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COGNITIVE DEVELOPMENT

CHILDREN AS WITNESSES IN THE CONTEXT OF FAIR TRIAL

In South Australia a child is a person who has not attained the age of 18 years. A young child means a child of, or under, the age of 12 years. A young child is not obliged to submit to the obligation of an oath unless:-

(a) the child is of or above the age of 7, and

(b) the judge is satisfied that the child understands the obligation of the oath.

From that point on, it all becomes very tricky.

[1](2) *"If a young child, who is not obliged to submit to the obligation of an oath, is to give evidence before a court and -*

(a) the child appears to the judge to have reached a level of cognitive development that enables the child -

(i) to understand and respond rationally to questions, and

(ii) to give an intelligible account of his or her experiences, and

(b) the child promises to tell the truth and appears to understand the obligations entailed by that promise,

unsworn evidence of the child will be treated in the same way as evidence given on oath.

(3) In any case in which unsworn evidence of a young child is not assimilated under sub-section (2) to evidence given on oath -

(a) the child's evidence will be evaluated in the light of the child's level of cognitive development, and

(b) a person who has been accused of an offence and has denied the offence on oath cannot be convicted of the offence on the basis of the child's evidence unless it is corroborated in a material particular by other evidence implicating the accused.

If a young child between 7 and 12 fails to satisfy the judge that he or she understands the obligation of the oath, it is difficult to see how that child could "appear to understand" the obligations imposed by a promise to tell the truth.

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[1] Criminal Law South Australia Volume 1, R M Lunn LLB (Hons) QC

I do not know if that situation has ever occurred. I believe it unlikely because, in my experience, judges are relatively easily satisfied that a child understands the obligation of the oath.

If the child is under 7, then the decision of the trial judge under sub-section 2 has, as you can see, a profound impact on the trial.

How then does a judge assess the child's cognitive development?

The short answer is that a judge cannot. All the judge can do is to assess whether the child can give an intelligible account of his or her experiences.

It is odds on that, from time to time, the judge will get it wrong and will permit evidence to be assimilated when it should not be. Should the accused be convicted on uncorroborated evidence, he or she will not have had a fair trial. The chances of redress on appeal are, at best, slim. An appellate court is unlikely to interfere with the trial judge's decision because that court will not be in any position to make their own independent assessment.

The risk of a wrong assessment is accentuated by pre trial preparation of the witness. The line between preparing a child for the witness box and teaching the child the answer is, I suspect, often very thin.

The fact that the South Australian Parliament believed that judges can assess the cognitive development of a young child is a problem. The fact that the judges think they can do it, is an even more serious problem. I realise that judges are bound by the legislation to make the decision, but there has been no discernible outcry from the bench about the impossibility of their given task.

The "cognitive development test", in a sense, replaces the need for corroboration. It provides no safeguard at all. It arises out of a fundamental misconception of the role of the criminal law in our society. It negates the presumption of innocence and creates the antithesis of the notion of a fair trial.

COGNITIVE DEVELOPMENT TEST

1. What do you understand the expression "cognitive development" to mean?

2. List six topics you would explore if required to apply the test.

   (1)

   (2)

   (3)

   (4)

   (5)

   (6)

3. Take any one of those topics and list six questions you would ask the child pursuant to that topic. (Select your most important topic)

   (1)

   (2)

   (3)

   (4)

   (5)

   (6)