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## *Witness Assistance and Familiarisation in England and Wales*

### ABSTRACT

*Since the 1700s lawyers have controlled interactions with witnesses in court. In England and Wales witness familiarisation, endorsed in *R v Momodou* [2005],<sup>1</sup> aimed to demystify the process and through practical guidance assist witnesses to give their best evidence in legal proceedings with the result that they are less likely to be confused, misled or unduly influenced by the process of cross-examination. This paper outlines empirical research which indicates familiarisation can be helpful; though argues that justice systems should develop to best practices for elicitation of accurate evidence and not leave it to witnesses to combat the system's shortcomings. Given this is particularly acute for vulnerable witnesses (and familiarising witnesses to cross-examination is in its infancy), the paper suggests refinement of the question form shown to create the primary mischief in meeting trial goals. It draws attention to *R v Lubemba* [2014]<sup>2</sup> which suggests there is no right to put a case to a witness in child cases.*

### INTRODUCTION

The Honourable Justice Green recently said that 'how the courts treat those who are exposed and weak is a barometer of our moral worth as a society'.<sup>3</sup> As such, serious reconsideration of how justice systems treat vulnerable (and victim) witnesses in the criminal justice process has been one which has been reflected upon in England and Wales for some considerable time.

In 1998 the Home Office produced the 'Speaking up for Justice Initiative'. The focus of the report was to enable greater consideration of victim-centred justice processes with an emphasis on facilitating the gaining and giving of evidence through safeguarding witnesses at all stages of proceedings (e.g., Achieving Best Evidence and use of Special Measures).<sup>4</sup> Techniques had already been pioneered with children and 78 recommendations made.<sup>5</sup> The publication discussed more effective

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<sup>1</sup> *R v Momodou* [2005] 1 W.L.R. 3442 - in the subsequent case of *R v Salisbury* Lord Phillip similarly observed "There is, in my view, a difference of substance between the process of familiarisation with the task of giving evidence coherently and the orchestration of evidence to be given. The second is objectionable and the first is not" [2005] EWCA Crim 3107, para. 27.

<sup>2</sup> *R v Lubemba* [2014] WLR(D) 472, [2014] EWCA Crim 206

<sup>3</sup> Jacqueline M. Wheatcroft, 'Avoiding Miscarriages of Justice' (2016), in P. Cooper & L. Hunting (Eds.), *Addressing Vulnerability in Justice Systems* (pp xiii), Wildy, Simmonds & Hill Publishing: London

<sup>4</sup> *Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses, and guidance on using special measures* (2011) London: Home Office.

<sup>5</sup> Mandy Burton, Roger Evans and Andrew Sanders, 'Are Special Measures for Vulnerable and Intimidated Witnesses Working? Evidence from the Criminal Justice Agencies', Home Office Online

evidence collection through ABE interview procedures, video recorded evidence in chief played in court. Further, that protection for witnesses such as, live TV links, provision of screens or curtains, and clearing the gallery could be made available. The provision of social support through specially trained interviewers, pre-trial and trial support; and the moderation of adversarial conventions (e.g., court dress, use of intermediaries and video cross-examination) were also noted. Such special measures were introduced under the Youth Justice and Criminal Evidence Act,<sup>6</sup> forming part of measures used to assist vulnerable and intimidated witnesses. Importantly, the report and researchers have recognized that being a witness in proceedings can be a stressful affair.<sup>7</sup> Vulnerable groups remain overrepresented as victims of crime, underrepresented in court, and there remain problems in collecting evidence because of communication difficulties despite the use of intermediaries and other associated measures.<sup>8</sup> Those who are intimidated and fear the process, and confronting the accused, suffer additional difficulties in coping with the traditional features of adversarial systems of justice, finding cross examination, in particular, traumatising.<sup>9</sup>

Advances have been made in methods of obtaining best information using investigative interviews<sup>10</sup> yet despite the introduction of the Domestic Violence, Crime & Victims Act (2004),<sup>11</sup> and the introduction of special measures, witnesses continue to suffer impediments in process. Work conducted on examination in court suggests that many, even experts with experience of giving evidence and being subject to cross-examination, struggle with this feature of the process.<sup>12</sup> Thereby all lay witnesses are potentially vulnerable and those who are classified as vulnerable are especially susceptible. Qualitative interviews conducted with rape victim witnesses illustrate. One study found one of the main themes was court re-victimisation. Participant Sally (anonymised) reflected on her courtroom experience and gave a brief account of how she felt about the in court process and how it had affected her. She notes:

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Report 01/06. Summarised in Burton, M, Evans, R and Sanders, A (2006) An evaluation of the use of special measures for vulnerable and intimidated witnesses, *Home Office Research Findings* 270

<sup>6</sup> *Youth Justice and Criminal Evidence Act* (1999)

<sup>7</sup> Rob Ewin, 'The vulnerable and intimidated witness: a study of the special measure practitioner', (2016), 2(1), *Journal of Applied Psychology & Social Science*, 12

<sup>8</sup> See <http://www.advocacytrainingcouncil.org/vulnerable-witnesses/advocates-gateway> for a detailed consideration of practical, evidence-based guidance on vulnerable witnesses and defendants.

<sup>9</sup> See Jacqueline M. Wheatcroft, Graham Wagstaff and Annmarie Moran, 'Re-Victimising the Victim? How rape victims experience the UK legal system', 4 (2009) *Victims and Offenders* 265.

<sup>10</sup> Jacqueline M. Wheatcroft and Graham Wagstaff, 'An example of a Solution-Focused Academic-Practitioner Co-operation: How the iIRG facilitated the development of the Liverpool Interview Protocol' (2014), 6(1) *Investigative Interviewing: Research and Practice*, 42-50.

<sup>11</sup> Domestic Violence, Crime and Victims Act 2004 (c 28) see UK Legislation at <http://www.legislation.gov.uk/ukpga/2004/28>

<sup>12</sup> Gisli Gudjonsson, 'Psychologists as expert witnesses: The 2007 BPS Survey', (2007) 92 *Forensic Update* 23; Gisli Gudjonsson, 'Psychological evidence in court: Results from the BPS survey' (1995) 383 *Bulletin of the British Psychological Society* 327; Gisli Gudjonsson, 'Psychological evidence in court: Results from the 1995 survey' 52 *The Psychologist* 213.

“I had to sit in front of the man who raped me and tell loads of strangers what he did to me. They exhibited my underwear, talked about my body, and called me a liar. They showed intimate pictures of my body, you know injuries and stuff, and I felt violated all over again. The defence just seemed to want to break me. They raped me again. I felt so ashamed. I was on trial, not him. I went there as a liar to try and prove what I was saying was the truth. I had to account for every aspect of my life” (Sally, 247–253).<sup>13</sup>

Although it is acknowledged this report draws upon a few rape victims experiences they do mirror repeated discussions in research works<sup>14</sup> and commentaries in some media reports.<sup>15</sup>

In adversarial systems considerable faith continues to be placed in the capacity of cross-examination to highlight flaws, errors and contradictions in witness testimony.<sup>16</sup> The basis for this exposé is a key aspect of justice - the right of the defendant to confront the witness - usually through means of a confrontation.<sup>17</sup> The role of challenge is considered a central and defining feature of adversarial criminal trials<sup>18</sup> and fundamental to the concept of trial fairness. In fact, Lord Bingham described ‘a long established principle of the common law that the defendant in a criminal trial should be confronted by his accusers’.<sup>19</sup> Moreover, the case of *Saidi v France*<sup>20</sup> illustrates that the European Court of Human Rights has sometimes referred to a ‘lack of confrontation’ as ground for a trial to have been unfair.<sup>21</sup> The effectiveness of the principle awaits empirical examination. In consideration of fairness of the principle, a nine year old girl who faced aggressive cross-examination says she has never recovered from such challenge. She

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<sup>13</sup> See Jacqueline M. Wheatcroft, Graham Wagstaff and Annmarie Moran, ‘Re-Victimising the Victim? How rape victims experience the UK legal system’, (2009) 4 *Victims and Offenders*, 265;

<sup>14</sup> Louise Ellison, ‘Witness preparation and the prosecution of rape’, (2007) 27 *Legal Studies*, 171; Jacqueline M. Wheatcroft and Sandra Walklate (2014) ‘Thinking differently about ‘False Allegations’ in cases of rape: The search for truth’, 3 *International Journal of Criminology & Sociology*, 239.

<sup>15</sup> See <http://www.channel4.com/news/cross-examinations-too-harsh-for-rape-victims-says-labour>

<sup>16</sup> Marcus Stone, *Cross-examination in Criminal Trials*, 3<sup>rd</sup> Edn (2009), Haywards Heath: Tottel Publishing; Louise Ellison and Jacqueline Wheatcroft, ‘Exploring the influence of courtroom questioning and pre-trial preparation on adult witness accuracy’ (2010) *Research Briefing Paper produced for the Arts & Humanities Research Council (AHRC), Universities of Leeds and Liverpool*.

<sup>17</sup> Ian Dennis, ‘The right to confront witnesses: Meanings, myths and human rights’, (2010) 4 *Criminal Law Review*, 255

<sup>18</sup> David Lusty, ‘Anonymous accusers: An historical and comparative analysis of secret witnesses in criminal trials’ (2002) 24 *Sydney Law Review*, 361

<sup>19</sup> Ian Davis, (2008; p.5); UKHL 36; [2008] 3 All E.R. 461

<sup>20</sup> *Saidi v France* [1994] 17 E.H.R.R. 251 ECtHR at [44]

<sup>21</sup> Ian Dennis, ‘The right to confront witnesses: Meanings, myths and human rights’, (2010) 4 *Criminal Law Review*, 255

described her experience of being cross-examined via video link in a side room of the court;

“They took me to a tiny room with a TV screen. It wasn’t like a front room it was very cold and blank. There was a lady I hadn’t met before and one I’d met once. I didn’t really know who they were. When I started to get upset, I was allowed to sit outside the room for five minutes and sit in a corridor on some chairs. The women comforted me, but not really.”<sup>22</sup>

In another case Frances Andrade, a talented violinist, took her own life after being called a liar and a fantasist in court by the barrister (Manchester, England). It was reported the overdose was a way of the witness coping with the trial.<sup>23</sup> Such cases illustrate the in-court process as very stressful for witnesses and highlight the need for the development and maintenance of *effective* support, particularly with the process of assisting witnesses in the giving of their best evidence.<sup>24</sup> In terms of fairness of the operationalisation of the principle it is proposed that adversarial systems might have both high and unreasonable expectations of witnesses in this regard.

Of course, it is of utmost importance that the equilibrium between testing witness veracity and obtaining accurate reports from the witness is maintained. Accordingly, the pre-trial process needs to ensure that witnesses are aware of what is expected of them in the courtroom; that is, they be given information about the procedure, be offered the opportunity to ask questions, and be placed at ease. Indeed, the significance of clear guidelines to encourage accurate testimony in court seems essential, particularly given some commentators note ‘the kinds of questions asked in cross-examination are subject to very little regulation’, and that ‘trial judges should generally ensure that questions are relevant and courteously put, but seem unable to protect some witnesses from being hectored or humiliated’.<sup>25</sup> A body of research suggests that certain question types are damaging to witness evidence.

#### QUESTIONING IMPACT

Never before have justice systems been under such pressure to consider the impact of procedures, on those who are victims and, by definition,

<sup>22</sup> See <http://www.independent.co.uk/news/uk/crime/court-is-just-as-traumatic-girl-who-faced-aggressive-cross-examination-aged-nine-says-she-has-never-recovered-8631662.html>; accessed 18<sup>th</sup> August 2016.

<sup>23</sup> See <http://www.bbc.co.uk/news/uk-england-28489500>; accessed 29<sup>th</sup> May 2015.

<sup>24</sup> Jacqueline M. Wheatcroft, ‘Avoiding Miscarriages of Justice’ (2016), in P. Cooper & L. Hunting (Eds.), *Addressing Vulnerability in Justice Systems*, Wildy, Simmonds & Hill Publishing: London

<sup>25</sup> Jenny McEwan, ‘Special measures for witnesses and victims’ (2002) M. McConville, G. Wilson, *The Handbook of the Criminal Justice Process*, pp. 237-251. (Oxford University Press: Oxford, 2002) 248

vulnerable.<sup>26</sup> Where the cross-examination of witnesses is concerned this is of some note and concern, particularly as the term confrontation conjures up images and meanings that surround terms such as, hostility, war, battle, fight, and so on.<sup>27</sup>

For some time, cross-examination procedures have been considered by the legal profession to be crucial for probing the accuracy of evidence obtained in examination-in-chief, and to expose unreliable or dishonest witnesses. Hickey, for example, notes cross-examination is “a legitimate, effective and perfectly respectable contribution to the judicial process” and “performs a crucial function in the objectives of witness information and witness credibility”.<sup>28</sup> However, the growing body of evidence shows that particular questioning techniques are commonly employed and witnesses confronted with complex questions containing multiple parts, negatives, double-negatives and advanced vocabulary and/or legal terminology.<sup>29</sup> The approach to challenge render the procedure of cross-examination a daunting one for most witnesses and represents an unusual situation that can cause sufficient discomfort and stress to impact and undermine the recall accuracy and completeness, and beyond.<sup>30</sup> Unsurprisingly studies indicate that these kinds of questions can be difficult to decipher and respond to with accuracy.<sup>31</sup> Moreover, some argue that cross-examination is used as a tool to humiliate, intimidate and confuse opposing witnesses rather than contain itself to artful challenge. The use of intrusive attacks made on the character and general credibility of witnesses can cause extreme distress while threatening to distort the fact-finding process.<sup>32</sup> It appears witnesses still find the cross-examination process arduous and stressful.

One way of challenging witness evidence is by the use of leading questions. Such questions, which contain pre-suppositional statements, often seek a ‘yes’ or ‘no’ response and have likewise been shown to have an adverse influence on accuracy when compared to more open styles of

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<sup>26</sup> Jacqueline M. Wheatcroft, Graham Wagstaff and Annmarie Moran, ‘Re-Victimising the Victim? How rape victims experience the UK legal system’, (2009) 4 *Victims and Offenders*, 265

<sup>27</sup> Ian Dennis, ‘The right to confront witnesses: Meanings, myths and human rights’, (2010) 4 *Criminal Law Review*, 255

<sup>28</sup> Leo Hickey, ‘Presupposition under Cross-Examination’, (1993) 1(16) *International Journal for the Semiotics of Law* 89 (see 109 and 99 respectively).

<sup>29</sup> Jacqueline M. Wheatcroft and Louise Ellison ‘Evidence in Court: Witness preparation and cross-examination style effects on adult witness accuracy’ (2012) 30 *Behavioral Sciences & the Law*, 821.

<sup>30</sup> See for summary Jacqueline M. Wheatcroft, David Caruso and James Krumrey-Quinn, ‘Rethinking Leading: The Directive, Non-Directive Divide’, (2015) 5 *Crim. L.R.* 340; and Emily Henderson “‘Did you see the broken headlight?’ Questioning the cross-examination of robust adult witnesses’ 10 *Archbold Review* (2014) 4.

<sup>31</sup> Janet Cotterill, *Language and Power in Court* (2003), New York: Palgrave MacMillan; D. Dodd and J. Bradshaw, J. ‘Leading Questions and Memory: Pragmatic Constraints’ (1980) 19 *Journal of Verbal Learning and Verbal Behavior* 695; Mark Kebbell and David C. Giles. ‘Lawyers’ questions and witness confidence: Some experimental influences of complicated lawyers’ questions on witness confidence and accuracy’ (2000) 134 *The Journal of Psychology* 129.

<sup>32</sup> S. Caroline Taylor, *Court licensed abuse: Patriarchal lore and the legal response to intra-familial sexual abuse of children* (2004) New York: Peter Lang Publishing.

questioning.<sup>33</sup> Leading questions are, by definition, suggestive (for example, ‘The car was red, wasn’t it?’) and aim to limit responses made to a two-alternative forced choice (i.e., yes/no), and elicit preferred answers in the context of ‘yeah’ (i.e., consistent passive ‘yes’ responses).<sup>34</sup> As such concerns have been raised by scholars and practitioners in that certain questions can suggest or even compel responses and interfere with the fairness of the process.

In this respect, Scotland's most senior judge, Lord Justice Clerk, Lord Carloway, has warned judges must step in to protect witnesses from ‘protracted or vexatious questioning’ from counsel who insult alleged rape victims during cross-examination.<sup>35</sup> The comment, in part, was made as an advocate in the case of *R v Begg* had begun cross-examination with the opening line; ‘You are a wicked, deceitful, malicious, vindictive, liar?’<sup>36</sup> For more examples of convoluted questions used in actual criminal trials see Fielding (2006); one case illustrates how a defendant with acknowledged learning difficulties was asked “you can't be certain that you think it was not possible that you filled in the first side of the form?” (p. 178). Despite such warning being given, a feature of advocacy tuition is leading.<sup>37</sup> Its use is argued necessary to comply with certain rules of evidence, for example, as specified in *Browne v Dunn*.<sup>38</sup> The form is taboo in examination-in-chief yet the leading question itself has received little scrutiny.<sup>39</sup> Its definition however, as developed at common law, focuses on the content of the question, failing to account for the significant impact of its *form* on the witness. Legal definitions do not differentiate between the different forms leading may take, primarily, directive and non-directive, and their effect on witness reports.

Wheatcroft and Woods made this distinction and examined the effects directive forms had upon witness accuracy.<sup>40</sup> The study revealed that when directive leading, for example, ‘He didn’t touch you did he?’ was

<sup>33</sup> Jacqueline M. Wheatcroft, Graham Wagstaff and Mark Kebbell, ‘The influence of courtroom questioning style on actual and perceived eyewitness confidence and accuracy’ (2004) 9 *Legal & Criminological Psychology*, 8-101

<sup>34</sup> Sandra Harris, ‘Questions as a mode of control in magistrates’ courts’ (1984) 49 *International Journal of Society and Language* 5-27

<sup>35</sup> See Herald Scotland, ‘Judge calls stop to prolonged questioning of rape victims in court after woman called ‘malicious, vindictive liar’ (2015). See <http://www.heraldscotland.com/news/13582843> accessed 15 May 2016.

<sup>36</sup> *R v Begg* [2015] HCJAC 69

<sup>37</sup> See, eg, Iain Morley, *The Devil’s Advocate*, 2nd edn (2009), pp. 158–9; Thomas A. Mauet & Les A McCrimmon, *Fundamentals of Trial Technique*, 3rd edn (2011), pp. 199–200 and Peter Murphy, *Evidence and advocacy*, 4<sup>th</sup> edn (1994) London: Blackstone Press.

<sup>38</sup> *Browne v Dunn* (1893) 6 R. 67 (House of Lords): a cross-examiner must put the nature of his case in full to the witness in cross-examination, to give him or her the opportunity to comment on or explain the contradictory version.

<sup>39</sup> *But see* Jacqueline M. Wheatcroft, David Caruso and James Krumrey-Quinn, ‘Rethinking Leading: The Directive, Non-Directive Divide’, (2015) 5 *Crim. L.R.* 340; Adrian Keane & Rudi Fortson, ‘Leading Questions: A Critical Analysis’ (2011) 4 *Crim.L.R.* 280

<sup>40</sup> Jacqueline M. Wheatcroft and Sarah Woods ‘Effectiveness of witness preparation and cross-examination non-directive leading and directive leading question styles on witness accuracy and confidence’ (2010) 14(3) *International Journal of Evidence & Proof*, 189

compared against non-directive counterparts, adult witnesses were significantly less accurate in response to the directive form; the form alone produced that result.<sup>41</sup>

It can be expected therefore that when directive leading questions are incorporated into the cross-examination procedure a witness's overall accuracy will be reduced. The researchers also discussed how the distinction might more usefully define the question form appropriate for use in cross-examination, in that there should be no place for questions that sideline the search for fact in the trial process.<sup>42</sup> At the very least, there should be no place for questions that impact negatively upon witness accuracy. Moreover, the balance between the right to challenge and the right of the victim witness to speak honestly and openly without fear of the process or re-victimisation by the court is a critical one, as this may impact on the outcome of the trial should their testimony be less accurate as a result.

Pressures placed upon witnesses and a suggestion that guidelines meant to highlight the vulnerability of victims and special measures, such as allowing evidence to be given behind screens, "are not having their intended effect"<sup>43</sup> what approaches are at the courts disposal to ensure witnesses are assisted in giving their best evidence? One which has been considered useful is of preparing witnesses to the process of giving evidence.

#### WITNESS FAMILIARISATION

Courtroom procedures should be designed to optimise witness accuracy and if witnesses can be prepared and supported in ways that help them with daunting cross-examination which leads to effective performance in court then their use would be most valuable. Confidence that the aim of the trial can be realised would be increased. It is also important that justice systems recognise the value of witness experience and how to maximise witness reports. It has been reported by a Home Office witness survey that the levels of satisfaction for categories of witnesses involved in the courtroom process varied greatly. Prosecution witnesses (68 per cent), especially victims, were less satisfied with the defence lawyer (48 per cent) than defence witnesses (90 per cent). The marked reduced effects on satisfaction ratings were observed more keenly in oppositional (i.e., challenging) exchanges, with the largest variation shown for victim witness transactions with the defence.<sup>44</sup>

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<sup>41</sup> Jacqueline M. Wheatcroft, David Caruso and James Krumrey-Quinn, 'Rethinking Leading: The Directive, Non-Directive Divide', (2015) 5 *Crim. L.R.* 340; Adrian Keane & Rudi Fortson, 'Leading Questions: A Critical Analysis' (2011) 4 *Crim.L.R.* 280

<sup>42</sup> See Mark Brennan, 'The Discourse of Denial: Cross-Examining Child Victim Witnesses' (1995) 23 *Journal of Pragmatics* 71

<sup>43</sup> See <http://www.independent.co.uk/news/uk/crime/court-guidelines-for-rape-victims-are-not-working-as-study-finds-aggressive-crossexamination-and-intimidating-encounters-are-still-common-10031451.html>

<sup>44</sup> Helen Angle, Sally Malam and Christine Carey, *Witness Satisfaction: Findings from the Witness Satisfaction Survey 2002* (London: Home Office Online Report 19/03, 2003).



Such findings illustrate greater levels of support for all witnesses in coping with oppositional interactions when testifying are needed.

It has nevertheless been recognised by the courts that witnesses coming to court to give evidence face a difficult task and that such parties could be familiarised to the process. As a result, the courts have endorsed the practice of witness familiarisation approving the right of barristers to prepare witnesses on conduct appropriate to the courtroom and more specifically how to give effective evidence.<sup>45</sup> In the case of *Salisbury*, the trial judge, Mr Justice Pitchford, heard that the preparation had been delivered by a Bar member, and stated that there was a “difference of substance” between orchestrated evidence and familiarisation to giving evidence coherently, stating:

‘ ... This, it seems to me, was an exercise any witness should be entitled to enjoy. What was taking place was no more than preparation for the exercise of giving evidence.’

Similarly, in *Momodou* the Court of Appeal (Judge LJ) held that witnesses should “not be disadvantaged by ignorance of the process, nor when they come to give evidence, taken by surprise at the way it works”, and that:

“ ... Sensible preparation for the experience of giving evidence, which assist the witness to give of his or her best at the forthcoming trial, is permissible ... The process may improve the manner in which the witness gives evidence by, for example, reducing the nervous tension arising from inexperience of the process.”

The method endorsed in *R v Momodou* aimed to demystify the process and through practical guidance assist witnesses to give their best evidence in legal proceedings with the result that they are less likely to be confused, misled or unduly influenced by the process of cross-examination.<sup>46</sup> In essence, the advice is confined to directing witnesses to speak slowly, to ask for questions to be repeated if they are not understood and not to guess if they do not know the answer to a question. Witness services do offer varying pre-trial support and advice to lay witnesses but this does not extend to preparation for the process of testifying. Such organisations take the view that volunteers should not make any attempt to talk to witnesses even in general terms about how they might conduct themselves in the witness box or what they might expect from cross-examination - for fear of allegations of witness coaching.<sup>47</sup>

<sup>45</sup> *R v Momodou* [2005] 1 W.L.R. 3442; *R v Salisbury* [2005] EWCA Crim 3107

<sup>46</sup> Jacqueline M. Wheatcroft and Louise E. Ellison, ‘Evidence in Court: Witness preparation and cross-examination style effects on adult witness accuracy’, (2012) *Behavioral Sciences & the Law*, 30, 821-840

<sup>47</sup> Louise E. Ellison and Jacqueline M. Wheatcroft, ‘Could you ask me that in a different way please? Exploring the impact of courtroom questioning and witness familiarisation on adult witness accuracy’ (2010) 11 *Crim L.R.* 823

Little research has empirically considered the effects of preparing witnesses for cross-examination. Wheatcroft and Woods however conducted an initial study focused upon short familiarisation statements and leading question style effects upon witness accuracy and confidence.<sup>48</sup> The findings showed if question examples were provided prior to questioning this would help witnesses apply higher levels of confidence to their accurate responses. A further, more ecologically valid, study was carried out by Wheatcroft and Ellison to assess familiarisation to complex and simple cross-examination questioning strategies. A community group of participants received preparation whilst another group received no preparation. Initial analysis showed those who received familiarisation gave more accurate responses, made fewer errors, and were enabled to seek clarifications from the cross examining lawyer. Additional analysis revealed that familiarisation increased accuracy and reduced errors to multiple-part questions, and reduced errors made in response to negative questions, and some complex vocabulary. The process did not however assist in increasing the amount of information given by the witness, confidence to interrupt the lawyer, or ask the lawyer to repeat the question.<sup>49</sup> Overall, the studies lend support to those who suggest witness preparation is essential for the improvement of witness evidence in court.

A number of psychological reflections can be made which may explain why familiarisation might be helpful.<sup>50</sup> Researchers suggest that more complex tasks, such as answering lawyerly cross-examination questions, require greater cognitive effort and thereby activate executive and frontal systems with potential to lead to fewer correct responses as a result of lowered processing capacity. Inhibition of correct responses may also be influenced by witnesses drawing upon cognitive coping methods, such as those defaults to more autonomic responses that require little in the way of cognitive work, yet result in lower accuracy. In the complex context of the courtroom, mental shortcuts, which can often help to streamline information in daily activities, can become detrimental resulting in a greater number of errors.<sup>51</sup>

The prior exposure to techniques used in cross-examination in court appears to allow witnesses to organize knowledge of events such that

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<sup>48</sup> Jacqueline M. Wheatcroft and Sarah Woods, 'Effectiveness of witness preparation and cross examination non-directive leading and directive leading question styles on witness accuracy and confidence', (2010) *International Journal of Evidence & Proof*, 14(3), 189-207

<sup>49</sup> Jacqueline M. Wheatcroft and Louise Ellison, 'Evidence in Court: Witness preparation and cross-examination style effects on adult witness accuracy', (2012) *Behavioral Sciences & the Law*, 30, 821-840

<sup>50</sup> Graham Wagstaff, Jacqueline M. Wheatcroft, et al., 'Some cognitive and neuropsychological aspects of social inhibition and facilitation' (2007) *European Journal of Cognitive Psychology*, 20(4), 828-846; Jacqueline M. Wheatcroft and Louise Ellison, 'Evidence in Court: Witness preparation and cross-examination style effects on adult witness accuracy', (2012) *Behavioral Sciences & the Law*, 30, 821-840

<sup>51</sup> Jacqueline M. Wheatcroft, 'Avoiding Miscarriages of Justice' (2016), in P. Cooper & L. Hunting (Eds.), *Addressing Vulnerability in Justice Systems*, Wildy, Simmonds & Hill Publishing: London

information may be accessed more readily in response to lawyerly questions. Thus, familiarisation guidance appears to allow for some method of ‘updating’ to occur making accessible the information for use as and when appropriate. Further, familiarisation with the questioning techniques seems to ‘free up’ capacity in the brain to process information, but if a witness is not given guidance the frontal–executive brain systems are potentially forced to work harder, leaving less processing capacity to work on the process of comprehending, understanding, formulating, and responding to questions. Witnesses may become nervous and frustrated. It also remains for research to consider whether questioning will make the effects of delay more problematic.<sup>52</sup>

Witness familiarisation approaches evidenced herein appear to show some promise. In addition, there is fresh ground covered in regard to the questioning put to those classed as vulnerable in the form of Ground Rules Hearings (GRHs), and with the use of intermediaries. GRHs are commonly used by judges to set the parameters for the fair treatment of vulnerable defendants and vulnerable witnesses.<sup>53</sup>

#### GROUND RULES HEARINGS, QUESTIONING AND INTERMEDIARIES

In 2013 GRHs were recognised in England and Wales by the Criminal Practice Directions<sup>54</sup> (CPD) as a key step in planning the proper questioning of a vulnerable witness<sup>55</sup> or defendant.<sup>56</sup> Cooper and colleagues have examined the evolution of practice and law, including restrictions on ‘putting your case’ to a vulnerable witness, using an illustrative case example. The authors concluded that a checklist for GRHs to support the development of best practice would be an entirely reasonable step to take.<sup>57</sup> It was argued the standardisation of such a move would ensure greater consistency in application and afford greater levels of protections. In respect of GRHs specifically, in England and Wales there have to date been three cases [i.e., *Dixon*<sup>58</sup>; *Re A (A Child) (Vulnerable Witness)*<sup>59</sup>; and *Lubemba*<sup>60</sup>].

<sup>52</sup> Jacqueline M. Wheatcroft, Graham Wagstaff and Brian Manarin, ‘The influence of delay and item difficulty on eyewitness confidence and accuracy’ (2015) 1 *International Journal of Humanities and Social Science Research*.

<sup>53</sup> Penny Cooper, Paula Backen and Ruth Marchant, ‘Getting to Grips with Ground Rules Hearings: A checklist for judges, advocates and intermediaries to promote the fair treatment of vulnerable people in court’, (2015) 6 *Crim L.R.* 417; Jacqueline M. Wheatcroft, ‘Avoiding Miscarriages of Justice’ (2016), in P. Cooper & L. Hunting (Eds.), *Addressing Vulnerability in Justice Systems*, Wildy, Simmonds & Hill Publishing: London

<sup>54</sup> Criminal Practice Directions [2013] EWCA Crim 1631 in particular at ‘3E: GROUND RULES HEARINGS TO PLAN THE QUESTIONING OF A VULNERABLE WITNESS OR DEFENDANT’

<sup>55</sup> Penny Cooper (2014) ‘Ticketing Talk Gets Serious’, *Counsel*, November 11-12

<sup>56</sup> Emily Henderson (2014) ‘Jewel in the Crown?’, *Counsel*, November 10-12

<sup>57</sup> Penny Cooper, Paula Backen and Ruth Marchant, ‘Getting to Grips with Ground Rules Hearings: A checklist for judges, advocates and intermediaries to promote the fair treatment of vulnerable people in court’, (2015) 6 *Crim L.R.* 417

<sup>58</sup> *R v Dixon* [2013] EWCA Crim 465

<sup>59</sup> *Re A (A Child) (Vulnerable Witness)* [2013] EWHC 1694

<sup>60</sup> *R v Lubemba; R v JP* [2014] EWCA Crim 2064, conjoined appeals

In the latter, the Court of Appeal heard two cases together because each raised a similar issue which surrounded the question of what measures a judge might be able to take to protect vulnerable witnesses without impacting on the accused right to a fair trial. It was noted by the Vice President:

‘... judges are taught, in accordance with the Criminal Practice Directions, that it is best practice to hold hearings in advance of the trial to ensure the smooth running of the trial, to give any special measures directions and to set the ground rules for the treatment of a vulnerable witness. We would expect a ground rules hearing in every case involving a vulnerable witness, save in very exceptional circumstances. If there are any doubts on how to proceed, guidance should be sought from those who have the responsibility for looking after the witness and or an expert.’<sup>61</sup>

Furthermore, in *Lubemba* the trial judge’s *duty* was emphasised, particularly in respect of the questioning process:

‘As we have already explained, a trial judge is not only entitled, he is duty bound to control the questioning of a witness. He is not obliged to allow a defence advocate to put their case. He is entitled to and should set reasonable time limits and to interrupt where he considers questioning is inappropriate.’<sup>62</sup>

*Lubemba* suggests there is no right to put a case to a witness, in this case, a child. Indeed, leading questions may not even be a suitable and proper means of challenging the account of a ‘robust’ adult witness<sup>63</sup> either.

While witness familiarisation shows promise for all witnesses and GRHs for those classed as vulnerable we must ask, are these the best remedies to enable witnesses to give of their best evidence? Should witnesses remain to be left to deal with the shortcomings of the system? Is it right and proper that witnesses who may be able to enable their wit or have increased ability to cope with pressures be allowed to operate in conditions that mean they will be more successful in their testimony than those who cannot?

In response, in England and Wales, special measures have grown to include a major significant change; the attention given to communication through the use of aids and intermediaries.<sup>64</sup> Registered intermediaries are available to vulnerable and/or intimidated witnesses to help victims,

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<sup>61</sup> Ibid, para 42

<sup>62</sup> *R v Lubemba* [2014] EWCA Crim 2064, para 51

<sup>63</sup> Penny Cooper, Paula Backen and Ruth Marchant, ‘Getting to Grips with Ground Rules Hearings: A checklist for judges, advocates and intermediaries to promote the fair treatment of vulnerable people in court’, (2015) 6 *Crim L.R.* 417

<sup>64</sup> Joyce Plotnikoff and Richard Woolfson, *Making the Most of Working with an Intermediary Toolkit* (2014) Lexicon Ltd, Preston

witnesses and defendants who find it difficult to understand questions and give answers. The intermediary assists the attendant individual to communicate answers during a police interview or when giving evidence at court. Communication aids may also be used to assist in that process (for example, symbol books and alphabet aids). The concept of the registered intermediary is a new, active role, which has been reported to have a number of merits. In a series of interviews performed with judges, advocates and intermediaries in England and Wales findings have shown there is little to fear from the intermediary system.<sup>65</sup> Nevertheless, whilst some improvements and support for witnesses is ongoing witnesses do continue to suffer impediments in process when coming to court to give evidence.

#### CROSS-EXAMINATION REFORM: PROHIBIT DIRECTIVE LEADING

The mechanism of cross-examination is designed to break down dubious testimony, and if it does then this is to be applauded. However, as early as 1939, it was shown that witness testimony reliability dropped when witnesses answered questions applied during cross-examination.<sup>66</sup> However, as noted above, putting leading questions, and only leading is a hallmark of advocacy tuition in cross-examination as they comply with certain rules of evidence.<sup>67</sup> That is to say, the defence lawyer must challenge the truthfulness of the complainant. Despite its centrality, the leading question has received little judicial, legislative or academic attention.<sup>68</sup>

The concept of the right to challenge and its long and unquestioned application together with an appetite for procedural change has informed the range of special measures available to vulnerable and intimidated witnesses (i.e., processes and procedures to assist participants to give of their best evidence in court) discussed herein. However, current approaches now sit in stark opposition to that right.<sup>69</sup> Moreover, it is argued that tinkering with the process to assist witnesses in their abilities to cope with cross-examination techniques would be alleviated more readily by dealing with the root of one major difficulty; question forms. Wheatcroft and colleagues have strongly suggested justice systems should develop to best practices for elicitation of accurate evidence and not leave it to witnesses to combat any adversarial system's shortcomings. Given this is particularly acute for vulnerable and

<sup>65</sup> Emily Henderson, 'Bigger fish to fry: Should the reform of cross-examination be expanded beyond vulnerable witnesses?' *The International Journal of Evidence & Proof*, 19(2), 83-99

<sup>66</sup> William Stern, 'The psychology of testimony' (1939) 34(1) *Journal of Abnormal and Social Psychology* 3

<sup>67</sup> *Browne v Dunn* (1893) 6 R. 67 (House of Lords): a cross-examiner must put the nature of his case in full to the witness in cross-examination, to give him or her the opportunity to comment on or explain the contradictory version.

<sup>68</sup> Jacqueline M. Wheatcroft, David Caruso and James Krumrey-Quinn, 'Rethinking Leading: The Directive, Non-Directive Divide', (2015) 5 *Crim. L.R.* 340

<sup>69</sup> Ian Dennis, 'The right to confront witnesses: Meanings, myths and human rights', (2010) 4 *Criminal Law Review*, 255

victim witnesses the form shown to create the primary mischief in meeting trial goals is that which is directive; its prohibition in cross-examination has been proposed.<sup>70</sup> As there is also movement toward the idea that there may be no right to put a case to a witness in child cases<sup>71</sup> the right to challenge, as a central and defining feature of adversarial criminal trials,<sup>72</sup> is tested. The debate of the issue has gone further. Empirical research on robust adult witnesses suggests consideration may need to be given to extending reforms of cross-examination ... beyond vulnerable witnesses<sup>73</sup>, and that leading questions may not even be a suitable and proper means of challenging robust adult witness accounts.<sup>74</sup>

It is argued the current approach to the leading question does not assist or promote the accuracy of witness evidence. Given the psychological evidence base one cannot help but ask if the measures noted merely dampen the known consequences of certain examination techniques rather than dealing directly with the mischief in cross-examination. There is appetite for change which is personified in *Lubemba* and Honourable Justice Green's comment - outlined at the beginning of this paper. A direct change that will bring about immediate effect is to prohibit the directive leading question leaving in place the less likely to confuse counterpart, the non-directive leading form.

#### CONCLUSION

The need for change has created conditions where new approaches to assist witnesses in giving of their best evidence have been developed. Witness familiarisation, GRHs and intermediaries, represent a few developments which have shown promise in the facilitation of witness evidence in court. However, these are in infancy and the concept of the right to and method of challenge is under scrutiny. Research has shown the need to question the permissibility of directive leading questions during cross-examination in court. To prohibit these most damaging forms of question seems warranted and provides an immediate solution to eliminate some of the negative aspects of the cross-examination process. It provides an ideal opportunity to enhance other features of the way advocates test oral evidence in adversarial contexts<sup>75</sup> and processes to follow a methodology that produce the best

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<sup>70</sup> Jacqueline M. Wheatcroft, David Caruso and James Krumrey-Quinn, 'Rethinking Leading: The Directive, Non-Directive Divide', (2015) 5 *Crim. L.R.* 340

<sup>71</sup> See *R v Dixon* [2013] EWCA Crim 465; *A (A Child) (Vulnerable Witness)* [2013] EWHC 1694; *R v Lubemba*; *R v JP* [2014] EWCA Crim 2064, conjoined appeals

<sup>72</sup> David Lusty, 'Anonymous accusers: An historical and comparative analysis of secret witnesses in criminal trials' (2002), 24 *Sydney Law Review*, 361

<sup>73</sup> Emily Henderson, 'Bigger fish to fry: Should the reform of cross-examination be expanded beyond vulnerable witnesses?' *The International Journal of Evidence & Proof*, 19(2), 83-99

<sup>74</sup> Penny Cooper, Paula Backen and Ruth Marchant, 'Getting to Grips with Ground Rules Hearings: A checklist for judges, advocates and intermediaries to promote the fair treatment of vulnerable people in court', (2015) 6 *Crim L.R.* 417

<sup>75</sup> Jacqueline M. Wheatcroft, David Caruso and James Krumrey-Quinn, 'Rethinking Leading: The Directive, Non-Directive Divide', (2015) 5 *Crim. L.R.* 340

possible outcomes in terms of witnesses' experiences and the quality of evidence elicited.<sup>76</sup>

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<sup>76</sup> Scottish Evidence and Procedure Review: *Next Steps*. The Scottish Courts and Tribunals Services, 26 February 2016.