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15. Assessing the competency of child witnesses: Best practice informed by psychology and law.

Thomas D. Lyon, *University of Southern California*

Assessing the Competency of Child Witnesses: Best Practice Informed by Psychology and Law

THOMAS D. LYON

Key Points

- The law recognizes two types of child witness competency: basic competency and truth–lie competency. Jurisdictions vary in the extent to which they require that children demonstrate these competencies before being allowed to testify.
- Basic competency, which concerns the child’s ability to perceive, remember and communicate, can be demonstrated by eliciting a child’s report of a recent event.
- Truth–lie competency, which concerns the child’s understanding of the difference between truth and lies and the importance of telling the truth, can be demonstrated by asking the child whether simple statements are the truth, and by asking the child to promise to tell the truth.
- Tests of children’s truth–lie competency *do not* predict honesty, but eliciting a child’s promise to tell the truth *does* increase honesty.

In the courts, questions about the competency of child witnesses may arise in two respects. A child's competency *at trial* affects whether she will be allowed to testify. Because of the rules regarding the admissibility of hearsay, a child's competency *during a pre-trial interview* may affect the admissibility of her interview statements at trial. For these reasons, both attorneys and forensic interviewers are interested in how competency can best be assessed.

Witness competency is often said to include the capacity to observe, remember, communicate and to tell the truth (Hoyano & Keenan, 2007). The first three capacities can be thought of as *basic* competency. Many jurisdictions have eliminated specific requirements of basic competency. Nevertheless, rules requiring that evidence be relevant essentially establish a minimum level of basic competency, and therefore children are sometimes questioned about their ability to observe, remember, and communicate. The ability to tell the truth can be called *truth-lie* competency. Truth-lie competency is still popular in many courts, because witnesses are expected to testify under oath, and questions about truth-lie competency test whether a child understands the meaning of the oath. Therefore, children are often asked about their understanding of the truth and lies.

This chapter surveys both psychology and law. Based on what psychology teaches and what the law requires, it recommends approaches for both attorneys questioning child witnesses in court and interviewers questioning children before trial. Necessarily, compromises must be made, and what seems most sensible to psychologists must often be trumped by the requirements of the law. Nevertheless, understanding both psychology and law enables practitioners to avoid needless mistakes; many common practices are ill-informed by assumptions that psychologists make about the law and vice versa.

This chapter recommends practices for both eliciting testimony at trial and questioning before trial. At trial, a good rapport-building device – asking the child to narrate a recent event – doubles as a test of basic competency, and is therefore highly recommended. It is also extremely useful in pre-trial interviews. With respect to truth-lie competency, questions about truth and lies have little intrinsic value; they do not predict honesty, and they are not a foolproof means of determining what the child actually knows about the truth and lies. Truth-lie questions are not recommended unless they are legally required. The same recommendation applies to pre-trial interviews. On the other hand, there are good reasons for asking children to promise to tell the truth. Research has found that eliciting a promise to tell the truth from children increases honesty.

BASIC COMPETENCY: PERCEPTION, MEMORY, AND NARRATION

There are several reasons why one might reject any inquiry into a child's basic competency. First, an appreciation of a child's ability to perceive, remember, and communicate is arguably best obtained by letting the child testify. The proof is in the pudding. Recommending this approach, the renowned American evidence scholar, John Henry Wigmore, argued, 'the effort to measure *a priori* the degrees of trustworthiness in children's statements, and to distinguish the point at which they cease to be totally incredible and acquire suddenly some degree of credibility, is futile and unprofitable' (Wigmore, 1904, p. 640). New Zealand and Scotland have explicitly rejected any preliminary inquiry into a child witness's competency by the court (Hoyano & Keenan, 2007).

On the other hand, there are reasons why some preliminary assessment of basic competency is likely. Even without competency requirements, there are legal restrictions on witness testimony. The rule of relevance requires that evidence has some tendency to prove what it is intended to prove. The rule of prejudice states that relevant evidence may nevertheless be excluded if its evidentiary value is outweighed by the likelihood that the evidence will be misused or unfairly weighed by the fact finder. (The fact finder is either the judge or the jury, depending on the type of trial.) For example, in the United States, the Federal Rules of Evidence state that '[e]very person is competent to be a witness except as otherwise provided in these rules', and the advisory committee who drafted the rules emphasize that '[a] witness wholly without capacity is difficult to imagine' (Federal Rules of Evidence, 2010). Forty-two of the 50 states in the United States have adopted evidence codes very similar to the federal rules (Mueller & Kirkpatrick, 2009) and the 'every person is competent' language is quite common (National Center for the Prosecution of Child Abuse, 2009). Nevertheless, one often still encounters *some* preliminary inquiries of child witnesses, and the justification for those inquiries is that if a child is unintelligible, or otherwise incapable of answering questions, his or her testimony is of little or no relevance, and may simply have prejudicial effect (Lyon, 2000). Some believe that any testimony from a child, no matter how incoherent or inconsistent, will help the party who presents the child's testimony. Jurors' sympathies with a child (and, possibly, their anger at any attempts to cross-examine the child) might create prejudice. And even if this were not so, attorneys are quite adept at communicating their theory of the case through questions, regardless of the answers. The best argument against allowing the child's testimony to 'speak for itself' is that any declaration of irrelevance after a child's testimony

comes too late. If the case is tried before a jury, and the judge concludes that the child's testimony was irrelevant and prejudicial, the judge must provide the awkward instruction that the jury should disregard what they just heard. This type of instruction has been analogized to throwing a skunk into the jury box and telling the jury to ignore the smell (*Dunn v. United States*, 1962).

Because of concerns regarding relevance and prejudice, many countries allow for limited inquiry into child witnesses' competency. The child must be capable of understanding and answering questions (Hoyano & Keenan, 2007, discussing the United Kingdom, Canada, and both the federal system and the provinces/states in Australia).

Can psychologists provide any guidance into the questions that should be asked? Developmental psychologists specialize in mapping children's growing abilities to observe, remember and communicate, and one might expect researchers to have developed standardized tests to measure these abilities. However, there are good reasons for doubting the validity of any preliminary assessments of children's testimonial competency. Tests are inherently limited by the fact that a child's capacities in response to a test is at best an imperfect measure of her capacities with respect to the subject of her testimony.

Some researchers have developed tests for children's suggestibility (Candel, Merckelbach, & Muris, 2000; Endres, Poggenpohl, & Erben, 1999; Finnilä, Mahlberga, Santtilaa, & Niemib, 2003; Scullin & Ceci, 2001), and one might turn to these for assistance in assessing a child's competency. However, suggestibility assessments present their own difficulties. A child's suggestibility determines how well (or how poorly) the child responds to suggestive questioning, and not whether the child is capable of providing relevant testimony. If a child has not been subjected to highly suggestive questioning before testifying, and is not subjected to suggestive questioning in the case-in-chief, the child's suggestibility is of little relevance to basic competency. Even if suggestive influences are proven, the tests are designed to identify children along a continuum of suggestibility, rather than to distinguish between competent and incompetent. Any performance above chance would constitute relevant evidence (Lyon & Koehler, 1996). Finally, the scales are of limited validity; for example, the age range within which they predict performance is often quite narrow (Melinder, Scullin, Gravvold, & Iverson, 2007; Scullin, Kanaya, & Ceci, 2002).

A good solution is to look to research on interviewing, and to borrow a technique originally designed to build rapport and increase the productivity of children's reports: narrative practice. The interviewer begins by asking the child questions about her interests ("Tell us about things you like to do"), and then asks the child witness to narrate a

recent innocuous event (e.g., ‘Tell us about your last birthday. Tell us everything that happened, from the beginning to the end’). The child’s responses can establish basic competency, and will provide additional benefits as well. Preliminary questions about innocuous topics in court would allow the child witness to acclimate herself to the courtroom and to relax before the topic of interest is introduced. Through a series of open-ended questions asking the child to elaborate on her narrative (e.g., ‘You said you hit a piñata. Tell us what happened next’ or ‘You said you played in a bouncy. Tell us about playing in the bouncy’), the attorney could accustom the child to provide a chronological narrative without the need for leading or closed-ended questions. Research has established that narrative practice in interviews increases the productivity of children’s abuse disclosures (Hershkowitz, 2009; Sternberg *et al.*, 1997), with no evidence of impaired accuracy (Roberts, Lamb, & Sternberg, 2004).

TRUTH–LIE COMPETENCY: SINCERITY

Psychologists are likely to be surprised at the emphasis that the law places on the dangers of insincerity, particularly in the case of young children. Surely the dangers of the youngest witnesses have to do with errors in memory or the influence of adults rather than deliberate falsehoods. Nevertheless, in many jurisdictions witnesses are expected to affirm in some manner that they will tell the truth, typically by taking the oath, and a common concern is that child witnesses may be too young to meaningfully understand what they are asked to do. Because of these concerns, child witnesses are more often asked about their understanding of the meaning and morality of lying than about their understanding and ability to answer questions more generally.

The seriousness with which the law treats children’s truth–lie competency can be placed on a continuum. At its most strict, the law mandates that all witnesses take a formal oath, and requires that child witnesses understand the ‘danger and impiety of falsehoods’ in order to qualify as testimonially competent (*R. v. Brasier*, 1779). ‘Danger and impiety’ suggests an understanding of both earthly punishment for perjury and additional punishment in the hereafter. At its most liberal, the law abandons both the oath and any tests for truth–lie competency for child witnesses. Examination of the courts in the United States, the United Kingdom, Australia, New Zealand, Scotland, and Canada reveals a wide diversity of approaches.

The United States probably ranks first with respect to the rigors of truth–lie competency: some form of oath or affirmation is

near-universally required, and truth–lie competency inquiries are still very common. This may come as a surprise. Psychology commentators have asserted that courts in the United States have eliminated all competency inquiries (Bruck, Ceci, & Hembrooke, 1998; Goodman & Reed, 1986). Commentators sometime make reference to a federal law that allows for ‘competency examinations’ only upon written motion and a demonstration of ‘compelling reasons’ (18 U.S.C. 3509(c)(2)(4) (1999)). However, a federal court interpreting the law held that preliminary questioning of child witnesses regarding their understanding of the oath does not constitute a ‘competency examination’ (*United States v. Allen J.*, 1997).

The reason for the confusion is that commentators fail to distinguish between basic competency and truth–lie competency. The reader will recall that Federal Rule of Evidence 601 states that all witnesses are competent. At the same time, Federal Rule of Evidence 603 requires that ‘[b]efore testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness’ conscience and impress the witness’ mind with the duty to do so’ (Federal Rules of Evidence, 2010). The language of Rule 603 does not *necessitate* a preliminary inquiry into the witness’s understanding of the meaning of the truth and his/her duty to tell it, but it is routinely used as a justification for such an inquiry. The reader will also recall that most states in the United States have modelled their evidence codes after the Federal Rules, and states that have done so also have a Rule 603. Furthermore, 15 states have explicit provisions in their competency statutes that statutorily require understanding of duty to tell the truth (or at least the capacity to testify truthfully; National Center for the Prosecution of Child Abuse, 2009).

Provisions for unsworn testimony are quite rare. Because of the allowance in Rule 603 for an ‘affirmation’, witnesses need not take a formal oath, but they must at least signal their intention to tell the truth. I am aware of only two states in which unsworn testimony is allowed, by statute in Florida (1999) and New York (1999). In Florida, child witnesses are nevertheless expected to ‘understand. . . the duty to tell the truth or the duty not to lie.’ One US Federal Court of Appeals has even concluded that some form of the oath, and in turn some demonstration of competency to take the oath, is required by the Constitution (*Haliym v. Mitchell*, 2007; but see *Walters v. McCormick*, 1997, for the opposite view from a different Court of Appeal).

The US Supreme Court has not decided whether some form of the oath is required of all witnesses. However, it has increased the

significance of children's truth–lie competency through a series of cases involving defendant's confrontation rights against the admissibility of certain types of hearsay. The Court has held that 'testimonial' hearsay is inadmissible against a criminal defendant unless that defendant is given the opportunity to cross-examine the hearsay declarant (the person who made the hearsay statement) (*Crawford v. Washington*, 2004). 'Testimonial' hearsay includes most statements to the police. In a number of cases, criminal convictions have been overturned because a child witness failed to qualify as competent, and his/her testimonial hearsay was admitted against the defendant (e.g., *State v. Hooper*, 2007; *State v. Henderson*, 2007). The legal justification for reversing the convictions was not that the child's hearsay was inaccurate, but that the defendant's constitutional right to cross-examine the child was denied when the child failed to qualify.

Jurisdictions in Australia vary somewhat in their requirements (Evidence Act, 1906 (Western Australia); Evidence Act, 1929 (South Australia); Evidence Act, 1977 (Queensland); Evidence Act, 1995 (Commonwealth of Australia); Evidence Act, 2001 (Tasmania); Evidence Act, 2008 (Victoria); Evidence Act, 1995 (New South Wales)). All jurisdictions require that any witness taking the oath must understand his/her obligations to tell the truth, which entails an understanding of the meaning and special importance of telling the truth in court (e.g., *R. v. Climas*, 1999 (South Australia)). All jurisdictions allow for unsworn testimony if a witness is incompetent to take the oath. However, in two jurisdictions (South Australia and) children testifying unsworn must nevertheless understand the difference between the truth and lies, and must affirm that they 'will not tell lies.'

The United Kingdom has gradually liberalized the rules with respect to child witnesses, and has virtually abolished truth–lie competency requirements in the criminal courts. By 1991, the law required that testimony by children under 14 years of age be unsworn, and by 1999, the only requirement for unsworn testimony was that the witness understand questions and be capable of giving understandable answers (Hoyano & Keenan, 2007). Curiously, the law with respect to civil cases (including family law and child protection proceedings) is more strict, retaining the requirement that even children testifying unsworn must demonstrate that they understand the importance of telling the truth (Hoyano & Keenan, 2007).

Perhaps the most liberal approaches toward allowing children to testify without a demonstration of truth–lie competency have been adopted by Scotland and Canada. Scotland barred any inquiry into children's understanding of truth and lies in 2004 (Bala, Lee,

Lindsay, & Talwar, 2010). In 2005, Canada adopted a similar ban, and all children under 14 are asked to promise to tell the truth rather than administered a formal oath (Bala, Evans, & Bala, 2010).

The justification for the change in law in Canada was that there is little or no relation between children's understanding of truth and lies and their honesty (Bala *et al.*, 2010). There is substantial empirical evidence supporting this claim. Several studies have found that children's eyewitness performance is not related to their understanding of truth and lies (Feben, 1985; Goodman, Aman, & Hirshman, 1987; London & Nunez, 2002; Pipe & Wilson, 1994; Talwar, Lee, Bala, & Lindsay, 2002). When research does find a relation between performance and children's understanding, it is in contexts in which children may be motivated to make deliberately false reports and are then urged to tell the truth or asked to promise to do so (Lyon & Dorado, 2008; Lyon, Malloy, Quas, & Talwar, 2008; Talwar, Lee, Bala, & Lindsay, 2004). This suggests that the efficacy of 'I promise to tell the truth' depends to some extent on the child's comprehension of 'truth'; it does not mean that there is a general relation between understanding of truth and lies and honesty. And even in this context, one should not assume that an apparent failure to comprehend the meaning and morality of truth and lies justifies an assumption that a promise to tell the truth is ineffective. Lyon *et al.* (2008) found that children who failed to perform well on a truth-lie understanding task were nevertheless more honest after promising to tell the truth. The probable reason for this finding is that comprehension tasks likely underestimate what children understand.

The difficulty of accurately assessing children's understanding of the truth and lies provides another argument against competency inquiries. Competency questions are likely to confound children for reasons unrelated to their actual understanding of the meaning and importance of truth-telling. Children are much better at identifying statements as truth or lie than they are at providing even the simplest definitions of 'truth' and 'lie' (such as 'a lie is not the truth') or explaining the difference between the words (Lyon & Saywitz, 1999). Children who are quite adept at assessing whether statements are the truth or not may fail to identify false statements as lies (Lyon, Carrick, & Quas, 2010). They appear reluctant to label false statements lies, because of their awareness of the badness of lying. Children are better able to explain the negative consequences of lying when presented with a hypothetical child than when asked what would happen to themselves if they lied (Lyon, Saywitz, Kaplan, & Dorado, 2001). Young children appear to treat hypothetical questions ('What would happen to you if you lied?') as suggestions, and, again because of their acute

awareness of the badness of lying, reject the premises rather than entertain the hypothetical outcomes. Even 2-year-olds adhere to a principle that one ought to say true things – they reliably reject statements that are clearly false (Hummer, Wimmer, & Antes, 1993; Pea, 1982) – well before they are able to articulate an understanding of the concept ‘true statement’ and ‘false statement’ (T.D. Lyon, N. Carrick, & J.A. Quas, manuscript in preparation).

It is fair to conclude that an interviewer’s assessment of a child’s understanding of truth or lie has virtually no value in assessing the child’s honesty, and is likely to make matters worse. Indeed, recent research suggests that children with an incipient understanding of truth and lies are *better* able to make false statements (B. Ahern, T.D. Lyon, & J.A. Quas, manuscript in preparation). In other words, it is more difficult for the child who *does not* know the difference between ‘truth’ and ‘lie’ to tell a lie. This finding should not be surprising, because both the understanding of truth and lies and the ability to lie are related to children’s cognitive development. Indeed, adults are probably the best liars, and they are of course quite capable of defining truth and lie.

If inquiries into a child’s comprehension of truth and lies are not justified at the time the child testifies at trial, there is even less justification for such inquiries in investigative or other pre-trial interviews. Forensic interviewers primarily ask children truth–lie competency questions for two reasons:

1. To determine if the child will qualify as competent at trial, and
2. To increase the likelihood that the interview with the child will be admissible at trial under exceptions to the rule against hearsay.

Neither of these reasons is compelling.

The first justification is obviously undermined in jurisdictions that have abolished inquiries into truth–lie understanding at trial. A child who fails truth–lie questions but who is capable of understanding and intelligibly responding to questions of relevance to the case will qualify as competent in many courts. Truth–lie inquiries are of questionable value even in jurisdictions that retain competency requirements at trial. Given the long delays between investigation and trial and young children’s rapid development, young children are quite likely to acquire truth–lie understanding between the time they are first interviewed and the time they testify.

The second justification – that truth–lie competency is a prerequisite for the admissibility of hearsay – is overstated. I am aware of no jurisdictions in which truth–lie competency is a necessary precondition

for hearsay to be admitted (Hoyano & Keenan, 2007; Myers, 2005). Courts will sometimes cite truth–lie competency as a factor to be considered in assessing the reliability of children's statements (Myers, 2005), but as the research clearly documents, this is unwarranted. The use of truth–lie questions in interviews will unjustifiably undermine the credibility of children who fail the questions, and unjustifiably bolster the credibility of children who succeed. It also creates the impression that the interviewer (and, if the interviewer is working for law enforcement or social services, the state) believes that the inquiry has some value in assessing the child's story.

Truth–lie questions are quite common in forensic interviews. Studies of forensic interviewing have found large percentages asking about truth–lies in the United States (Huffman, Warren, & Larson, 1999; Sternberg, Lamb, Orbach, Esplin, & Mitchell, 2001; Walker & Hunt, 1998); the United Kingdom (Westcott & Kynan, 2006); New Zealand (Davies & Seymour, 1998); and Scotland (La Rooy, Lamb, & Memon, *in press*).

One would expect that with the liberalization of truth–lie competency requirements, the use of truth–lie questions in forensic interviews would diminish. However, there is little evidence that this is occurring. To a large extent, psychologists who recommend such questions assume some sort of legal need, and legal experts who recommend such questions assume psychological validity. As we shall see, both types of professional are somewhat misinformed. It is rather like the couple who go to a less preferred show, each attempting to please the other.

First, practitioners are likely influenced by practice guides that incorporated truth–lie discussions into their recommendations. For example, Poole and Lamb (1998) recommend a truth–lie discussion, and inquiry into children's understanding is part of the National Institute of Child Health and Human Development (NICHD) structured interview (Lamb, Hershkowitz, Orbach, & Esplin, 2008). What may be overlooked is that the recommendations were based on legal and not psychological considerations. Poole and Lamb (1998) emphasized that there is no empirical support for the use of the discussions as a key to accuracy, and recommended the questions only because 'such conversations are currently considered satisfactory demonstrations in jurisdictions that require explicit discussions of the truth' (p. 125). Similarly, the NICHD protocol incorporated truth–lie questions at the behest of law enforcement, and modification of those questions 'would not do violence to the Protocol' (Lyon, Lamb, & Myers, 2009, p. 73).

Second, in some jurisdictions, governmental guidelines continue to prescribe truth–lie discussions despite liberalization of the rules for child witnesses. Both the Home Office (2001) in the United Kingdom

and the Scottish Executive (Richards, Morris, & Richards, 2008) recommend that investigative interviewers continue to inquire into children's understanding of the meaning and importance of truth and lies. The purported justification is that the truth–lie discussion remains relevant for assessing the likelihood that the child was telling the truth. The reader will recall that questions regarding children's basic competency are justified by the courts as much by rules of relevance and prejudice as on competency requirements. The reasoning underlying retention of truth–lie questions is analogous. Hence, the Home Office (2001) suggests retaining the truth–lie inquiry on the grounds that 'admissibility of the statements may be of very little weight, and their admissibility prejudicial to the defendant' (p. 13). Similarly, the Scottish Executive warns that 'the court will still have to make a judgement of the witness's truthfulness and reliability, therefore any interview should still clarify, in age appropriate ways, the witness's level of understanding. This exploration will assist the court in determining issues of credibility and reliability' (Richards *et al.*, 2008, quoting Scottish Executive, p. 21).

These recommendations are puzzling, in so far as the justification for abolishing inquiries into children's truth–lie understanding is that their answers fail to correlate with their honesty. If a child's failure to answer truth–lie questions is not a basis for deeming her incompetent, it is no better basis for deeming her statements irrelevant or prejudicial. Even in those cases where there is some relation exists between accuracy and understanding (when the child has promised to tell the truth but does not know the meaning of the word 'truth'), the relation is imperfect and likely to be overstated. That is, truth–lie questions are themselves objectionable as of little relevance and likely prejudicial.

Third, interviewers might argue that although the prosecution may avoid truth–lie questions, the defence may insist on their right to do so, and the defence naturally has little inclination (and perhaps limited ability) to ask age-appropriate questions. Although Canadian law now prohibits questions about children's truth–lie understanding, a Canadian appellate court has held that these issues may still be inquired into on cross-examination (Bala *et al.*, 2010). Review of criminal court transcripts in the United States suggests that defence attorneys do indeed capitalize on children's difficulty with certain types of truth–lie questions (such as children's tendency to respond 'no' when asked 'Have you ever told a lie?') (A. Evans & T.D. Lyon, manuscript in preparation). However, prosecutors can object to defence attorneys' truth–lie questions as irrelevant and prejudicial, because they have little or no relation to honesty and they are likely to mislead the jury (Dufraimont, 2007).

Finally, there exists the concern that children's understanding should be demonstrated, because otherwise juries will be skeptical of unsworn child witnesses. Hoyano and Keenan (2007) warn that:

Jurors will not have to be particularly astute to notice that they have not been sworn to tell the truth, and may infer that their testimony is devalued by the criminal justice system. It is natural for jurors to want to be satisfied that the child can distinguish between truth and falsehood, and does understand the importance of telling the truth, given the implications for the accused (p. 604).

However, it would be preferable to ask the child witness to promise to tell the truth than to inquire into the child's apparent understanding of the truth and lies. Research has demonstrated that eliciting an age-appropriate oath from children (such as 'Do you promise that you will tell the truth?') increases children's honesty (Lyon & Dorado, 2008; Lyon, Malloy, Quas, & Talwar, 2008; Talwar, Lee, Bala, & Lindsay, 2002, 2004), even among children who fail truth-lie competency tasks (Lyon *et al.*, 2008). The fact that the court no longer elicits an oath does not prevent the attorney presenting the child witness from eliciting a promise.

When it is legally necessary to inquire into children's understanding, the most sensitive means of assessing young children's understanding is by asking the child to identify whether accurate and inaccurate statements uttered by a story child are the truth or not the truth (see Figure 4.1, stimuli from Lyon, Carrick, & Quas, 2010). In the depicted example, the interviewer shows the child the picture, and first points at the truck, asking 'What is this?' When the child responds 'truck', the interviewer says 'OK, that's a truck. This girl (pointing to the girl) looks at the truck and says "that's a plane".' The interviewer then asks the child 'Did the girl tell the truth?'

For the very young child who has not clearly acquired an articulable concept of 'truth', interviewers can ask the child to accept or reject a false label. In the previous example, the interviewer could omit the question 'Did the girl tell the truth?' Instead, the interviewer would point at the truck and ask 'Is that a plane?' As noted above, children evince a tendency to reject false statements by 2 years of age (Hummer *et al.*, 1993; Pea, 1982), and most children acquire a basic understanding of 'truth' before their fourth birthday (Lyon, Carrick, & Quas, manuscript in preparation); of course, children with language delays are likely to lag somewhat (Lyon, Carrick, & Quas, 2010).

A task this simple has a number of advantages. Children's potential reluctance to call statements lies is avoided by only asking about truth.

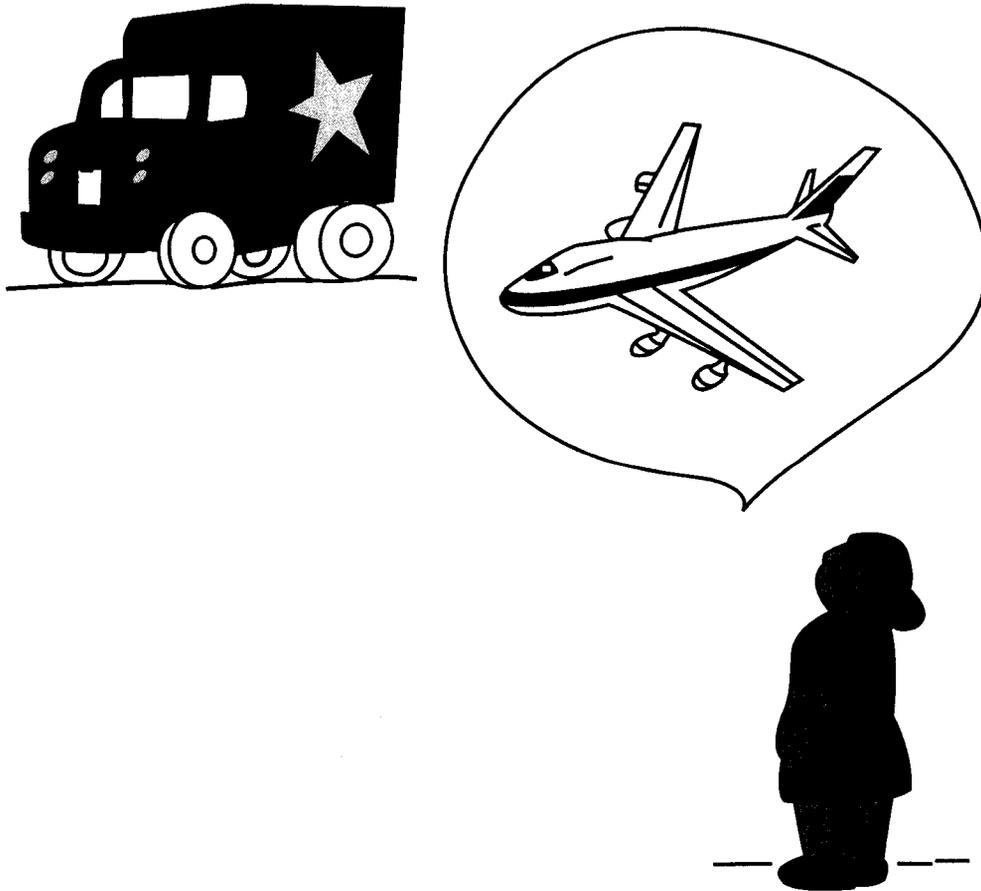


Figure 4.1 Task for asking children about the meaning of ‘truth’ (Lyon, Carrick, & Quas, 2010, manuscript in preparation).

The statements are uttered by a story child rather than the adult questioner or the child herself, which reduces reluctance to challenge an adult or to acknowledge making false statements. Issues of intent and wrongdoing are also avoided. For reasons that are not fully explained, commentators have sometimes urged that the truth–lie questions focus on lies about wrongdoing that are intended to deceive (Home Office, 2001; Hoyano & Keenan, 2007; McCarron, Ridgway, & Williams, 2004). The problem is that adding information about either wrongdoing or speaker intent complicates the scenarios and potentially misleads children (Aldridge & Wood, 1998; Lyon, Carrick, & Quas, 2010). Hoyano and Keenan (2007) argue that if the false statements are obviously false, children will not take the interview seriously, but this conflates the purpose of the truth–lie questions with the purpose of a promise to tell the truth; the former simply tests the child’s understanding of the word ‘truth’, and the latter is what communicates the seriousness of the interview.

CONCLUSIONS

In summary, this review of competency requirements suggests that interviewers and attorneys can elicit a narrative of an innocuous event during rapport-building as a means of establishing children's basic competency: their ability to perceive, remember, and communicate. Interviewers need not ask children truth-lie competency questions, but can profitably elicit a promise to tell the truth. When a legal requirement forces examination of young children's truth-lie understanding, the most sensitive approach entails asking the child whether statements are the truth, and eliciting a promise from the child that she will tell the truth. Competency requirements should not serve as a bar to the admissibility of relevant evidence from children.

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REFERENCES

- Aldridge, M., & Wood, J. (1998). *Interviewing Children: A Guide for Child Care and Forensic Practitioners*. Chichester, UK: Wiley.
- Bala, N., Evans, A., & Bala, E. (2010). *Child and Family Law Quarterly*, 22, 21–45.
- Bala, N., Lee, K., Lindsay, R.C.L., & Talwar, V. (2010). The competency of children to testify: Psychological research informing Canadian law reform. *International Journal of Children's Rights*, 18, 53–77.
- Bruck, M., Ceci, S.J., & Hembrooke, H. (1998). Reliability and credibility of young children's reports. *American Psychologist*, 53, 136–151.
- Candel, I., Merckelbach, H., & Muris, P. (2000). Measuring interrogative suggestibility in children: Reliability and validity of the Bonn Test of Statement Suggestibility. *Psychology, Crime and Law*, 6, 61–70.
- Crawford v. Washington*, 541 U.S. 36 (2004).
- Davies, E., & Seymour, F.W. (1998). Questioning child complainants of sexual abuse: Analysis of criminal court transcripts in New Zealand. *Psychiatry, Psychology, and Law*, 5, 47–61.
- Dufraimont, L. (2007). Care in cross-examining child witnesses. *Criminal Reports*, 48, 357.
- Dunn v. United States*, 307 F.2d 883, 886 (5th Cir. 1962).
- Endres, J., Poggenpohl, C., & Erben, C. (1999). Repetitions, warnings, and video: Cognitive and motivational components in preschool children's suggestibility. *Legal and Criminological Psychology*, 4, 129–146.
- Evidence Act, 1906 (Western Australia).

- Evidence Act, 1929 (South Australia).
- Evidence Act, 1977 (Queensland).
- Evidence Act, 1995 (Commonwealth of Australia).
- Evidence Act, 1995 (New South Wales).
- Evidence Act, 2001 (Tasmania).
- Evidence Act, 2008 (Victoria).
- Feben, D.J. (1985). Age of witness competency: Cognitive correlates. Unpublished honours thesis, Monash University, Clayton, Australia.
- Federal Rules of Evidence (2010) (United States).
- Finnilä, K., Mahlberga, N., Santtilaa, P., & Niemib, P. (2003). Validity of a test of children's suggestibility for predicting responses to two interview situations differing in degree of suggestiveness. *Journal of Experimental Child Psychology*, 85, 32–49.
- Goodman, G.S., Aman, C.J., & Hirschman, J. (1987). Child sexual and physical abuse: Children's testimony. In S.J. Ceci, M.P. Toglia, & D.F. Ross (Eds), *Children's Eyewitness Memory* (pp. 1–23). New York: Springer-Verlag.
- Goodman, G.S., & Reed, R.S. (1986). Age differences in eyewitness testimony. *Law and Human Behavior*, 10, 317–332.
- Haliym v. Mitchell*, 492 F.3d 680 (6th Cir. 2007).
- Hershkowitz, I. (2009). Socioemotional factors in child sexual abuse investigations. *Child Maltreatment*, 14, 172–181.
- Home Office (2001). *Achieving Best Evidence in Criminal Proceedings: Guidance for Vulnerable or Intimidated Witnesses, Including Children*. London: Home Office.
- Hoyano, L., & Keenan, C. (2007). *Child Abuse: Law and Policy Across Boundaries*. Oxford, UK: Oxford University Press.
- Huffman, M.L., Warren, A.R., & Larson, S.M. (1999). Discussing truth and lies in interviews with children: Whether, why, and how? *Applied Developmental Science*, 1, 6–15.
- Hummer, P., Wimmer, H., & Antes, G. (1993). On the origins of denial negation. *Journal of Child Language*, 20, 607–618.
- Lamb, M.E., Hershkowitz, I., Orbach, Y., & Esplin, P.W. (2008). *Tell Me What Happened: Structured Investigative Interviews of Child Victims and Witnesses*. West Sussex, UK: Wiley.
- La Rooy, D., Lamb, M.E., & Memon, A. (in press). Forensic interviews with children in Scotland: A survey of interview practices among police. *Journal of Police and Criminal Psychology*.
- London, K., & Nunez, N. (2002). Examining the efficacy of truth/lie discussions in predicting and increasing the veracity of children's reports. *Journal of Experimental Child Psychology*, 83, 131–147.
- Lyon, T.D. (2000). Child witnesses and the oath: empirical evidence. *Southern California Law Review*, 73, 1017–1074.
- Lyon, T.D., Carrick, N., & Quas, J.A. (2010). Young children's competency to take the oath: Effects of task, maltreatment, and age. *Law and Human Behavior*, 34, 141–149.
- Lyon, T.D., & Dorado, J. (2008). Truth induction in young maltreated children: The effects of oath-taking and reassurance on true and false disclosures. *Child Abuse and Neglect*, 32, 738–748.
- Lyon, T.D., & Koehler, J.J. (1996). The relevance ratio: Evaluating the probative value of expert testimony in child sexual abuse cases. *Cornell Law Review*, 82, 43–78.

- Lyon, T.D., Lamb, M.E., & Myers, J. (2009). Authors' response to Vieth (2008): Legal and psychological support for the NICHD Interviewing Protocol. *Child Abuse and Neglect*, 33, 71–74.
- Lyon, T.D., Malloy, L.C., Quas, J.A., & Talwar, V. (2008). Coaching, truth induction, and young maltreated children's false allegations and false denials. *Child Development*, 79, 914–929.
- Lyon, T.D., & Saywitz, K.J. (1999). Young maltreated children's competence to take the oath. *Applied Developmental Science*, 3, 16–27.
- Lyon, T.D., Saywitz, K.J., Kaplan, D.L., & Dorado, J.S. (2001). Reducing maltreated children's reluctance to answer hypothetical oath-taking competency questions. *Law and Human Behavior*, 25, 81–92.
- McCarron, A.L., Ridgway, S., & Williams, A. (2004). The truth and lie story: Developing a tool for assessing child witnesses' ability to differentiate between truth and lies. *Child Abuse Review*, 13, 42–50.
- Melinder, A., Scullin, M.H., Gravvold, T., & Iversen, M.K. (2007). The stability and generalizability of young children's suggestibility over a 44-month interval. *Psychology, Crime, and Law*, 13, 459–468.
- Mueller, C.B., & Kirkpatrick, L.C. (2009). *Evidence* (4th edn.). Austin, TX: Wolters Kluwer.
- Myers, J.E.B. (2005). *Myers on Evidence in Child, Domestic, and Elder Abuse Cases*. New York: Aspen.
- National Center for the Prosecution of Child Abuse (2009). Legislation and case law regarding the competency of child witnesses to testify in criminal proceedings. Available at http://www.ndaa.org/pdf/Competency_of_Child_Witnesses_%282009%29.pdf. Last accessed July 2009.
- N.Y. Crim. Proc. Law 60.20(2) (McKinney 1999).
- Pea, R.D. (1982). Origins of verbal logic: Spontaneous denials by two- and three-year-olds. *Journal of Child Language*, 9, 597–626.
- Pipe, M.E., & Wilson, J.C. (1994). Cues and secrets: Influences on children's event reports. *Developmental Psychology*, 30, 515–525.
- Poole, D.A., & Lamb, M.E. (1998). *Investigative Interviews of Children: A Guide for Helping Professionals*. Washington, DC: American Psychological Association.
- R v. Brasier*, 1 Leach 199, 168 Eng. Rep. 202 (K.B.) (1779).
- R v. Climas*, 74 S.A.S.R. 411 (1999).
- Richards, P., Morris, S., & Richards, E. (2008). *Turning up the Volume: The Vulnerable Witnesses (Scotland) Act 2004*. Edinburgh: Scottish Government Social Research.
- Roberts, K.P., Lamb, M.E., & Sternberg, K.J. (2004). The effects of rapport-building style on children's reports of a staged event. *Applied Cognitive Psychology*, 18, 189–202.
- Scullin, M.H., & Ceci, S.J. (2001). A suggestibility scale for children. *Personality and Individual Differences*, 30, 843–856.
- Scullin, M.H., Kanaya, T., & Ceci, S.J. (2002). Measurement of individual differences in children's suggestibility across situations. *Journal of Experimental Psychology: Applied*, 8, 233–246.
- State v. Henderson*, 160 P.3d 776 (Kan. 2007).
- State v. Hooper*, 176 P.3d 911 (Idaho 2007).
- Sternberg, K.J., Lamb, M.E., Hershkowitz, I., Yudilevitch, L., Orbach, Y., Esplin, P.W., & Hovav, M. (1997). Effects of introductory style on children's

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Editorial Offices

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- abilities to describe experiences of sexual abuse. *Child Abuse and Neglect*, 21, 1133–1146.
- Sternberg, K., Lamb, M., Orbach, Y., Esplin, P., & Mitchell, S. (2001). Use of a structured investigative protocol enhances young children's responses to free-recall prompts in the course of forensic interviews. *Journal of Applied Psychology*, 86, 997–1005.
- Talwar, V., Lee, K., Bala, N., & Lindsay, R.C.L. (2002). Children's conceptual knowledge of lying and its relation to their actual behaviors: Implications for court competence examinations. *Law and Human Behavior*, 26, 395–415.
- Talwar, V., Lee, K., Bala, N., & Lindsay, R.C.L. (2004). Children's lie-telling to conceal a parent's transgression: Legal implications. *Law and Human Behavior*, 28, 411–435.
- United States v. Allen J.*, 127 F.3d 1292 (10th Cir. 1997).
- Walker, N.E., & Hunt, J.S. (1998). Interviewing child victim-witnesses: How you ask is what you get. In C.P. Thompson, D.J. Herrmann, J.D. Read, D. Bruce, D.G. Payne, & M.P. Toggia (Eds), *Eyewitness Memory: Theoretical and Applied Perspectives* (pp. 55–87). Mahwah, NJ: Lawrence Erlbaum.
- Westcott, H.L., & Kynan, S. (2006). Interviewer practice in investigative interviews for suspected child sexual abuse. *Psychology, Crime and Law*, 12, 367–382.
- Walters v. McCormick*, 122 F.3d. 1172 (9th Cir. 1997).
- Wigmore, J.H. (1904). *A Treatise on the System of Evidence in Trials at Common Law (Vol. 1)*. Boston: Little Brown.