Lord President, Lord Milligan Lords Nimmo Smith, Bonomy, Allanbridge : Inner House, Court of Session. 10th November 2000

OPINION OF THE LORD PRESIDENT

[1] This appeal from the interlocutor of the Sheriff at Linlithgow dated 25 August 1999 raises an important point about the interpretation of Section 2(1)(b) of the Civil Evidence (Scotland) Act 1988 ("the 1988 Act"). The long title is *"An Act to make fresh provision in relation to civil proceedings in Scotland regarding corroboration of evidence and the admissibility of hearsay and other evidence; and for connected purposes"*. Section 1 abolishes the rule requiring corroboration and Sections 2 and 3 provide *inter alia*:

> *"2.(1) In any civil proceedings -*
> *(a) evidence shall not be excluded solely on the ground that it is hearsay;*
> *(b) a statement made by a person otherwise than in the course of the proof shall be admissible as evidence of any matter contained in the statement of which direct oral evidence by that person would be admissible; ...*
> *(2) Nothing in this section shall affect the admissibility of any statement as evidence of the fact that the statement was made. ...*
> *3. In any civil proceedings a statement made otherwise than in the course of the proof by a person who at the proof is examined as to the statement shall be admissible as evidence in so far as it tends to reflect favourably or unfavourably on that person's credibility."*

[2] As I explained in the short opinion of the court which I delivered on 5 July when the First Division decided to remit it to a Court of Five Judges, the appeal arises out of proceedings in which the pursuer seeks direct contact with his daughter E. The parties separated on 26 December 1997, since when E has lived with the defender. In fact the parties are now divorced and the defender has remarried, while the pursuer has formed a relationship with another lady whom he intends to marry. When the parties first separated, the pursuer had regular contact with E but, following on certain alleged difficulties, on 1 July 1998 the Sheriff ordered that contact should be supervised by the pursuer's mother. As a result of the allegations which are the focus of the present appeal, the Sheriff altered his interlocutor on 5 August 1998 to direct that the contact should take place in the presence of Mr. John Sheldon, a social worker. Eventually, on 21 October 1998 the Sheriff varied the award of contact to nil. Since that time the pursuer has had no contact with his daughter.

[3] In March and May 1999 the sheriff heard a proof spread over a number of days. The defender had been ordained to lead at the proof and among the witnesses whom counsel for the defender wished to lead was a police officer, W.P.C. Lawlor. She was to speak to answers which E had given at an interview in August 1998 when she had only recently passed her fourth birthday.

[4] In anticipation of that evidence certain discussions took place between counsel for both parties and the sheriff. In the light of the decision of the Second Division in ***F* v. *Kennedy*** 1992 S.C. 28, Mr. Halley, counsel for the defender at the proof, accepted that Constable Lawlor's evidence of E's answers would be admissible only if E herself would be a competent witness at the proof. He therefore indicated that he would put E into the witness box so that the Sheriff would have an opportunity to examine her. Mrs. Scott, who appeared for the pursuer, submitted that this approach was wrong in principle and that the relevant issue was whether E would have been a competent witness at the time when she gave the answers in the interview in August 1998. In the event the Sheriff decided to examine E and she was therefore called on 24 March 1999. Having put a number of questions to her, the Sheriff then allowed Mr. Halley to question E but he did no more than ask her name, where she lived and some questions about school. Mrs. Scott declined the opportunity to cross-examine.

[5] After an adjournment the Sheriff stated: *"I think for the record I should state formally that I found E a competent witness."* This led to a debate between the Sheriff and Mrs. Scott as to whether he should have made that determination, with Mrs. Scott reiterating her contention that the Sheriff had applied the wrong test and that the real issue was whether E would have been a competent witness at the time of the interview in August 1998. For present purposes I need not examine the detail of the exchanges since Mrs. Scott renewed her objection when counsel for the defender called Constable Lawlor as a witness and indicated that he intended to question her about what took place at the interview. The Sheriff repelled the objection, subject to competency and relevancy.

[6] In Finding in Fact 51 the Sheriff found that E was a child of above average comprehension and intelligence for her age, both in July 1998 and at the date of the proof. He also found that in July 1998 *"she was capable of distinguishing between the truth and lies."* But in his Note the Sheriff indicated that he had determined her competence to give evidence by reference to his examination of her at the proof: *"I interviewed E briefly as a witness for the defender following which I came to the conclusion that she knew the difference between telling the truth and telling lies. She was accordingly a competent witness and hearsay of her earlier statement at the second joint interview was admissible."*

In testing E's competence at the date of the proof rather than at the date of the interview, the Sheriff was giving effect to Mr. Halley's submission based on ***F* v. *Kennedy*** and the decision of Lord Hamilton in ***L* v. *L*** 1996 S.L.T. 767.

[7] Having reached his decision that E was a competent witness, the Sheriff held that the evidence, first, of the defender and a Mrs. Taylor as to certain remarks which E made to them in July 1998 and, secondly, of Constable Lawlor as to the answers given by E in the interview in August 1998, was admissible under Section 2(1)(b) of the 1988 Act. On the basis of that evidence the Sheriff made the crucial Findings in Fact 52 and 54: *"52. On one occasion the pursuer induced E to 'suck' or 'swallow' his pee pee. 'Pee pee' refers to the pursuer's penis. Said incident took place in the downstairs toilet at the home of Mr and Mrs T, the pursuer's parents, during a supervised contact session. Mrs. T, the contact supervisor, was in the living room at the time. ... 54. The pursuer behaved inappropriately towards E on said occasion. The pursuer's behaviour amounts to sexual abuse of E."*

[8] In his second ground of appeal to the Court of Session the pursuer contended that the Sheriff should have tested the matter of competence by reference to E's ability to appreciate the duty to tell the truth and to give trustworthy evidence as at July - August 1998. When the appeal began, therefore, the parties were adopting very much the same stance as they had adopted in the Sheriff Court. The pursuer was arguing that, in terms of Section 2(1)(b), the Sheriff should have tested E's competence to give evidence as at July - August 1998 and that, if he had done so and had had regard to all the relevant material, including the content of the interview with Constable Lawlor, he would have concluded that she was not then able to appreciate the duty to tell the truth or to give trustworthy evidence. For her part, the defender was arguing that the Sheriff had applied the correct test and reached the correct conclusion but, furthermore, even if he should have tested the matter as at July - August 1998, Finding in Fact 51 showed that he would still have reached the same conclusion.

[9] In the course of the debate before the First Division it became apparent that counsel for both parties were, frankly, unhappy about the law as laid down in the authorities dealing with the interpretation of Section 2(1)(b). In particular, counsel for both parties pointed out that the decisions of the Second Division in ***F* v. *Kennedy*** and of the Lord Ordinary in ***L* v. *L*** meant that any prudent counsel, who wished to lead the hearsay evidence of a statement made by a child, felt constrained to bring the child to court and to proffer the child as a witness to be examined by the presiding sheriff. Not only could this examination be long and painful for all concerned, and especially for the child, but in addition the procedure could seem like a ritual and somewhat disconnected indeed from reality, since there was no actual intention to take the child's evidence, even if he or she proved to be competent. These authorities had also caused difficulties for Reporters in social work proceedings where the grounds of referral were not accepted and the facts had to be proved. In some cases, where the relevant evidence was in the form of hearsay evidence of statements by young children, Reporters had preferred not to take proceedings rather than to submit the children to the procedure for testing competence.

[10] The First Division were aware, of course, that it might have been possible to resolve this appeal without deciding how Section 2(1)(b) actually fell to be interpreted. Indeed this has been done on a number of occasions in the past. I refer, for instance, to the decision of the First Division in ***L* v. *L*** 1998 S.L.T. 672 at p. 674 J - L. But, in view of the representations made by counsel for both parties, the First Division decided that the question of the proper interpretation of Section 2(1)(b) required to be addressed and that this could be done satisfactorily only by a court which was free to re-examine past decisions of the Inner House. In giving the opinion of the court, I suggested, under reference to part of an observation of Lord Hamilton in ***L* v. *L*** 1996 S.L.T. at p. 770 F, that in addition to the two competing

arguments advanced by counsel at the hearing before the First Division there was also room for another view. This would be to the effect that Section 2(1)(b) was designed to ensure that a statement would not be admissible if it related to a particular matter on which evidence from the person concerned would not have been admissible, for example, because it was confidential or sought to contradict the terms of a written contract. In other words, Section 2(1)(b) might embody a test of the admissibility of the evidence rather than of the competence, as a witness, of the person whose statement was to be narrated by the witness giving the hearsay evidence.

[11] At the hearing before this court, there were therefore three rival interpretations in play. For their part, counsel for the pursuer adhered to the argument which junior counsel had advanced before the sheriff, that Section 2(1)(b) involved a competence test which fell to be applied at the time when E made the statements in question. In their written submissions before this court, counsel for the defender still maintained, as their primary argument, that Section 2(1)(b) embodied a competence test, to be applied at the date of any proof or jury trial. The Sheriff had therefore applied the correct test. But, if they were wrong about that, they now argued that on a proper interpretation of Section 2(1)(b) no competence test at all fell to be applied and hearsay evidence was admissible unless direct evidence on the matter would be inadmissible if given by the person who had made the statement. In the course of the hearing, however, counsel for the defender modified their position to the extent of advancing the argument that there is no competence test as their primary contention and the other argument as their fallback argument.

[12] Counsel for the defender changed the emphasis of their submissions in this way in recognition of the very real and obvious difficulties in the argument that there is a competence test which falls to be applied at the time of the proof. Two opposing examples illustrate these difficulties, which arise independently of the exact wording of the provision.

[13] Suppose A overhears another adult, B, describing an event and B some months later, and quite independently, suffers a stroke which destroys his capacity to give evidence. If A's evidence is admissible under Section 2(1)(b) only if B would be a competent witness as to the event at the time of the proof, then A's evidence is inadmissible. And yet, it is hard to see any sensible reason for excluding A's evidence on that basis since the trustworthiness of the account given by B would not be affected by his subsequent illness. The same must indeed apply if B dies, since in that case also he would not be a competent witness at any proof. For the reasons given in paragraphs 40 - 42 below, when discussing the *res gestae* and *de recenti* rules, I am satisfied that this difficulty cannot be avoided by invoking the common law exception under which hearsay evidence was admitted if the maker of the statement had died.

[14] Now suppose that A overhears B, a child of two, make a statement about an event. Twenty years later A is called to give evidence as to B's statement about the event. By that time B will be twenty-two and plainly would be a competent witness. If the test of competence applies at the time of the proof, A's evidence will be admissible because at the proof B would be a competent witness as to the event. In this case it is hard to see any sensible reason for admitting A's evidence on that basis since the trustworthiness of B's statement at the age of two cannot be affected by her competence to give evidence at the age of twenty-two.

[15] These are just two examples of the consequences of holding that a competence test falls to be applied to the maker of a statement at the time of the proof. They are at once so obvious and so absurd that I should find it impossible to adopt a construction of the provision which led to them, unless the words used by Parliament admitted of no other construction.

[16] While not overlooking these difficulties, counsel for the defender submitted that, none the less, this was precisely the construction which the Second Division had placed upon the paragraph in ***F* v. *Kennedy*** and which had been followed by the Lord Ordinary in ***L* v. *L***. I turn accordingly to the first of these cases.

[17] ***F* v. *Kennedy*** arose out of a referral by a Reporter under the Social Work (Scotland) Act 1968 relating to allegations of lewd, indecent and libidinous practices in respect of three children. The grounds of

referral were not accepted and a proof was accordingly held in front of the sheriff. Evidence was led of various statements which the children were said to have made in the course of interviews. One of the children, W, was three years old at the time of the proof and, when brought into court, he remained mute and did not give evidence. Nevertheless, the sheriff held that evidence of the statements allegedly made by W was admissible. Although the reports of the decision of the Second Division do not reproduce Sheriff Gow's note, it can be studied in the Session Papers. From that note it appears that the argument presented to him was somewhat convoluted. But it also appears that he decided that the evidence of W's statements was admissible even though W himself had been unable to give evidence when called in the proceedings. The sheriff then made use of that evidence in holding that the grounds of referral had been established.

[18] Against that background I am satisfied that the argument for the Reporter in the appeal before the Second Division (1992 S.C. at p. 31) was to the effect that, even if a child did not know the difference between truth and falsehood, and so would fail the test of competence, hearsay evidence of statements made by that child would be admissible under Section 2(1)(b). Contrary, therefore, to a suggestion by senior counsel for the pursuer in this case at one stage of his argument, the decision of the Second Division in ***F* v. *Kennedy*** cannot be explained as having been given without the point having been argued.

[19] In delivering the opinion of the court, Lord Justice Clerk Ross began his decision by quoting the test for deciding when *"[a] child is admissible"* from Walker and Walker, *The Law of Evidence in Scotland*, p. 374. He continued by referring to two criminal appeals where the procedure had been discussed and added (1992 S.C. at p. 32): *"In the present case it was not possible for the sheriff to carry out any examination of the child to see whether he knew the difference between truth and falsehood nor was it possible for him to admonish the child to tell the truth because the child remained mute throughout. In these circumstances we are satisfied that the provisions of sec. 2(1)(b) of the Act of 1988 were not satisfied with regard to W. What he may have said to the social workers or others was not admissible as evidence of any matter contained in such statement because direct oral evidence by W. of any such matter was not admissible since in the circumstances W. himself was not an admissible witness. We recognise that W. would have been an admissible witness if he had been examined by the sheriff as to his ability to distinguish between truth and falsehood and if, on being satisfied on that matter, the sheriff had cautioned him to tell the truth, but in our opinion, the terms of the subsection make it plain that hearsay is only admissible if it is hearsay of a person who was in fact an admissible witness."*

On that basis the court held that evidence as to statements made by W was not admissible under Section 2(1)(b) and remitted the case to the sheriff so that he could inform them *"as to what the hearsay evidence of W. was"*, and also as to the extent to which he had relied on that evidence in making his findings in fact.

[20] In the passage which I have quoted the court can be seen to decide two points. First, they decide that evidence of statements made by W would have been admissible under Section 2(1)(b) if, but only if, W had in fact been *"an admissible witness"*. Secondly, they decide that W would have been "an admissible witness" if the sheriff had successfully examined him as to his ability to distinguish between truth and falsehood and had cautioned him to tell the truth. Although the second of these points has led to the development of the unfortunate practice of children being brought to court simply to be subjected to an examination by the presiding sheriff, it is in fact the less fundamental of the two. And indeed in two later cases the First Division indicated to practitioners that, depending on the other evidence available, a sheriff might be able to decide whether a child was an admissible witness without the child actually having to be brought to court. See ***M* v. *Kennedy*** 1993 S.C. 115 at p.125 A - E, per Lord President Hope giving the opinion of the court, and ***M* v. *Ferguson*** 1994 S.C.L.R. 487 at p. 492 C - E, per Lord President Hope, again giving the opinion of the court. In each case the court reached their decision for other reasons and these particular comments were *obiter*. Presumably because of this, practitioners have continued to be guided by ***F* v. *Kennedy*** and have persisted in bringing children to court to be examined by the Judge or sheriff. There may also have been difficulties in obtaining the kind of evidence envisaged by the First Division in the later cases.

[21] The second of the matters which I have identified arises only because of the Second Division's decision on the first matter. The correct starting point for any reconsideration of their decision is therefore with that first, and more fundamental, aspect.

[22] The use of language in the relevant passage in the opinion of the court is striking: the court repeatedly use the term "*admissible*" to refer to witnesses. The use of *"admissible"* in this way - which I shall call "*the first sense"* of the word - is, of course, well established in our textbooks. When so used, the adjective refers to persons who are called to give evidence and who are competent to do so. For instance, the words quoted from Walker and Walker on *Evidence*, paragraph 349, *"A child is admissible if he appears..."* occur in a chapter which is introduced in the previous paragraph with the words *"witness is competent unless he is excluded by a rule of law..."*. The same usage is to be found in Dickson's *Treatise on the Law of Evidence in Scotland*, paragraph 1542. Speaking of the former law, the author says, *"It was then more difficult to discover who were admissible, than who were incompetent witnesses."* As that comment suggests, at one time our law excluded many classes of persons from giving evidence but, largely as a result of the reforms of the nineteenth century, the only persons now regarded as incompetent are certain children and persons suffering from disease, whether physical or mental, affecting their ability to give evidence. If they are not competent to give evidence, they are not *"admissible"* witnesses. Since they are not admissible witnesses, they do not give evidence.

[23] That usage of the term "*admissible*" is to be distinguished from its use - in what I shall call *"the second sense"* - to refer to particular kinds of evidence which an *ex hypothesi* admissible witness may give. For instance, the common law protects the confidence of communings between a client and his lawyer and so, unless the client waives the lawyer's duty of confidentiality, evidence by the (admissible) solicitor as to those communings is inadmissible. Statute may also render certain evidence inadmissible. For instance, Section 1(1) of the Civil Evidence (Family Mediation)(Scotland) Act 1995 provides: *"Subject to section 2 of this Act, no information as to what occurred during family mediation to which this Act applies shall be admissible as evidence in any civil proceedings."*

Any evidence, which could otherwise be given by an (admissible) participant or mediator as to what occurred during family mediation, is not admissible in civil proceedings.

[24] With these two different uses of the adjective *"admissible"* in mind, I turn to look at the language of Section 2(1)(b) of the 1988 Act. It is immediately apparent that the legislature is using the term "admissible" in the second sense, to refer to a "*statement*" and to "*evidence*" rather than to refer to a witness (first sense). A "*statement made by a person"* is to be *"admissible as evidence"* of any matter contained in the statement of which direct *"evidence"* by that person would be *"admissible"*. In one respect Parliament uses a kind of shorthand. When it speaks of a statement being admissible as evidence of the matter contained in the statement, it is really referring to evidence of the statement being admissible as evidence of the matter contained in the statement. Nevertheless, whether in shorthand form or when its meaning is teased out in this way, the paragraph is concerned exclusively with defining the classes of statement which are admissible as evidence. Since the provision uses the adjective *"admissible"* in the second sense only, there is nothing in its language to suggest that Parliament was here concerned with the, distinct, issue of the admissibility of anyone to give evidence as a witness in proceedings. In other words, the paragraph presupposes that the maker of the statement would be a competent and admissible witness. If he were not, there would be no evidence, whether admissible or inadmissible. It is then concerned with the admissibility of any direct oral evidence which that person might give on particular matters. If such evidence would be inadmissible, then hearsay evidence of a statement by him to a similar effect is also inadmissible. Conversely, if such evidence would be admissible, hearsay evidence of a statement by him to a similar effect is also admissible.

[25] In ***F* v. *Kennedy***, the court's reasoning, that the provision does indeed deal with the admissibility of the child to give evidence, depends on running together the two distinct senses of "admissible" in our law: the evidence of the social workers was regarded as inadmissible (second sense) because direct evidence of the matter by W was inadmissible (second sense) because he himself was not an admissible witness (first sense). In my view, having regard simply to the wording of the subsection,

that reasoning is unsound. It might, perhaps, be justified if the words used by Parliament could not otherwise be given a sensible meaning. But that is very far from the case. If the adjective *"admissible"* is given its second sense, to refer only to the admissibility of evidence relating to a particular matter, the provision not only makes sense but performs a vital role. If paragraph (b) did not exist, hearsay evidence could be led of a person making a statement about a matter as to which his direct oral evidence would not be admissible. I have already mentioned the solicitor who is asked to give evidence about communings with his client and a participant or mediator who is asked to give evidence about events at a mediation hearing. The policy of the law is that such evidence is not to be admissible. That policy would be undermined if it were open to a party either to give evidence himself or to lead the evidence of someone else as to what the solicitor or participant or mediator had said about these matters. Section 2(1)(b) exists to prevent this kind of potential misuse of hearsay evidence and to bolster the policy of the law, by virtue of which evidence of certain matters is to be inadmissible. This interpretation, it should be noted, gives full value to the words *"by that person"* since, where evidence is inadmissible because of a duty of confidentiality on the witness or because, perhaps, the witness came by his knowledge in an unlawful manner, evidence as to the same matter may be admissible if given by someone else who obtained it in a different way.

[26] In ***L* v. *L*** 1996 S.L.T. at p. 770 F - G, the Lord Ordinary recognises that the exclusion of evidence of this kind may have been the primary purpose behind the provision but adds, under reference to ***F.* v. *Kennedy***, that it is "*also apt to include a situation of legal incapacity where no direct evidence by the maker of the statement would be admissible*." For the reasons which I have given, I see nothing in its language which suggests that the provision should be given this extended meaning. Moreover, as Lord Hamilton goes on to demonstrate and as I explain in more detail below, if it is given that extended meaning, the conditional tense used in the words "*would be admissible*" really compels the court to interpret the provision as requiring the court to decide the admissibility of the hearsay evidence by asking whether evidence by the maker of the statement would be admissible at the proof. As I have shown already and as counsel for the defender readily acknowledged, such an interpretation leads to absurd results. Those absurd results are themselves a powerful indication that the construction which gives rise to them is itself flawed.

[27] I find reinforcement of this view in the terms of Section 259 of the Criminal Procedure (Scotland) Act 1995 which provides *inter alia*:

> *"(1) Subject to the following provisions of this section, evidence of a statement made by a person otherwise than while giving oral evidence in court in criminal proceedings shall be admissible in those proceedings as evidence of any matter contained in the statement where the judge is satisfied -*
>
> *(a) that the person who made the statement will not give evidence in the proceedings of such matter for any of the reasons mentioned in subsection (2) below;*
>
> *(b) that evidence of the matter would be admissible in the proceedings if that person gave direct oral evidence of it;*
>
> *(c) that the person who made the statement would have been, at the time the statement was made, a competent witness in such proceedings....*
>
> *(2) The reasons referred to in paragraph (a) of subsection (1) above are that the person who made the statement - ...*
>
> *(e) is called as a witness and either -*
>
> *(i) refuses to take the oath or affirmation; or*
>
> *(ii) having been sworn as a witness and directed by the judge to give evidence in connection with the subject matter of the statement refuses to do so,*
>
> *and in the application of this paragraph to a child, the reference to a witness refusing to take the oath or affirmation or, as the case may be, to having been sworn shall be construed as a reference to a child who has refused to accept an admonition to tell the truth or, having been so admonished, refuses to give evidence as mentioned above."*

[28] The provision is more elaborate than, and has a different scope from, Section 2(1)(b) of the 1988 Act since it applies only where, for one of a number of specified reasons, the person who made the statement is not to be called to give evidence at the trial. What is significant for present purposes, however, is that in the 1995 Act Parliament has expressly dealt with both the admissibility of evidence as to the matter in question (in paragraph (b) of subsection (1)) and the competence of the maker of the statement (in paragraph (c) of subsection (1)). Even more significantly, the language of paragraph (b) is similar to the language of Section 2(1)(b) of the 1988 Act. The similarity in the language suggests

that the provision in the 1988 Act is intended to have the same restricted scope as paragraph (b) of Section 259(1) of the 1995 Act. In both, "admissible" is used in the second sense noted above.

[29] Another argument should be noticed. On behalf of the pursuer counsel attached some importance to the word *"solely"* in Section 2(1)(a) of the 1988 Act. This showed, they said, that Parliament had intended to do no more than abolish the hearsay rule; all the other rules remained intact and the provisions should be interpreted in such a way as to give effect to those rules. It followed that Parliament must have intended that the courts should exclude hearsay evidence of the statement of a child if the child herself would not be a competent witness, since otherwise the rules as to the admissibility of child witnesses would be undermined. This did not appear to be a separate argument, but simply a consideration which was said to support the pursuer's submission that subsection (1)(b) did indeed incorporate a competence test. The use of the word "solely" does not, however, justify the approach which counsel sought to build on it. Paragraph (a) of subsection (1) is in fact the key provision which creates the general rule that hearsay evidence is admissible. If it said nothing more than that, however, it would mean that no hearsay evidence could ever be excluded, however irrelevant or incompetent it might be - for instance, because it related to a matter not falling within the scope of the pleadings or because it sought to contradict the terms of a written contract. By framing the paragraph in the way that it did, however, Parliament ensured that this new class of evidence would be treated like direct oral evidence of the same matter. In other words, even though hearsay evidence is in principle admissible, it can be excluded in the same way that certain direct oral evidence of a witness can be excluded. The general rules apply to this new form of evidence as they do to other types of evidence. The inclusion of the word "solely" in subsection (1)(a) is not therefore a reason for saying that the subsection as a whole, or paragraph (b) in particular, embodies a test of competence of the maker of the statement.

[30] For the reasons which I have outlined so far, my provisional view is therefore that Section 2(1)(b) should be given its straightforward meaning, according to which it deals only with the admissibility of evidence as to a statement about the matters in question and does not deal at all with the admissibility as a witness of the person making the statement.

[31] Counsel for the pursuer argued that such an approach would be mistaken and that the paragraph should be construed as importing a competence test, but that the test should be applied by reference to the time when the person made the statement. This interpretation enjoys support from certain *obiter* remarks by the Lord President in ***M* v. *Kennedy*** 1994 S.C.L.R. at p. 492 D - E and from Lord Hope's observations, again *obiter*, in ***Sanderson* v. *Macmanus*** 1997 S.C. (H.L.) 55 at p. 60 C. It has the additional merit of making a certain kind of sense in policy terms: if the policy of the legislature was to exclude evidence of statements by persons who could not have been competent witnesses on the matter, then the aim would be to exclude evidence of statements by people who were too young or too unfit to be able to give trustworthy evidence when they made the statement in question. That is simply the obverse of the argument as to the absurdity of applying a competence test at the date of the proof. The criticism of the pursuer's argument is not, therefore, that it leads to absurdity. Rather, as counsel for the defender made clear, the criticism is that the pursuer's interpretation finds no support in the language of Section 2(1)(b) and is indeed inconsistent with it. It also tends to exclude evidence which might well be compelling.

[32] In the first place, the interpretation favoured by counsel for the pursuer is open to precisely the same basic objection as applies to the interpretation which imports a competence test at the time of the proof. It conflates the two senses of *"admissible"* and ignores the language of the provision which is concerned with the admissibility of evidence rather than with the admissibility of witnesses. I need not repeat what I have already said on that point. In addition, however, even on the assumption that this difficulty could be overcome, the pursuer's interpretation ignores the tenses of the verbs used by Parliament. An example makes this clear. The statement in question "*shall be admissible*" if oral evidence by that person "*would be admissible*". Suppose that a child has made a statement about a particular matter at the age of three and is called to give evidence about it at a proof held when she is six. Having examined her in the usual way, the sheriff concludes that she is competent to give

evidence. If she then gave oral evidence about the matter, it "*would be admissible*". That being so, even on the assumption that the provision embodied a competence test, in that situation, according to the words used in paragraph (b), the statement made about the same matter when the child was three would be admissible. The position becomes even clearer if the child has made, say, three statements relating to different incidents. When called to give evidence, she recalls two of them and gives admissible oral evidence about those two, but fails to remember the third. If she remembered the third incident, her direct oral evidence about it "*would be admissible*". I can therefore see no basis, standing the terms of paragraph (b), for holding that hearsay evidence of her earlier statement about that third incident would be inadmissible, simply because she would not have been a competent witness when she made the statement at the age of three.

[33] For the pursuer's approach to be acceptable, one would have to be able to read the paragraph as providing that, even though the direct oral evidence of the child would be admissible at the proof, hearsay evidence of the statement would be inadmissible if the child would not have been a competent witness at the time when she made the statement. I find it impossible to read the language of the paragraph in that way. Nor am I tempted to try, since we can see that, when Parliament later wished to introduce just such a two-fold test in Section 259 of the 1995 Act, it did so explicitly, using unambiguous language and creating a more complex scheme. As Lord Nimmo Smith pointed out during the hearing, under Section 259 the child witness who refuses to accept the admonition to tell the truth or who refuses to give evidence, as envisaged in subsection (2), is *ex hypothesi* a competent witness at the date of the trial. But, none the less, in terms of subsection (1)(c), evidence of her statement is admissible only if the trial judge is satisfied that she would have been a competent witness at the time the statement was made. If Parliament had wished to make similar provision in the 1988 Act, it could have done so. Since it did not, I infer that Parliament did not intend to introduce a test of that kind. I therefore reject the construction of Section 2(1)(b) of the 1988 Act advanced by counsel for the pursuer.

[34] In the result, simply on the basis of the language of the subsection, I conclude that it does not embody a competence test and that hearsay evidence of a statement is admissible unless it concerns a matter as to which direct oral evidence by the maker of the statement would not be admissible. I have preferred to base that conclusion on the language used by Parliament in Section 2(1)(b), but in my view it is also consistent with a number of wider considerations which were urged upon us.

[35] As the long title suggests, the 1988 Act effected a revolution in our law of evidence. At times the courts have had difficulty in adjusting to all the implications of that revolution. As I had occasion to remark in ***L* v. *L*** 1998 S.L.T. 672 at p. 676 G, our duty, however, is to give full effect to the changes which Parliament has made.

[36] Down the years before 1988, there was a more or less desultory debate about the advantages and disadvantages, on the one hand, of retaining the exclusionary rule and, on the other, of allowing in hearsay evidence. Some flavour of that debate is to be found in paragraphs 19.01 - 19.21 of the published version of the research paper on the law of evidence which Sheriff Macphail wrote for the use of the Scottish Law Commission and which formed the basis of their Memorandum (No. 46) on the Law of Evidence published in 1980. The catalogue of issues reappears in much the same form in the Commission's Report on Corroboration, Hearsay and Related Matters in Civil Proceedings (No. 100, 1988), paragraphs 3.15 - 3.21. That debate is now of largely historical interest but it shows, of course, that the risk that hearsay evidence might be less reliable than direct oral evidence was among the arguments which could be, and were, deployed in support of retaining the pre-existing law. On the advice of Ministers, who adopted a considerably more radical policy than the Commission had proposed, Parliament none the less swept away the old exclusionary rule and replaced it with a rule which made hearsay evidence admissible in principle in all cases where primary evidence to the same effect would have been admissible. By passing the legislation Parliament resolved the antecedent debate, as far as Scottish courts at least are concerned, and replaced the old law with a new and completely different rule, to which we must give effect.

[37] On the interpretation of Section 2(1)(b) which I prefer, this means that we must accept that hearsay evidence of a statement is admissible even though, perhaps, the maker of the statement would not have been an admissible witness. Mr. Mitchell, Q.C., sought to dissuade us from adopting that interpretation on the simple ground that there was no hint of it in the previous authorities or in textbooks. As he himself recognised, that is not strictly speaking the case but, in any event, even if the interpretation had never been previously advanced, I should not find that a persuasive argument one way or the other. It is well known that, when once adopted, a particular approach will often tend to persist even if it is unsound, unless and until the whole question is thoroughly re-examined. In the case of Section 2(1)(b) the basic approach to its interpretation adopted early on in ***F* v. *Kennedy*** was really just accepted in all the subsequent cases, with attention being given to trying to manage the difficulties to which it gave rise in practice. This is the first opportunity which the court has had to look again at the fundamentals of the matter.

[38] More importantly, counsel for the pursuer urged upon us what they saw as the undesirable consequences of allowing in hearsay evidence without a competence test. It would mean that a judge or even a jury might have to hear evidence of a statement made by a child who was incapable of distinguishing truth from falsehood or of giving a trustworthy account. Those undesirable consequences were an indication that Parliament could never have intended the provision to have this effect. For my part, I find it helpful to keep in mind that hearsay evidence is, almost by definition, evidence by A of what B said when not on oath. Whoever B may be, it is evidence of what he said when he was not giving evidence in the proceedings in which the hearsay evidence is led. When he made the statement, B may have been drunk, affected by drugs, ill, distracted, engaged in a practical joke or impelled by sheer malice. These and a thousand other factors may mean that his statement is completely untrustworthy and the evidence of what he said equally valueless. None the less the evidence of his statement is admissible under Section 2 and the court or jury have to use their wisdom and common sense to assess what weight, if any, to give to that evidence. The statements of children and of persons suffering from mental disorder or disability raise not dissimilar issues. Even assuming that their statements can properly be regarded as inherently less trustworthy than statements by people affected in the ways which I have mentioned, it is a matter of degree only. If evidence of their statements is admitted, the judge or jury will again have to use their wisdom and common sense to decide whether the statements are trustworthy. The exercise is not *au fond* different. In carrying it out, in the case of young children in particular, the judge or jury will be able to draw not only on their own experience of listening to children in everyday life but also on any expert evidence which may be tendered in relation to the individual whose statement is in issue.

[39] To hold that evidence of the statements of a child is admissible only when the child could have given evidence on the same point is to equiparate the capacity to make a statement about something with the capacity to give evidence on the same point. They may, however, be entirely different. There must be many children who can state, perhaps casually but quite accurately, what they happen to have seen but who, for a whole variety of reasons, could not give evidence on the same matter in court. The moves in Britain and elsewhere in recent years to change the ways in which children give evidence are eloquent of precisely that distinction. More particularly, we all know that even quite young children will try to explain what they have just seen happening and we do not simply reject all these explanations as fantasy or as wholly untrustworthy. It is not hard, for instance, to imagine a situation where a young child comes into a room, perhaps in distress, and says that she has just seen her father hit her mother or that her father has just hit the child herself. That child may be unable to pass the test of competence to give evidence, but what she said may still be extremely compelling and have the ring of truth. In real life you might well act on the strength of such a statement and, indeed, be open to criticism if you did not. On an application of the competence test as envisaged by the pursuer, however, evidence of what the child said would often be inadmissible as evidence of these matters.

[40] To avoid that uncomfortable conclusion, counsel for the pursuer argued that a statement of this kind would be admissible as part of the evidence of the *res gestae*. Perhaps to give this doctrine a more modern and shiny patina, Mr. Mitchell preferred to refer to such statements as "*excited utterances*" and pointed out that in many other jurisdictions hearsay evidence of such spontaneous utterances is

admissible. He also appeared to envisage that in a suitable case evidence of a *de recenti* statement by a young child might be admissible. The court was suddenly faced with the idea that, somewhere behind the terms of Section 2 of the 1988 Act, the *res gestae* and *de recenti* doctrines survived to haunt the law. So far from making all things new, Parliament had impliedly preserved these troublesome rules.

[41] I reject that argument, as I would also reject any argument that hearsay evidence of statements by someone who had since died would be admissible by reason of the old common law, even though the person concerned could obviously not comply with a competence test applied at the time of the proof. The *res gestae*, *de recenti* and deceased persons rules were all exceptions to the former general rule that hearsay evidence was inadmissible. That general rule has passed away and, with it, any need for these former exceptions. Indeed, on counsel's analysis, these common law rules would not now be performing the role assigned to them by the common law. Rather, they would be common law exceptions to a supposed statutory exception to a statutory rule that hearsay statements are admissible. There is no warrant in the wording of the 1988 Act or in its long title for conjuring up common law exceptions or supplements of this kind to the rules laid down by Parliament. In this respect I agree with the court in ***F* v. *Kennedy*** 1992 S.C. at p. 32 that the admissibility of statements depends on the provisions of the 1988 Act.

[42] The fact that counsel for the pursuer felt the need to resort to the desperate measure of calling up the spirits of the *res gestae* and *de recenti* rules is an indication that the interpretation of Section 2(1)(b) which counsel favoured was not in itself satisfactory. It is therefore another reason for rejecting that interpretation. The same would apply to any invocation of the old exception for statements of deceased persons to avoid difficulties in applying any supposed competence test at the time of the proof. On the approach to Section 2 which I favour, all these various classes of statement can be accommodated within the legislation enacted by Parliament without the need to disturb the repose of the old common law exceptions, whose work in our civil law is done.

[43] When looking at the position more generally, I am also struck by the way in which any competence test, whether applied at the time of the statement or at the time of the proof, tends to cut down what one might have thought would be potentially useful effects of the reform of the law of hearsay. Very often - though not invariably, of course - if a witness is available to give direct oral evidence on a matter, that will be the most compelling and effective evidence. If so, the party will tend to call the witness to give evidence, even if some other witness can speak to a statement which the person concerned has made on the point. It is precisely in those cases where, for whatever reason, that person cannot give evidence that hearsay evidence of the person's earlier statement may be most useful to the court. If that person is an adult, usually no difficulty arises and the evidence can be led. But if the person happens to be a child up to, say, twelve years of age, evidence of her earlier statement cannot be led, it is said, unless there is evidence available to demonstrate that she would be a competent witness. If available at all, such evidence may be difficult and costly to obtain, involving the need to commission expert reports and, perhaps, to have the child interviewed. And, of course, if the evidence is to the effect that the child would not be or would not have been a competent witness, then on this approach the evidence of her statement will be inadmissible, however compelling it may appear to be.

[44] My uneasiness with such a conclusion increases when I contemplate the terms of Section 23 of the (Irish) Children Act 1997 (No. 40) which counsel for the pursuer helpfully drew to our attention. The section provides *inter alia*:

> *"(1) Subject to subsection (2), a statement made by a child shall be admissible as evidence of any fact therein of which direct oral evidence would be admissible in any proceeding to which this Part applies, notwithstanding any rule of law relating to hearsay, where the court considers that -*
> *(a) the child is unable to give evidence by reason of age, or*
> *(b) the giving of oral evidence by the child, either in person or*
> *under section 21, would not be in the interest of the welfare of the child.*
> *(2) (a) Any statement referred to in subsection (1) or any part thereof shall not be admitted in evidence if the court is of the opinion that, in the interests of justice, the statement or that part of the statement ought not to be so admitted.*

(b) In considering whether the statement or any part of the statement ought to be admitted, the court shall have regard to all the circumstances, including any risk that the admission will result in unfairness to any of the parties to the proceedings."

The provision is different in important respects from Section 2 in our own legislation. For one thing, it deals only with the evidence of children and does not touch the general rules relating to hearsay evidence. Moreover, subsection (2) retains to the court a measure of control which is absent from the Scottish legislation. On the other hand I note in passing that the Irish provision distinguishes between the admissibility of evidence and the ability of a child to give evidence in language which tends to confirm the interpretation that I have placed on Section 2(1)(b) of our own legislation.

[45] Despite the difference in approach, the Irish provision is of some assistance for present purposes, since it shows that the Irish legislature has made the evidence of statements by children admissible in the very kind of case where the competence test supposedly enshrined in our Section 2 would make such evidence inadmissible. The rationale for the Irish provision must be that evidence of statements by children may be of value to the court, even though the child may not be capable of giving evidence or it would not be in the interests of the child for her to give oral evidence. That seems, with respect, a wholly justifiable balance for a legislature to strike and, though the balance is struck differently by Section 2(1), I find no reason to recoil from the conclusion that Parliament intended to allow evidence to be led of statements made by children who are too young or are otherwise incapable of giving oral evidence. Indeed some confirmation that this was the intention of Parliament may be found in certain passages of the debates on the Civil Evidence (Scotland) Bill. Before turning to those passages, I should look further at the various documents which the Scottish Law Commission produced to pave the way for the 1988 Act.

[46] As already mentioned, the starting point is the research paper prepared by Sheriff Macphail. At paragraph 19.27 he observed that it did not seem logical to depart from the requirement that the maker of the statement must be a person who would have been a competent witness. He then quoted a passage from Walker and Walker on *Evidence*, paragraph 371, dealing with hearsay statements of deceased persons under the old law and suggesting that there were three possible dates for determining competence: the date when the statement was tendered in evidence, the day the maker of the statement died, and the day when the statement is alleged to have been made. Sheriff Macphail pointed out that Dickson on *Evidence*, paragraphs 266 - 267, considered that the date should be the day when the statement was alleged to have been made, but that in ***Deans's J.F.* v. *Deans*** 1912 S.C. 441 at p. 448 Lord President Dunedin had reserved his opinion.

[47] In Memorandum No. 46, which was prepared on the basis of Sheriff Macphail's paper, the Commission observed (at paragraph T.08): *"The maker of the statement must be a person who would have been a competent witness. We propose that the date on which his competency should be tested is the time when the statement is tendered in evidence."*

In the published version of his research paper (*Evidence*, paragraph S19.27) Sheriff Macphail simply recorded this proposal. The striking thing about the proposal is that there is no indication whatever of the reasons for the Commission's (*prima facie* strange) choice.

[48] When the Commission eventually came to publish their report on the matter in 1988, they did not discuss this issue at all. In fact they made no mention of the need for a test of competence, far less of the date at which any such test should be applied. In paragraph 3.37 they concluded that the rule against the admission of hearsay evidence should be abolished, subject to certain safeguards. They then added: *"In making this recommendation we do not intend to render admissible evidence of statements made by another if direct oral evidence of the matter contained in the statement would not have been admissible if offered by the original maker of the statement. In other words we are concerned only with evidence which is presently inadmissible because of the rule against hearsay, not with evidence which may be inadmissible for other reasons, for example, by reason of confidentiality. Therefore, subject to the safeguards outlined below, we* ***recommend that:***

8. The rule against hearsay should be abolished and any statement made by a person otherwise than as a witness in court should be admissible as evidence of any matter contained in the statement

> ***which could competently have been given by that person as direct oral evidence. We further recommend that this should apply to multiple as well as simple hearsay."***
>
> *This recommendation formed one of the bases for Clause 2 in the draft Bill attached to the Report. Paragraphs (a) and (b) of Clause 2(1) are in all essential respects similar to the terms of Section 2(1)(a) and (b) as eventually enacted by Parliament.*

[49] Unfortunately, Recommendation 8 is formulated somewhat loosely. In particular the relative clause at the end of the first sentence lacks any appropriate antecedent. In that situation I should not be inclined to attach weight to the particular words used by the Commission in their recommendation. But, if the recommendation is read along with what the Commission say immediately before, I infer that they intended to exclude the admission of hearsay evidence if direct oral evidence of the same matter would have been either incompetent or irrelevant. On the other hand, despite what they said in their Memorandum in 1980, I find nothing at all to suggest that the Commission intended to recommend that any legislation should contain a test of competence. The reason for this is hidden from our gaze: it may be that the Commission changed their minds in the light of the responses to their Memorandum, or else changes in the membership of the Commission may have led to a change of view. Whatever the reason, it is sufficient that the Commission did not recommend the inclusion of such a test and that on this matter Parliament enacted the provision in essentially the same terms as the Commission had proposed. The appropriate inference from the Law Commission material seems therefore to be that the provision enacted by Parliament was not designed to incorporate a test of competence.

[50] Although I have indicated that I do not myself find Section 2(1)(b) ambiguous, I readily acknowledge that a different interpretation has hitherto prevailed and has been regarded favourably, even in the House of Lords (***Sanderson* v. *Macmanus*** 1997 S.C.(H.L.) 55 at pp. 59 I - 60 D). In those circumstances it would be wrong to exclude consideration of the passages in Hansard on any technical ground relating to perceptions of ambiguity or the lack of it.

[51] We were referred to the proceedings in the House of Commons. In the Second Reading debate on 16 May 1988 the only indication which appears to me to be of any possible assistance comes in the Minister's reply to the debate in which he said that the Member for Aberdeen, South (Mr. Doran) had made an interesting comment on child abuse cases. The Minister, Lord James Douglas-Hamilton, indicated that he believed that the Bill met his point (Official Report House of Commons Sixth Series Volume 133, column 774). The Minister appears to be referring to Mr. Doran's comment (column 765) that many cases of child abuse are discovered outside the home, at school or nursery school, and that, under the pre-existing law, evidence from a teacher, a nursery nurse or a social worker would be inadmissible. The Bill would, he thought, provide a considerable improvement and the work of the social work departments and children's hearing system would be much more effective because courts would be able to deal with such cases. If Mr. Doran's comments and the Minister's reply are read together, it may be legitimate to infer that the Minister was indicating that the Bill would indeed make it easier for hearsay evidence to be introduced even in the case of children of nursery school age. At the very least, this passage is important because it shows that Parliament was well aware of the possible implications of the new provision for evidence relating to statements by young children.

[52] This is confirmed by the debate in the Standing Committee in which several members, including the Minister, were legally qualified and were well aware of the full implications of the legislation which they were discussing. On 23 June 1988 Mr. Dewar was concerned about the possible adverse effects of the legislation on persons facing social work proceedings in relation to allegations of child abuse (First Scottish Standing Committee Debates, Session 1987 - 88, vol. XI, columns 95 - 96). He put down an amendment designed to exclude such proceedings from the scope of the Bill. Mr. Doran (columns 96 - 98), on the other hand, was worried that any such amendment would weaken the Bill's beneficent effect in giving more scope for the use of hearsay evidence of children's statements in such proceedings. He gave the example of the difficulties which had occurred in a case involving a girl of four who made two graphic statements indicating that she had been abused by her father. The grounds of referral were not accepted and a hearing was held before the sheriff who was unable to

find the grounds established because the statements were hearsay and there was no corroboration. The Minister undertook to consider the matter and Mr. Dewar withdrew the amendment.

[53] At Third Reading on 4 July 1988 Mr. Dewar did not move his amendment again and, having considered the matter, the Minister did not seek to amend the Bill in this way either. In replying to the short debate he said (Official Report House of Commons Sixth Series Volume 136, column 742), however, that Mr. Doran had fairly and correctly pointed out that the ultimate aim should be the protection of the child. He added that Mr. Doran had made it absolutely clear that he believed that the majority of reporters, social workers and police welcomed the fact that the Bill would do away with a major difficulty in the proof of child abuse. He had also stated his opposition to Mr. Dewar's amendment and had expressed concern that the Minister had agreed to reconsider the matter. Lord James concluded: *"Having considered the matter further, I should state that the weight of evidence is clearly in one direction, and I hope that the House will accept the position on that very important point."*

The House then agreed that the Bill should be read a third time.

[54] While the passage in the Minister's speech is not perhaps entirely clear on the matter, the fair interpretation seems to be that he recognised that, if passed, the Bill would indeed have an impact on social work proceedings by abolishing the need for corroboration and by permitting the introduction of hearsay evidence as to statements made by young children, who would not be called to give evidence themselves. If that is correct, then the passage from the Minister's speech, when interpreted in the light of the debates, tends to support the view that Parliament envisaged that, by virtue of what is now Section 2, parties would be able to introduce into civil proceedings evidence of statements of children who could not themselves give evidence. In this way proceedings would now be able to be brought where previously they could not be brought because the children were unable to give evidence. So construed, the Minister's reply would give some support for the view, which I would reach in any event, that Section 2(1)(b) does not import a competence test.

[55] Before passing from the issue of interpretation to consider the facts of this case, I should say something about the passage to which I have referred in the speech of Lord Hope of Craighead in the House of Lords in ***Sanderson* v. *Macmanus***. All the other peers present concurred with Lord Hope. There is no doubt that Lord Hope did indeed express a view, which he had already expressed in *M* v. ***Kennedy*** and ***M* v. *Ferguson*** in this court, about the way in which evidence could be led to prove the competence of a child to give evidence without the need to bring the child to court. He also indicated that it would have been "sufficient" that the child was competent at the time when the statements were made. But, like the passages in the earlier cases to which he referred, this passage in Lord Hope's speech in ***Sanderson*** is *obiter*. Indeed, as he makes clear (1997 S.C. (H.L.) at pp. 59 I - 60 A), the Dean of Faculty, who appeared for the appellant, had accepted that the sheriff had been wrong to treat the hearsay evidence of the child's statements as evidence of what had happened to him or had been said to him. That being so, the House was not called upon to consider whether the interpretation of Section 2(1)(b), which underlay that concession, was sound. In these circumstances counsel for both parties in the present appeal proceeded on the basis that Lord Hope's observations were not binding on this court. I consider that that is correct. On the other hand, any observations from their Lordships are entitled to the greatest respect. I have therefore felt entitled to depart from them only because the point at issue was not argued in ***Sanderson*** whereas we have had the benefit of the assistance of an argument from counsel extending over several days and examining the question in greater depth than was possible in any earlier case. I should perhaps add that one benefit of the interpretation of Section 2 which I prefer is that it avoids the need to make subtle distinctions, of the kind drawn in ***Sanderson*,** about the use which can properly be made of hearsay evidence of children's statements. As ***Sanderson*** itself shows, such distinctions can be difficult to apply in practice.

[56] In summary, Section 2(1)(a) of the 1988 Act introduces a general rule that hearsay evidence is admissible in the same way that direct oral evidence is admissible and, therefore, it is subject to same rules as to competency and relevancy as would apply to direct oral evidence. This is the paragraph which will usually regulate the admission of hearsay evidence. Section 2(1)(b) deals with one particular matter. It enacts that hearsay evidence of a statement cannot be admitted if it relates to a

matter on which direct oral evidence by the maker of the statement would be inadmissible. The most obvious, but not the only, example is where evidence by the maker of the statement would be inadmissible because it would be in breach of an obligation of confidentiality. To allow in hearsay evidence of such a statement would undermine the rule against the admissibility of such direct oral evidence. The scope of Section 2(1)(b) is therefore relatively narrow and in most cases, including the present case, it will have no application. ***F* v. *Kennedy***, and any subsequent decisions of this court which rely on its reasoning, should therefore be overruled. In these circumstances the second of the two matters which I identified (in paragraph 20 above) in the decision of the court in ***F* v. *Kennedy*** is superseded.

[57] I turn now to deal with the facts of the present case and do so on the basis that the Sheriff was indeed correct to admit the evidence of what E said in July and August 1998, even though he did so for the wrong reason. The correct reason would simply have been that it was hearsay evidence which was admissible in terms of Section 2(1)(a), since there was no reason to exclude it and it did not relate to a matter of which direct evidence, if given by E, would have been inadmissible.

[58] Counsel for the pursuer invited the court to recall the Sheriff's interlocutor depriving the pursuer of all parental rights and responsibilities in respect of E. On any view, they submitted, that interlocutor was unnecessarily sweeping. Although in her crave the defender had asked the Sheriff to make an order in terms of Section 11(2) of the Children (Scotland) Act 1995 depriving the pursuer of his parental responsibilities and parental rights in relation to E, at the proof counsel for the defender had submitted that any order by the Sheriff should specify each of the responsibilities and rights of which he intended to deprive the pursuer. The Sheriff had failed to frame his interlocutor in this way and had made a blanket order. For reasons which will become apparent, I do not find it necessary to examine this point in detail but the Sheriff's failure to address the submission made by counsel for the defender is a first indication, slight perhaps in itself, that the Sheriff did not apply his mind to the issues in this difficult case as carefully as was required.

[59] Indeed counsel for the defender were conspicuously frank in their assessment of the Sheriff's judgment. They acknowledged that it was lacking in many respects. Their submission was, and could be, no more than that, despite these deficiencies, the judgment met the minimum requirements. I have, unfortunately, reached the conclusion that it did not in fact do so and that this court should therefore recall the Sheriff's interlocutor.

[60] In reaching that conclusion I have, of course, kept in mind Lord Shaw of Dunfermline's cautionary words about the advantages enjoyed by a judge of first instance. See ***Clarke* v. *Edinburgh and District Tramways Co.*** 1919 S.C. (H.L.) 35 at pp. 36 - 37. I have also reminded myself of the guiding principles formulated by the House of Lords in ***Thomas* v. *Thomas*** 1947 S.C. (H.L.) 45 and especially in the speech of Lord Thankerton at p. 54. Applying those principles I have reached the view that the reasons given by the Sheriff for his decision are not satisfactory and that he has not taken proper advantage of having seen and heard the witnesses. The defects in the Sheriff's judgment which have influenced me can be set out fairly succinctly. Since I have also concluded that, if your Lordships agree to my motion to allow the appeal, a fresh proof will need to be held, it is best that any sheriff hearing that proof should do so with an open mind, unaffected by any unnecessary observations by this court on the matters which the sheriff will have to decide. I have therefore deliberately avoided analysing the evidence in detail and have also refrained from assessing the competing accounts given by the various witnesses.

[61] I begin with a point which originally formed a separate ground of appeal but which counsel for the appellant eventually subsumed under their more general ground of criticism of the Sheriff's judgment. In his Note the Sheriff began by setting out the issues which he had to determine. He then said that, in deciding whether there had been some form of sexual abuse, the character of the pursuer was, in his opinion, vital. He set out various sexual activities in which the pursuer had engaged and also noted that, latterly in 1997, the defender's interest in sex had declined. Having completed his survey, the Sheriff said: *"This then was the classic background of a male with a high sexual drive and a female who was less*

keen than she had been in the past for sexual intercourse. It would not be surprising if the pursuer attempted to supply the lack from another available source, namely, his daughter."

This is a quite extraordinary statement. There is, of course, nothing whatever in the evidence to support the suggestion that, if the pursuer had been sexually frustrated, he would have attempted to supply his needs from his daughter aged four. Nor was any such suggestion ever put to him. It is equally clear from his evidence that, if it had been, the pursuer would have repudiated it. Both senior counsel for the defender and Mr. Halley, who had conducted the proof for the defender, were therefore at pains to disown these views of the Sheriff. They could not seek, they said, to justify that particular sentence in his note. This is, however, no trivial slip. On the contrary, these sentences reveal that the Sheriff approached the central issue in the case with a completely unjustified and unjustifiable preconception that it would not have been surprising if the pursuer had sought sexual satisfaction from his four-year-old daughter. Therefore the Sheriff misdirected himself as to the approach which he required to adopt to the evidence. Even in isolation this flaw in the Sheriff's reasoning would, in my view, be fatal. But, regrettably, it does not stand alone.

[62] We were told that the Sheriff's Findings in Fact were entirely based on a draft submitted by counsel for the defender. In effect the Sheriff had adopted that draft. It will often, of course, be helpful for counsel to place before a sheriff a draft of the findings which they are inviting the court to make. And indeed junior counsel for the pursuer in this case put in a draft containing the findings which she wished the Sheriff to make. It has long been the practice, I understand, for parties to submit such drafts. Nowadays, of course, word processing makes their preparation much simpler than it would have been in the past. I certainly would not wish in any way to discourage parties from preparing them since the advantages to sheriffs of having such drafts on which to work are obvious. None the less, as with the use of any draft prepared by someone else, there are certain possible disadvantages which are, perhaps, less obvious but are still of some importance. Sheriffs should simply be alert to them. In particular there is a risk that a sheriff may adopt the draft put forward by the party in whose favour he decides, without working through the detail of the findings in the draft with the same care that he would use if he were formulating the findings himself. Another danger is that the sheriff may not ever fully articulate, even to himself, the reasons why he makes the crucial findings in fact.

[63] One of the most striking aspects of the Sheriff's Note is that he does not make any assessment at all of the credibility or reliability of either of the parties. Yet both gave important evidence relating to the matters in dispute. The omission is particularly grave in the case of the pursuer. As the Sheriff's findings disclose, he is a man who indulges in certain sexual practices which could be regarded as out of the ordinary. But when he gave evidence, the pursuer was completely frank about them. He also had no hesitation in saying that E would have seen him naked and that on various occasions she would have seen him urinating. On the other hand, he was equally adamant in evidence that he had not committed the acts specified in Findings 52 and 54 which I have quoted above. Those findings are based on answers given by E during the interview with W.P.C. Lawlor in August 1998. It must therefore be inferred that the Sheriff rejected the pursuer's evidence where it differed from the answers given by E. Since there is no possibility of the pursuer having forgotten the incidents if they occurred, the Sheriff must have reached the view that in his evidence the pursuer was lying on this matter. Of course, it is not difficult to think of reasons why he might have lied, but when explaining the basis for his decision on this critical matter the Sheriff required to indicate what in fact his reasons were. This appears to me to be particularly important in a case where E's answers were, perhaps inevitably, not altogether clear.

[64] The Sheriff also fails to make any comment on the reliability and credibility of Mrs. T., the pursuer's mother, who was aged 49 at the date of the proof and who was employed by Midlothian Council as a nursery nurse working with children between the ages of three and five. Previously, she had been a registered childminder and a registered day carer. It was presumably because of these particular qualifications that, when difficulties arose, the Sheriff ordered that contact between the pursuer and his daughter should take place under her supervision. During these contact periods the pursuer, his mother and E went on various outings but they also spent some time at Mrs. T.'s home. The allegation

which the Sheriff found established in Findings 52 and 54 was said to have taken place in the lavatory at Mrs. T.'s home during the supervised contact and at a time when Mrs. T. was in the living room. The Sheriff based this finding on E's answers to questions put by W.P.C. Lawlor. On the other hand Mrs. T. gave the clearest possible evidence that E had never gone into the lavatory without her knowledge and that any incident did not happen in her house. She said that she knew that she was in charge of E and took her responsibility very seriously, to the point of being obsessive. The Sheriff simply makes no comment whatever about Mrs. T's evidence, to explain why he rejected it - as he would have to, in order to make the findings which he did. That is wholly unsatisfactory, especially given that Mrs. T. was not just a loving grandmother, but a lady whose profession was the care of children of E's age.

[65] Expert evidence was led from Dr. Jack Boyle, a child psychologist at the Bon Secours Hospital, on behalf of the defender, and from Dr. Robert Lindsay, a child psychiatrist from Yorkhill Hospital, on behalf of the pursuer. The parties led these experts to help the Sheriff in his assessment of the evidence relating to the statements made by E, both to the defender and Mrs. Taylor and to Constable Lawlor. Dr. Boyle had the advantage of having spoken to E and the defender, whereas Dr. Lindsay had been instructed at a late stage at which he did not consider that an interview with E would have assisted him in forming his views. He had therefore formed his views solely on the basis of his study of the written documents in the case. Dr. Boyle had prepared a report for the purpose of these proceedings, but Dr. Lindsay had not. The Sheriff records his view of the two experts in this way: *"Dr Lindsay had a remit to deduce from the written documents whether abuse had taken place. He stated that it was extremely difficult to interview young children. He was unable to say whether the abuse had occurred or not. Clearly, leading questions were to some extent used. Dr Lindsay's report was not a full one as he would have had to interview E and her father and mother. There was available to the court in much greater detail a considerable quantity of evidence. I think his report can largely be discounted. I prefer the evidence of Dr Boyle, who impressed me as a witness. He agreed with some of Mrs Scott's criticisms of the mode of interviewing but he was quite clear that if sexual abuse was proved, the abuser should have no contact* (355 C)."

[66] The first thing to notice is that the Sheriff says that "*Dr. Lindsay's report*" was not a full one - even though in fact Dr. Lindsay prepared no report, full or otherwise. In some cases one would readily dismiss this error as nothing more than an unfortunate slip of the pen, but I am unable to do so in this case where it takes its place among other indications that the Sheriff failed to address the issues in the case with the necessary degree of care. Moreover, the Sheriff appears to criticise Dr. Lindsay's *"report"* on the ground that, to prepare a full report, he would have had to interview E and her father and mother. In fact, however, Dr. Boyle, who had prepared a report and whose evidence the Sheriff accepted, had interviewed only E and her mother. The Sheriff also makes the point that the court had available to it a considerable quantity of detailed evidence which had not been available to Dr. Lindsay. The same comment must apply, if not perhaps to exactly the same extent, to Dr. Boyle. The Sheriff"s conclusion that Dr. Lindsay's *"report"* can largely be discounted is therefore open in the first place to the criticism that there was no such report. Even if the conclusion is translated into a rejection of Dr. Lindsay's evidence, however, the Sheriff puts forward no adequate basis for largely discounting it. Dr. Lindsay gave detailed evidence, as did Dr. Boyle, of course. Their evidence coincided in certain matters but diverged on other critical points. In each case they were drawing on their expertise. It was incumbent on the Sheriff to analyse this body of evidence and, in the light of that analysis, to explain why he adopted one opinion rather than the other. Especially in view of his flawed account of Dr. Lindsay's evidence, the Sheriff's pronouncement that he preferred the evidence of Dr. Boyle, who impressed him as a witness, is little more than oracular and is, therefore, deficient as a judicial determination of this matter. See, for example, ***Davie* v. *Magistrates of Edinburgh*** 1953 S.C. 34 at p. 40 per Lord President Cooper.

[67] The various factors can be summarised. The Sheriff misdirected himself in a fundamental fashion by approaching the evidence on the basis that it would not be surprising if the pursuer had sought sexual satisfaction from his four-year-old daughter. This serious flaw affects the whole of the judgment and is the background against which the other criticisms must be considered. Very importantly, the Sheriff failed to assess the credibility and reliability of any of the witnesses in the case, except Mr. Sheldon. In

particular he made no assessment of the credibility and reliability of the pursuer, his mother and the defender. By inference the Sheriff rejected the pursuer as a liar and also rejected his mother's considered evidence, without giving any indication of why he did so. He wrongly thought that the pursuer's expert witness, Dr. Lindsay, had prepared a report and then discounted that non-existent report. In doing so, he preferred the evidence of the defender's expert, Dr. Boyle, without explaining why he did so or how he resolved the points upon which the two experts had joined issue in the evidence.

[68] Taking all these factors together, I am satisfied that the Sheriff's decision cannot stand. On the other hand, precisely because so much turns on the assessment of the witnesses on which we lack all guidance from the Sheriff, this court is plainly in no position to reach a view on the matters in dispute between the parties. Miss O'Brien, Q.C., suggested that, even on the basis of Findings in Fact 43 - 45, which relate to certain sexual activities on the part of the pursuer, we could hold that he had sexually abused E. These findings are based on admissions by the pursuer. Significantly, however, in none of these findings is it said that the conduct took place in the presence of E. We were referred to the passages in the evidence of the pursuer on which these findings are based and I am unable to find in them any indication that E was present at the relevant times. Indeed, my impression is that the pursuer would have rejected such a suggestion. That being so, Miss O'Brien's alternative approach is unacceptable. In these circumstances, my motion to your Lordships is that we should allow the appeal, recall the Sheriff's interlocutor and remit to the Sheriff to proceed as accords. If your Lordships agree, it is obvious from what I have said that any further steps in the proceedings should take place before a different sheriff.

OPINION OF LORD MILLIGAN

[1] I agree with the Opinion of your Lordship in the chair both as to the effect of Section 2(1)(b) of the Civil Evidence (Scotland) Act 1988 and as to appropriate disposal of the present appeal. I agree in particular that for the reasons stated by your Lordship the subsection does not embody a competence test at all and that hearsay evidence of a statement is admissible unless it concerns a matter as to which direct oral evidence by the maker of the statement would not be admissible. I also agree that this is apparent from the terms of the subsection alone.

[2] The task of assessing the weight, if any, to be given to evidence of a hearsay statement involves potential difficulties which do not arise in the case of direct evidence given by a witness. However favourable the assessment may be of the evidence of the witness as to the statement having been made, questions may well arise, of course, as to the truth and accuracy of the content of the statement. In the case of double hearsay, the potential difficulties of assessment are further increased. Such particular difficulties of assessment may well arise whatever the age at the time of the person alleged to have made the original statement to which the evidence refers. One simple example of a factor which may affect reliability, quite independently of any involvement of a child would be intoxication of one or other or both, or indeed all, of the persons involved. The potential difficulties are all the greater in the event of non-availability for questioning of the maker of the statement or, in the case of double hearsay, the intermediary concerned. Such potential difficulties of assessment, inherent in making hearsay admissible as to the truth of its content, are obvious and, in particular, must have been obvious to all concerned when Section 2(1) was enacted. The difficulties of assessment which may arise in the case of evidence of statements made by children, however young, are potential difficulties with, no doubt, special features but they are not necessarily any more complex than those arising in other situations. Parliament has not chosen to single out for special treatment the position of hearsay statements by young children of any age and, in my opinion, there was no sound reason to do so, generalisation being impractical. Difficulties of assessment as to the weight, if any, to be put upon evidence of a hearsay statement, whether they be difficulties for judge, civil jury or reporter, have to be faced in the interest of avoiding exclusion of evidence which may well merit consideration in the interests of justice, whatever the result of assessment may turn out to be in the circumstances of the case. In the case of evidence of hearsay statements by young children I very much agree with what your Lordship has said as to the possible value of evidence of a hearsay statement by a child too young to give evidence in court.

OPINION OF LORD NIMMO SMITH

[1] I agree in its entirely with the Opinion of your Lordship in the Chair and that we should allow the appeal and remit to the sheriff to proceed as accords. I agree also that any further steps in the proceedings should take place before a different sheriff. There is nothing that I can usefully add to the reasons given by your Lordship for holding that the sheriff's decision, seriously flawed as it is in important respects, cannot stand. It is regrettable that there should have to be another proof, but I can see no alternative if justice is to be done.

[2] I wish only to add a few words on the construction of section 2 of the Civil Evidence (Scotland) Act 1988 which, as the case-law since its enactment demonstrates, has not been found to be free from difficulty. The long title of the Act states that it is *inter alia "to make fresh provision in relation to civil proceedings in Scotland regarding corroboration of evidence and the admissibility of hearsay and other evidence"*. It is, I think, important to bear in mind from the outset the distinction, recognised here, between the admissibility of evidence and the competence of a witness, although the competence of a witness is often referred to in terms of admissibility. Section 2 is clearly, in my opinion, concerned only with the admissibility of evidence, in this instance hearsay evidence, and does not, on a proper construction, contain any requirement as to the competence of the maker of the statement of which hearsay evidence is sought to be led. If there were thought to be good reason for the application of a competence test, more obviously by reference to the date of the making of the statement than to the date of the proceedings at which evidence is being led, express provision to that effect would be required. An example of this can be seen in section 259 of the Criminal Procedure (Scotland) Act 1995. The rules of evidence in civil and in criminal proceedings are, however, not the same, and Parliament may be taken to have decided that a competence test was not required as part of the more relaxed rules applicable in the former. Nothing in the Scottish Law Commission material or in the Hansard reports of the proceedings in Parliament, in so far as they are of assistance for present purposes, would tend to support a contrary view.

[3] In the case of a child witness, the application of a competence test is a prelude to an admonition to tell the truth in lieu of an oath or affirmation, and should in my view be seen in that context. Almost always, a statement made elsewhere of which hearsay evidence is sought to be given in court is not preceded by any such formality. I can see no obvious reason why hearsay evidence of a statement made by an unsworn adult should be admitted while hearsay evidence of an identical statement by a child should not, unless a competence test was satisfied, and nothing in section 2 in my opinion points to this. The assessment of the evidential value of a statement of which hearsay evidence is given does of course give rise to its own particular considerations, which in the case of a child would include the child's age and ability to give a truthful account, but these are considerations which relate to the credibility and reliability of the statement, not to the competence of its maker. I am satisfied that section 2, while not rendering admissible hearsay evidence in respect of any matter of which, for example by reason of confidentiality, direct oral evidence would be inadmissible, does render admissible hearsay evidence of a statement without the application of a competence test. There was accordingly no requirement on the sheriff to apply a competence test to E at any time, and still less for her to be brought to court for that purpose.

OPINION OF LORD BONOMY

[1] There are broadly two bases on which the pursuer challenges the Sheriff's approach to the case. The first relates to the admissibility of statements made by the parties' daughter E on occasions prior to the proof and spoken to by other witnesses there. To that issue I shall return in some detail shortly. The second relates to the evaluation of the evidence in general and the reasoning, or lack of it, for rejecting witnesses and evidence favourable to the pursuer's case.

[2] On that second point I agree entirely with the Opinion of your Lordship in the Chair as to the areas in which the reasoning of the learned Sheriff is deficient. These relate to material which was absolutely crucial to the determination of material issues in the case. While valiant efforts were made by Miss O'Brien, Q.C. for the defender to show that the errors were not so significant that the appeal must inevitably succeed, and in particular to try to identify a compromise solution which would involve

deletion of certain findings and modification of the interlocutor to provide for refusal of the order sought for contact and make no further order, I agree with your Lordship in the Chair that the appeal must be allowed on this point and matter remitted to the Sheriff Court as your Lordship proposes. While I have reached this view unhesitatingly for the reasons set out in your Lordship's Opinion, it is with great regret that I feel compelled to arrive at a conclusion which raises the disturbing prospect of a case in which the proof lasted eight days having to be re-heard. Although E may not require to give evidence in the rather farcical way in which she did at the original proof, the re-hearing of such a sensitive case and indeed the preparation for the re-hearing thereof are likely to cause upset and disturbance in the lives of the parties and others close to E.

[3] The only other comment I have to make on this part of the appeal is to commend as sound the practice followed before the Sheriff by counsel for both parties of presenting written submissions which included proposed findings in fact. It is the responsibility of counsel and agents to assist the Sheriff in whatever way they consider appropriate. The practice of agents or counsel presenting proposed findings in fact has been followed in the Sheriff Court for many years. Plainly it should be helpful to any Sheriff to have a clear statement before him of the findings in fact that a party's representative considers that it would be appropriate to make on the evidence before the court. The practice is one I would be slow to discourage on the strength of this one case where it is far from clear that it was the submission of proposed findings that led to the Sheriff erring as he did.

[4] I turn now to the issue which has led to the hearing of this appeal by this Court of Five Judges. Crucial to the defender's case that the pursuer should not have contact with their daughter was hearsay evidence of things said by E shortly after her fourth birthday. In deciding to admit the hearsay evidence the learned, and very experienced, Sheriff followed the rule, invariably applied, we were informed, since it was laid down in the Opinion of the Court in ***F.* v. *Kennedy*** 1992 S.C. 28, that, where the hearsay evidence is of statements made by a child, the Sheriff must carry out a preliminary examination of the child to determine whether she understands the difference between what is true and what is false, and, if he is so satisfied, must then admonish the child to tell the truth. When that preliminary examination took place, E was 4 years and 8 months old. Once the Sheriff had satisfied himself that E did know the difference between what is true and what is false and had admonished her to tell the truth, neither counsel sought to examine her either about the statements which she had made or the events which she had spoken about. She was brought to court simply to go through the exercise described above. While this might, on the face of it, seem to be an extreme application of the rule, I understand from counsel's submissions that that is not so, and that this practice is fairly common in spite of statements *obiter* by the Lord President (Hope) in ***M.* v. *Kennedy*** 1993 S.C. 115 at 125 and ***M.* v. *Ferguson*** 1994 S.C.L.R. 486 at 492 suggesting other ways of testing competence. Indeed, it has caused concern to children's hearing reporters and others closely involved in securing the welfare of children that that procedure should be required.

[5] One need look for no authority other than common sense to say that that requirement cannot be right. It does not, in my opinion, make sense to test whether the court ought to hear what a young child in her early formative years said by reference to her understanding at the proof many months or years later. It also, in my opinion, pays scant regard to the dignity and welfare of children, who are by and large victims and nothing more, to force the attendance of a child at court to participate in the procedure which I have described, in the knowledge that the child will not be asked anything about the merits of the case. Thus, when endeavouring to construe the terms of section 2(1)(b) of the Civil Evidence (Scotland) Act 1988, the terms of which are apparently simple, but which all counsel agreed are far from easy to interpret, I have found it easy to come to the conclusion that Parliament could not possibly have intended that such a procedure should be followed, nor that the admissibility of hearsay evidence should be tested by reference to the competency of the maker of the statement to give evidence at a time which might have little or no bearing on the child's level of understanding at the time the statement was made.

[6] That that could not have been Parliament's intention can be confirmed in this way. Section 2(1)(b) applies to all hearsay. It thus applies to something said by a perfectly sane person who, at the time of

the proof, is insane or perhaps in a persistent vegetative state. Following the approach of ***F.* v. *Kennedy***, if such a person was found by the court to be incapable of giving evidence at the time of proof and thus not a *"competent"* witness, evidence of his earlier perfectly lucid statements would not be admissible. An even more extreme example is that of the dead witness. And, of course, in relation to children that approach simply means that, no matter how young the child was when the statement was made, hearsay evidence of the statement will become more readily admissible the older the child becomes; indeed when the child becomes 12 years of age, after which it is unlikely that there would be controversy over the child's capacity to give direct evidence, evidence of the statement would be automatically admissible. One can readily understand the position ultimately taken by counsel for the defender that they could not support such a construction.

[7] What then of the pursuer's contention that a young child must satisfy a competency requirement related to the time at which the statement was made? One can readily see the logic of testing the competence as a witness of a child whose earliest statement is to be led in evidence by reference to her level of understanding at the time the statement was made. However, the subsection simply does not provide for a test related to that stage, since the conditional clause speaks of admissibility as at the date the evidence is being led in court. To provide for a test of competence at that earlier stage requires language referring to the past such as was subsequently used in the Criminal Procedure (Scotland) Act 1995, section 259(1)(c), which specifically provides for the competence as a witness of the person whose hearsay account is given to be determined at the point the statement was made.

[8] That it is not possible to identify in the language of section 2(1)(b) a point in time at which the competence of the maker of the statement should be assessed points strongly, in my opinion, to the conclusion that the subsection does not relate to the competence of the maker of the statement as a witness at all. Counsel for the pursuer founded strongly on the words "*that person*" in the requirement in the subsection that before a hearsay statement can be admitted it must relate to matters *"of which direct oral evidence by that person would be admissible..."* as qualifying the hearsay evidence that would be admissible; only where the person who made the statement was a competent witness would hearsay evidence of the statement be admissible. The point in time in relation to which competence should be determined was a separate matter, and would vary according to who was the maker of the statement; thus the time would be different depending upon whether he was a child, insane or dead. In my opinion that submission places a gloss on the use of the expression "that person" which is not warranted by the terms of the subsection read as a whole. The subsection provides quite simply, in my opinion, that evidence of a hearsay statement is admissible where direct evidence relating to the matter referred to in it, given in court by the person who made the statement, would be admissible. The whole emphasis of the subsection is on the admissibility of the content of the evidence and not on the competence as a witness of the person who made the statement. The reference to "*that person*" makes it clear that hearsay evidence may be inadmissible because the role of the maker of the statement when he obtained information may render direct evidence thereof by him inadmissible. The provision thus prevents circumvention of the rule preventing disclosure of confidential communications as well as *inter alia* rules relating to the relevancy of evidence, e.g. in relation to obligations which must be constituted in writing. In this regard I respectfully adopt the reasoning of your Lordship in the Chair at paragraphs 22-26.

[9] In the course of debate counsel on both sides made reference to the report of the Scottish Law Commission on Corroboration, Hearsay and Related Matters in Civil Proceedings (No. 100, 1986) and their preparatory work. I do not find in the Commission's report any clear expression of view that is inconsistent with my interpretation of the subsection. Reference was also made by counsel on both sides to Hansard and in particular to the debates on the Second and Third readings of the Bill and in the first Scottish Standing Committee. I do not consider that any statement in the course of any of the debates to which we were referred satisfies the ***Pepper* v. *Hart*** test for use as an aid to construction. While it is reassuring to note that there is nothing there to contradict my interpretation of the subsection, I do not rely on the reports of parliamentary debates for support for my view.

[10] There are sound policy considerations why different rules should apply in criminal cases and why there should be a competency requirement there. It is nevertheless entirely consistent with the nature of hearsay evidence that there should be no test of the competence of the maker of the statement to be a witness. By its very nature the description of evidence as "*hearsay*" creates the expectation that the maker of the statement which is being produced as evidence of the facts contained in it will not be present in court. The statement is likely to have been given some time in the past and perhaps a long time into the past. Unless there is a particular reason for having the maker of the statement attend court to give direct evidence, no question arises of placing the maker of the statement on oath or admonishing the maker to tell the truth. He may have been drunk or otherwise impaired at the time he made the statement. Many such statements may well have been made spontaneously as a reaction to events in a context in which the assessment of the level of understanding of the witness would be immaterial. All factors relevant to the question of the truthfulness and reliability of the statement can be explored in the course of the proof. The statement might in the end be given no weight whatsoever. There is no reason to think that, where it is open to a court to evaluate such a statement in the light of all the evidence presented to it, any injustice is likely to result.

[11] Counsel for the pursuer also founded strongly on the terms of section 2(1)(a), *"In any civil proceedings evidence shall not be excluded solely on the ground that it is hearsay"*, with particular emphasis on the use of "solely". It was submitted that that meant that every other possible basis on which evidence could be excluded was unaffected, including the rule requiring the competence of a child witness to be positively established. The argument was that the inclusion of the word "*solely*" made that plain. For my part I do not see that the word "*solely*" adds anything to the provision. The meaning of the subsection is the same with or without the word. All that is said is that the fact that evidence is hearsay will not henceforth justify its exclusion. Other grounds for exclusion of evidence, such as breach of confidentiality, would remain open were the subsection to include the word "solely" or not. Our attention was drawn to the reports of the debates of the First Scottish Standing Committee on the Bill. An amendment to delete "*solely*" was proposed on the basis that its inclusion was not strictly necessary. The Minister's response was that, if the word was not retained, the paragraph might mean that hearsay could not be excluded, even if there were other grounds for exclusion. In my opinion that reasoning is confused. It discloses a belief on the part of the Minister that hearsay evidence would be automatically admissible no matter what grounds of objection were taken to it, if the word were not included. While the Minister may have thought that the addition of "solely" somehow or other altered the meaning of the subsection, all it does in fact do is emphasise that the fact that evidence is hearsay is not a basis for excluding it, and that any objection taken on other grounds will be an objection to the admissibility of "*hearsay evidence*", e.g. as irrelevant.

[12] It follows that section 2(1) should be recognised for the radical measure it is, providing for the admission of hearsay evidence generally. By section 2(1)(a) a complex set of rules governing the exceptions to the rule excluding hearsay evidence was swept away along with the rule itself. Section 2(1)(b) provides the simple qualification that for hearsay evidence of a person's statement to be admissible it must relate to subject-mater on which the court, if called upon to do so, would rule her direct evidence admissible. The admissibility or competence of a child, or indeed any other witness, who may have made a statement of which evidence is sought to be led does not arise in relation to the admissibility of that evidence. Section 2(1)(b) deals exclusively with the admissibility of the evidence by reference to its content and not by reference to the competence of the maker to be a witness.

[13] Should the maker of the statement be led as a witness, then there may well be an issue over the competency of that person, but only in relation to the giving of oral evidence. That was not an issue explored in the debate in this case. Counsel on both sides proceeded on the assumption that the competency of a young child to give oral evidence is an issue for the presiding judge to explore. The parties differed as to the appropriate test, the pursuer considering that it was the trustworthiness of the evidence that would be given that had to be assessed, whereas the defender contended that the test was the narrower one of the ability of the witness to distinguish between truth and falsehood. Counsel also touched briefly on, but did not examine in detail, the question whether it was *pars iudicis* to decide when an examination was appropriate or whether it should only be undertaken when the

point was raised by one of the parties. In my opinion these are issues which will require careful consideration when they arise in a suitable case. For the present case it is sufficient to acknowledge that, where hearsay evidence of a statement made by a child is relied upon but the child is also called to give evidence in court, the court might well hold that the child is not a competent witness. In such circumstances the hearsay evidence of the statement would nevertheless be admissible, but, depending on the nature of the statement and the circumstances in which it was made, it might be given little or no weight. Mr. Mitchell, Q.C. for the pursuer had given consideration to the historical origins of the competency test for child witnesses. In his submission the mandatory requirement of a preliminary examination first made its appearance as recently as 1989 in the criminal case of ***Rees* v. *Lowe*** 1990 J.C. 96. Mr. Mitchell made the point that the approach of the learned Sheriff in that case might strike the interested lay observer as sensible. He told the 3 year old child witness that parties would ask her things and that she should answer as best she could. He then relied on a close watch of her actually giving her evidence to form his impression as to her intelligence and truthfulness. I consider that there is force in Mr. Mitchell's point. His research showed that between 1582 and the publication of Dickson's *Treatise on the Law of Evidence in Scotland* the issue of the competency of a child witness had to be raised in an objection to the leading of her evidence. From the time of Dickson until 1989 the matter appeared to have been regarded as one for the judge to raise and explore as he considered appropriate. So there was, in his submission, no obviously coherent pattern to the treatment of the issue of the competency of children to give evidence. As I say, that submission is for another day.

[14] The decision in ***F.* v. *Kennedy*** is inconsistent with the opinion I have expressed on the issue before the court. Counsel for the defender in that case made the plain submission that, even if a child did not know the difference between truth and falsehood, hearsay evidence of statements made by her was admissible. That was rejected on the basis that the hearsay could not be admitted unless the child first of all satisfied the court that at the date of proof she was a competent witness. The court went on to require a preliminary examination of the child by the presiding judge. In agreement with the opinion of your Lordship in the chair, and each of the other judges in this case, that ***F.* v. *Kennedy*** wrongly required a competency test before such hearsay evidence could be admitted, I consider that the decision should be overruled as indeed should any subsequent decisions which depend on the reasoning in ***F.* v. *Kennedy***.

[15] On one particular case I consider it is appropriate that I should make comment. In his speech in ***Sanderson* v. *McManus*** 1997 S.C. (H.L.) 55 Lord Hope of Craighead (as he had earlier done in this court in ***M.* v. *Kennedy*** and ***M.* v. *Ferguson***) not only assumed the propriety of the requirement in *F.* v. *Kennedy*, but also at page 60 made the following specific statement: *"The evidence of a child who is not a competent witness is not admissible:* ***F. v. Kennedy (No. 1).***" Plainly that opinion is entitled to the utmost respect. Assuming that Lord Hope had not departed from the view, expressed in this court in ***M.* v. *Kennedy*** and ***M.* v. *Ferguson***, that it is the competence of the child at the time when the statement was made rather than the proof that should be established, his opinion does appear to be based on a qualified rather than full acceptance of the reasoning in ***F.* v. *Kennedy***. It is immediately preceded by these words *"but no attempt was made at the proof to examine this issue, and the appeals have been conducted throughout on the basis that the child's statements were inadmissible as evidence of the matters contained in them."* The statement of opinion is accordingly not a necessary part of the decision in ***Sanderson* v. *McManus*** and is therefore one with which I can, following an analysis of the terms of section 2(1)(b) of the 1988 Act, respectfully disagree.

[16] Nothing I have said should be regarded as doubting that, when a child's statement is taken in a "*formal*" setting such as by a police officer, it is likely to assist a court considering the statement later if the interviewer has been able to explore the child's understanding in the course of the interview.

OPINION OF LORD ALLANBRIDGE

I agree that the court should allow the appeal and remit to the Sheriff to proceed as accords, for the reasons expressed in the Opinion of your Lordship in the Chair. There is nothing I can usefully add.

Act.: J. J. Mitchell, Q.C., J. M. Scott; Loudons, W.S. Alt.: O'Brien, Q.C., Halley; Drummond Miller, W.S.