a sexual offence alleged to have been committed in respect of a person who was at the material time under that age; or
  - (c) it consists of attempting or conspiring to commit, or of aiding, abetting, counselling, procuring or inciting the commission of, an offence falling within paragraph (a) or (b) above.
- (4) No person who is charged in any proceedings shall be compellable by virtue of subsection (2) or (2A) above to give evidence in the proceedings.
- (4A) References in this section to a person charged in any proceedings do 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).
- (5) In any proceedings a person who has been but is no longer married to the accused shall be compellable to give evidence as if that person and the accused had never been married.
- [(5A) In any proceedings a person who has been but is no longer the civil partner of the accused shall be compellable to give evidence as if that person and the accused had never been civil partners.]
- (6) Where in any proceedings the age of any person at any time is material for the purposes of subsection (3) above, his age at the material time shall for the purposes of that provision be deemed to be or to have been that which appears to the court to be or to have been his age at that time.
- (7) In subsection (3)(b) above 'sexual-offence' means an offence under the Protection of Children Act 1978 or Part 1 of the Sexual Offences Act 2003.
- (9) Section 1(d) of the Criminal Evidence Act 1898.

It should immediately be noted that a husband or wife is always compellable to testify on *behalf* of an accused spouse, by dint of s 80(2). \* This is, of course, subject to the predictable exception, set out in s 80(4), which provides that a spouse who is charged in the same proceedings as their

husband or wife, is not compellable to testify for them. \* is in conformity with the position with regard to any other co-defendant. Obviously, without such a provision, a spouse, if forced to give evidence, would have no choice as to whether to answer questions about their own involvement in any alleged crime.

Section 80(4A) of the 1984 Act provides that 'a person charged' does not include a person who is not, or is no longer, liable to be convicted of any offence in the proceedings. Thus, if the spouse of an accused person, who is also a defendant in the same proceedings, pleads guilty, s/he is outside the ambit of s 80(4) and, consequently, is treated as an ordinary witness, and so subject to the traditional rule of compellability for the defence.

Over the years, a number of different rationales have been advanced for the spousal exemption from being compelled to give evidence for the prosecution. Several would no longer be treated seriously. Nevertheless, the preservation of marital harmony is still considered to be important. \* us, in the pre-PCEA 1984 case of *R v Hoskyn* [1979] AC 474, Lord Salmon ascribed the general exemption of a wife to: '... the supreme importance attached by the common law to the special status of marriage and to the unity supposed to exist between husband and wife'. \* e judge also referred to the 'natural repugnance' that the public would feel at seeing a wife give evidence against her husband in many situations.

One major criticism of such a justification is that the exemption only applies to those defendants who are legally married. As a result, parties who are merely cohabiting with each other, no matter for how long a period, are outside the scope of s 80 and are, accordingly, treated as ordinary witnesses. An attempt in *R v Pearce* [2002] 1 Cr App R 39 to argue that respect for family life under Article 8 of the ECHR required that long-term cohabiting partners be treated in the same way as married spouses in this regard was swiftly rejected by the Court of Appeal, which saw benefits in restricting the number of potential witnesses who were not compellable to testify and also in limiting uncertainty in this area of the law; it would be difficult to determine what was a long-term relationship.



### Pause for reflection

In the modern era do you feel that this is a fair conclusion to reach on this issue?

### ***R v Pearce*** [2002] 1 Cr App R 39, CA

#### **Kennedy LJ**

In any event we do not accept the proposition which underlies Mr Wood's submissions in relation to this aspect of the case, namely that proper respect for family life as envisaged by Article 8 requires that a co-habitee of a defendant, whether or not married to him, should not be required to give evidence or to answer questions about a statement which he has already made. This is plainly, as Ms Joseph submits, an area where the interests of the family must be weighed against those of the community at large, and it is precisely the sort of area in which the European Court defers to the judgment of States in relation to their domestic courts. There may be much to be said for the view that with very limited exceptions all witnesses who are competent should also be compellable, and certainly the material before us does not enable us to conclude that because a concession has been made to husbands and wives proper respect for family life requires that a similar concession be made to those in the position of a husband or a wife. As Ms Joseph points out, if the concession were to be widened it is not easy to see where, logically, the widening should end.

However, it should be noted that a civil partnership, between same sex couples, does have the same evidential effect as marriage, as a result of s 84(1) of the Civil Partnership Act 2004. This provides that any enactment or rule of law: ‘...relating to the giving of evidence by a spouse applies in relation to a civil partner as it applies in relation to the spouse’. As a result, someone in a subsisting civil partnership cannot normally be compelled to give evidence against their partner. Additionally, it should be noted that, if a marriage has been celebrated abroad, it is essential that it is recognized as valid under English law for the spousal exemption to apply. \* us, in *R v Khan* [1987] 84 Cr App R 44, a ‘second’ Muslim marriage, made abroad, had no legal consequences for the purposes of giving evidence.

### ***R v Khan* (1987) 84 Cr App R 44, CA**

#### **Glidewell LJ**

... what is the position of a lady who has gone through a ceremony of marriage which under the religious observances of a faith, and under the law of some other countries, is entirely valid, but which, because it is a second polygamous marriage, is of no effect in the law of this country? In our judgment the position so far as her ability and competence to give evidence is concerned is no different from that of a woman who has not been through a ceremony of marriage at all, or one who has been through a ceremony of marriage which is void because it is bigamous. Exactly the same principles in our view apply, and therefore we hold that the learned judge was entirely correct in his reasoning in deciding that Hasina Patel was a competent witness for the prosecution, both in respect of her husband and in respect of this appellant.

Provided that they are still legally married, it is irrelevant that the parties are separated from each other or are no longer living in amity. Perhaps more logically, once divorced, the previous status of the witness/defendant, ie that they were once married but are now no longer so, becomes irrelevant. \* ey are treated as if they had never been married at all, by dint of s 80(5). \* e material time for determining whether a witness is a legal spouse of the person charged is the point at which that person is called to testify.

Some academics have doubted whether the spousal exemption will apply to a marriage that has been entered purely and cynically for that purpose (ie to prevent compellability for the prosecution). However, it seems unlikely that it would not apply, both for theoretical and practical reasons (it would not be easy to prove motive).

### **R Munday, ‘Sham Marriages and Spousal Compellability’ (2001) J Crim L, vol 65, no 4, 336–348 (Extracts)**

Another point to be borne in mind is that English law is now governed by legislation which must be taken to have given proper consideration, both via PCEA and via the Youth Justice and Criminal Evidence Act 1999 amendments, to the delicate task of balancing the maintenance of the institution of marriage against the public interest in the effective fight against crime. There is no history of English courts inquiring into the reality of parties’ marriages, and there is no hint in the statute that the courts should begin to do so. In any case, one might infer from the fact that s 80(5) of PCEA regulates the position of parties who are no longer married to one another (those who are divorced, whose marriages have been annulled, etc.), that had Parliament wished to insist that



s 80 only applies to marriages truly founded upon the understanding that the partners will observe those mutual obligations of care and support upon which Minton J insisted in *Lutwak*, it would have done so expressly.

Although this article has not explored the question, thorny, if not morally insoluble policy choices lie at the root of spousal compellability. Section 80 of PCEA offers a crude but workable accommodation between a desire to uphold the dignity of the married state and the need to promote the effective administration of criminal justice. As noted above, the drafting of s 80(3)(a), in particular, offers the courts some leeway in determining the range of cases in which spouses may be compelled to testify against one another. It would undoubtedly be improper for the courts simply to employ this looseness of legislative language as a means of circumventing marriages that looked to be shams. However, should the courts elect to give a generous construction to the concept of an offence which 'involves an assault on, or injury or threat of injury to' the spouse, the issue of sham marriages would lose some of its force simply because such an interpretation would significantly diminish the potential pool of serious offences in which it would be likely to arise.

Indeed, it also appears that there is no power to prevent a prisoner from marrying, even where there is a suspicion that it is being done for the purpose of taking advantage of the spousal exemption, as the following case, involving a defendant who wished to marry a prosecution witness (also his partner) in a murder case, suggests.

***R (On the Application of the Crown Prosecution Service) v Registrar General of Births, Marriages and Deaths* [2003] QB 1222, CA**

**Waller LJ**

The right to marry has always been a right recognised by the laws of this country long before the Human Rights Act 1998 came into force. The right of course is also enshrined in article 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. It has more recently been held that prisoners are not to be denied that right in the cases cited by the judge. The right, furthermore, must not be denied to Miss B who has indeed born a child to J. It seems to me that the right of marriage carries with it the incidences of marriage, including that the wife may not be compelled to give evidence against her husband or vice versa.

It should be noted that, in England, there is no requirement that the police tell a wife that she is not a compellable witness *before* interviewing her about a crime of which her husband is suspected (and, of course, vice versa). This is quite important as, if the wife subsequently invokes the right not to testify, the earlier statement might still be admitted as evidence in its own right under the inclusionary discretion for hearsay contained in s 114(1)(d) CJA 2003: *R v L* [2009] 1 WLR 626. Nevertheless, as Lord Phillips CJ also noted in this case, if such a warning has been given, it may make it more likely that it will be deemed to be in the interests of justice to admit a spousal statement under s 114(1)(d).

In *R v L* [2009] 1 WLR 626, the complainant had made a number of allegations against her father, including one of rape, allegedly committed some ten days earlier. She claimed that,

during this incident, the defendant had ejaculated on the floor and on a sofa, claims that were subsequently substantiated by forensic examination. However, the defendant accounted for this by saying that he had had intercourse with his wife on and about the sofa at that time. While he was still being held in custody the police approached his wife and took a statement from her, in which she denied having had sexual intercourse with her husband on the night in question, or ever having had intercourse anywhere other than in their bedroom. Potentially, this was very damaging to her husband's case. However, when the matter came for trial, the wife refused to give evidence for the prosecution against her spouse.

As the daughter was over the age of 16 years (she was 19), the wife was not compellable under s 80 PCEA 1984. Nevertheless, the Crown was allowed to adduce her earlier statement to the police, as an exception to the hearsay rule, under the discretion contained in s 114(1)(d) CJA 2003.

In other circumstances, the fact that the maker of a statement was available in court to controvert it, and that it had been recorded in a reliable format in near contemporaneous circumstances (as was the situation in *L*), might well have justified it being adduced under s 114(1)(d). However, in the instant case it could be argued that allowing the statement to be admitted undermined the general spousal privilege not to testify against a marital partner. Nevertheless, the Court of Appeal concluded that compelling a wife to testify against her husband was not the same thing as permitting another witness to adduce a voluntary statement that she had made on an earlier occasion.

### **R v L** [2009] 1 WLR 626, CA

#### **Lord Phillips CJ**

To caution a wife before taking evidence from her could inhibit the investigation of crime. We do not think that the policy that prevents a wife from giving evidence against her husband requires such a limitation upon the powers of investigation of the police to be implied... we have concluded that there is no requirement to tell a wife that she is not a compellable witness against her husband before interviewing her about a crime of which her husband is suspected. Having said that, it does not follow that there may not be circumstances in which the police will be well advised to make it plain to a wife that she need not make a statement that implicates her husband. If a question is raised, as it has been in this case, as to whether it is in accordance with the interests of justice to admit a wife's statement, the prosecution's hand is likely to be strengthened if it can show that the wife made her statement voluntarily, having been expressly informed that she was under no obligation to make it.

Changes in the general nature of society, in patterns of cohabitation, in the way in which marriage is widely viewed, and in perceptions of the social need to prosecute crime effectively, have cast considerable doubt on whether it is appropriate to preserve a marital exemption from compellability in the modern era. However, alternative approaches, whether making exemption entirely a matter of judicial discretion, one that is purely dependant on a judge's perception of the nature of a relationship (and consequently uncertain as to its application), or, alternatively, abolishing it altogether, also pose serious problems.

**Deirdre Dwyer, ‘Can a Marriage be Delayed in the Public Interest So as to Maintain the Compellability of a Prosecution Witness?: R (On the Application of the Crown Prosecution Service) v Registrar General of Births, Marriages and Deaths’ [2003] E & P, vol 7, no 3, 191–196 (Extract)**

At the time of the Criminal Evidence Act 1898, marriage was the dominant form of long-term sexual relationship, and marriage was all but indissoluble. There were (at least in the eyes of Parliament) few unmarried families, and it was unlikely that two people would enter into marriage simply to invoke the privilege of incompetence and non-compellability. Following Pearce (which was not referred to in judgments in the instant case), B would have been a compellable prosecution witness against her partner of seven years. By marrying J, she ceased to be compellable. There is no reason why J and B could not divorce by mutual arrangement soon after J’s trial, having made use of that privilege. Conversely, if J and B had been married but separated for seven years, B would have automatically been non-compellable (subject to the exceptions of specific offences). In this case, the Court of Appeal would appear to have sought to prioritise the right to marriage over the effective running of the criminal justice system. It has been submitted that to have done otherwise would have been to breach J and B’s Convention rights.

One possible solution, suggested by Andrew Choo, is to follow the approach taken in Australia by the Evidence Act 1995. In all cases, except those concerning domestic violence and particular offences against children, s. 18 of that Act provides that the question of prosecution compellability for spouse, ‘de facto spouse’, parent and child is subject to the court’s discretion. The court shall consider (s. 18(7)) the nature and gravity of the offence, the substance and weight of any evidence, whether other evidence is reasonably available, the relationship between defendant and witness, and whether a matter might have to be disclosed that was received in confidence. The merit of such an approach is that it avoids scenarios in which marriage is used to gain privilege, or where the accused and witness feel that marriage is forced upon them as a means to protect their relationship. The demerit is that it encroaches further on Article 8 rights, in that the police, the Crown Prosecution Service and the court will be required to investigate and scrutinise the private lives of the accused and of certain witnesses as part of the criminal justice process.



**Pause for reflection**

Do you feel that, in the modern era, it is appropriate that spouses or civil partners should ever be allowed not to testify for the prosecution against their partners?

## Spousal Compellability for the Prosecution/Co-accused

\* The rules governing those rare situations in which a defendant’s spouse is compellable for the prosecution or for a co-defendant are the same, and so may be considered together. Although the general rule is that a spouse is not compellable to testify for either of these parties, this is subject to the major statutory exceptions set out in s 80(2A) and (3) of the PCEA 1984, as amended by Sch 4 of the YJCEA 1999. This establishes a limited number of ‘specified offences,’ found in s 80(3)(a)–(c), where a spouse is compellable to give evidence; they constitute an attempt by

Parliament to balance the perceived need for the institution of marriage to be respected, and marital harmony preserved, against the desirability that certain types of crime be prosecuted effectively.

The original legislation was heavily, if belatedly, influenced by the recommendations of the Criminal Law Revision Committee's 11th Report of 1972. It was particularly aimed at addressing domestic violence and sexual abuse. The specified offences comprise: those involving an assault on, or injury (including threats of injury) to the wife or husband of the accused person, or to a victim who was under the age of 16 years at the material time; a sexual offence, as defined in s 80(7) of the Act, alleged to have been committed against a person under the age of 16 at the material time (such as rape or indecent assault); or being charged as an accessory, in any fashion, to the commission of the above offences.

It should be noted that the expression, 'offences involving an assault', although somewhat vague, appears to be wider than a simple charge of assault. For example, it would seem to extend to situations in which a drunken husband 'robbed' his wife of cash to fund a visit to a public house, as robbery necessarily entails the use or threat of violence. However, in this situation, in order to make the spouse compellable to testify for the co-accused or the prosecution, s/he must be a victim of the offence; for example, the victim in a case of domestic violence. By contrast, if a spouse witnesses a child under the age of 16 being the victim of an assault perpetrated by their husband or wife, it does not matter that s/he is not a child of the spouses' family or household. This is broader than the provision originally proposed by the Criminal Law Revision Committee. Thus, if a man were to assault the 14-year-old offspring of a neighbour, in the presence of his own wife, she would be compellable for the prosecution in any ensuing trial.

Of course, the dividing line inevitably produces certain anomalies. For example, if a man slapped his neighbour's 15-year-old daughter, his wife would be compellable to give evidence on the matter; if he raped her sixteen-year-old sister, she would not. It should also be noted that the limitation enacted in s 80(4) is equally applicable in this context. Thus, if the spouse of the accused is also charged with an offence in the proceedings (for example, she aided and abetted the attack on the neighbour's child), she is not competent to testify for the prosecution, and not compellable to testify for the co-accused.

## Waiving the Spousal Exemption

Although a spouse is not compellable to testify for the prosecution against their husband or wife (in most situations) or for a co-defendant, they may, of course, waive that right and elect to give evidence (as they are always competent to testify). This is an important step. Once they make this decision, they cannot later refuse to answer questions in the witness box, simply because they were not initially obliged to enter it. However, to waive their right not to testify they must also first be aware of it. In the past, this led to a rule of practice whereby a trial judge would warn a spouse, in the absence of the jury, that s/he was not required to testify: *R v Acaster* (1912) 7 Cr App R 187. In this case, Darling J observed that: 'In any case where the spouse of the accused comes to give evidence against her husband, the judge ought to ask her, "Do you know you may object to give evidence?"' In the case of *R v Pitt* [1983] QB 25, the Court of Appeal noted that this warning should be given *before* the individual takes the oath.

In *Pitt*, the defendant was charged, on two counts, with assault occasioning actual bodily harm to his baby daughter. His wife made a police statement implicating the defendant. At his trial, she was called to testify for the prosecution. However, the trial judge failed to inform her

that she was not compellable to give evidence for the prosecution (as the law then stood; this is no longer the case, as a baby is obviously under the age of 16 years). She reluctantly testified, but during her evidence in chief she gave answers that were inconsistent with her earlier statement. The judge then granted the prosecution leave to treat her as a hostile witness and the prosecutor was allowed to cross-examine her. The defendant was convicted and appealed to the Court of Appeal on the basis that his wife had not appreciated that she did not have to testify. The Court of Appeal allowed the appeal because the trial judge had failed to inform the witness that she was not required to testify. Although decided before the advent of the Police and Criminal Evidence Act 1984, this decision still appears to be good law.



### Cross-reference Box

A hostile witness is a witness who bears a hostile animus, for whatever reason, to the party calling him, and who, as a result, does not give the evidence expected of him. In such situations, the witness can be declared hostile by the judge, and some of the normal restrictions placed on a calling party during examination in chief, such as the rule against asking leading questions, are then relaxed. Hostile witnesses are discussed in greater detail at pp 401–406.

### **R v Pitt** [1983] QB 25, CA

#### **Pain J**

This case illustrates very powerfully why it is necessary for the trial judge to make certain that the wife understands her position before she takes the oath. Had that been done here, there would have been no difficulty. Up to a point where she goes into the witness box, W [the wife] has a choice: she may refuse to give evidence or waive her right of refusal. The waiver is effective only if made with full knowledge of her right to refuse. If she waives her right of refusal, she becomes an ordinary witness. Once W has started upon her evidence, she must complete it. It is not open to her to retreat behind the barrier of non-compellability if she is asked questions that she does not want to answer. This makes it particularly important that W should understand when she takes the oath that she is waiving her right to refuse to give evidence.

Of course, if a wife is reluctant to give evidence because she is afraid to do so, it might be possible to admit an earlier statement, made to (for example) the police, under s 116(2)(e) of the Criminal Justice Act 2003, as an exception to the hearsay rule.



### Cross-reference Box

Any statement that has been made out of court, and which is tendered as evidence of the truth of its contents at trial, constitutes hearsay evidence. In criminal cases such statements can only be adduced if they come within a statutory or (preserved) common law exception to the rule, or alternatively, are admitted via an exercise of the judicial discretion under s 114(1)(d) of the Criminal Justice Act 2003. For more on this go to pp 248–276.



## Summary

- Competence governs the ability of a witness to testify, ie whether the witness can be 'heard' by the court.
- In the modern era, most witnesses are competent to give evidence in both civil and criminal matters. However, very small children, and those with limited intellectual functioning, may not meet the designated tests set out in the YJCEA 1999 in criminal cases. In civil matters, adults who do not understand the sanction of taking an oath, and children who do not satisfy the more modest test set out in s 96 of the Children Act 1989, will also not be competent to testify.
- Compellability governs whether a potential witness can be forced to give evidence, even if they do not wish to do so. This is usually effected by an order of the court, disobedience to which can be punished as a contempt.
- The normal rule is that competent witnesses are also compellable. However, there are a few exceptions to this general position. Most importantly, the spouse of a defendant in a criminal matter can only be compelled to give evidence against their partner in the limited situations set out in s 80(3) of the PCEA 1984. These attempt to balance the social need to prosecute crime with respecting the institution of marriage, and only force a spouse to give evidence where s/he is the victim of an assault or the offence involves a child under the age of 16.
- When it comes to compellability, a civil partner is treated in the same way as a spouse by dint of s 84 of the Civil Partnership Act 2004. However, unmarried partners, no matter how long-standing their relationship, and those who, although previously married, are now divorced, are treated in exactly the same manner as any other type of witness for the purposes of compellability.
- Witnesses normally either swear an oath or affirm, before testifying. However, in criminal cases, children under 14, and those above this age (including adults) with intellectual handicaps or deficiencies who, as a result, do not reach the test set out in s 55 of the YJCEA 1999 for taking an oath, but who are, nevertheless, capable of giving intelligible evidence, can testify unsworn. Similarly, children in civil cases who do not satisfy the common law test for taking an oath set out in *Hayes*, but can meet the test set out in s 96 of the Children Act 1989, are allowed to give unsworn testimony. However, adults must give evidence on oath in civil matters.
- Affirmation has the same legal effects—for example, with regard to subsequent prosecutions for perjury—as taking the oath, but does not employ a religious sanction in its wording.



## Further reading

P Creighton, 'Spouse Competence and Compellability' [1990] Crim LR 34

D Dwyer, 'Can a Marriage be Delayed in the Public Interest so as to Maintain the Compellability of a Prosecution Witness?: R (On the Application of the Crown Prosecution Service) v Registrar General of Births, Marriages and Deaths' [2003] E & P, vol 7, no 3, 191–196

A Gillespie, 'Compellability of a Child Victim' (2000) J Crim L, vol 64, no 1, 98–105

D Jones, 'The Evidence of a Three-Year-Old Child' [1987] Crim LR 677

R Munday, 'Sham Marriages and Spousal Compellability' (2001) J Crim L, vol 65, no 4, 336–348

JR Spencer and R Flin, *The Evidence of Children: The Law and the Psychology* (2nd edn, 2003, Blackstone Press)



### Questions for Further Discussion



For suggested approaches, please visit the Online Resource Centre

1. Amanda tells the police that she has been raped by her husband, Bertie. However, shortly before trial, Amanda tells the police that she does not want to give evidence. The CPS wish to proceed with the case, and ask for advice as to whether she can be compelled to testify against Bertie.

Advise the CPS.

2. Fred is an intelligent four-year-old; he sees his mother being stabbed to death by a neighbour, George, with whom she was having a stormy affair. Will Fred be allowed to testify against George?

3. Arthur is accused of assaulting Boris, the 12-year-old son of one of his neighbours, occasioning actual bodily harm, after he caught Boris 'scrumping' [stealing] apples in his orchard. Claudia, Arthur's wife, was with him when the incident occurred and made a statement to the police, incriminating her husband, shortly afterwards. However, she has since informed the CPS that she does not wish to testify against her spouse.

Advise the CPS.

4. Is it right that a married person should be exempt from being compelled to give evidence against their spouse, except in the most limited circumstances? Should these circumstances be expanded or reduced, and how should other social relationships be treated in this respect?

5. Percy is suing Quincy in his local County Court, accusing Quincy of knocking him (Percy) down with a mechanized lawnmower, inflicting moderately serious injuries in the process. Quincy denies that he was involved in any such collision. The incident was witnessed by Rachel, a seven-year-old girl, and Simon, a local simpleton who suffered a brain injury at birth (50 years earlier). Both of these people identified Quincy as the driver of the lawnmower. Will Percy be allowed to call Rachel and Quincy to give evidence?

6. Maurice and Nick are civil partners. Nick is accused of assaulting Maurice during an argument over burnt toast, occasioning actual bodily harm in the process. Maurice, who made a lengthy written statement to the police about the incident, is now very reluctant to testify for the prosecution against his partner, but the police and CPS are keen to proceed.

Advise Nick.