

*Victim Witnesses in Investigative Interviews and Court Processes*

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*Objectives*

After studying this chapter, the reader should understand:

- The context of the investigative interview and in court examination in the production of evidence for the victim witness
- The leading issues affecting witnesses in investigative interviews and in the courtroom
- Why these issues are important in criminal justice
- New directions

*Victim Witnesses in Investigative Interviews*

*Introduction*

Witnesses are pivotal to any criminal justice system (Wheatcroft, 2016a). In 2015 in England and Wales (& Northern Ireland; NI) the Ministry of Justice published the Code of Practice for

Victims of Crime which was presented to Parliament pursuant to section 33 of the Domestic Violence, Crime and Victims Act, 2004. The document details the key entitlements for victims of crime, who is required to provide the services, and who may receive them. The entitlements apply to police investigation through to trial and in complaints, and represent a more comprehensive consideration of victims of crime than has previously been observed. There is a growing appetite for procedural change in criminal justice systems where the evidence base supports such amendment be made and this this chapter will outline some developments which have taken place in the UK jurisdiction, where the applications of new insights have been applied, and where potential modifications are being considered. It will discuss the current position of victim witnesses (as vulnerable witnesses) in the UK in, a) investigative interviews, and b) in procedures and examination in the courtroom.

*The context of investigative interviews in the production of evidence and the leading issues affecting victim witnesses*

Victims and witnesses are a fundamental component of the criminal justice system in that they provide the information, intelligence and evidence to investigators which enables offenders to be brought to justice (ACPO, 2005). There are however differences between the terms victims and witnesses which are differentiated in Black's Law Dictionary (2004). A victim is defined as one which is harmed by a crime, tort or other wrong, whereas the witness is defined as one, who sees, knows or vouches for something. Also, one who gives testimony under oath or affirmation, in person, by oral or written deposition or by affidavit. A witness must be legally competent. In our

consideration of the victim witness in this context it is important to recognise that despite the differences all victims are potential witnesses.

In the maximisation of the accuracy of information interviews represent a key strategy employed by investigators in the overall process of investigation. In 1982, Wagstaff informed the police how they might best help witnesses to remember accurate and useful information in an investigation. Despite the many years devoted to field research evidence suggests that witnesses remain vulnerable to the various ways they are questioned about events (Fisher, 1995; Wheatcroft, 2016c) and across contexts (Wheatcroft & Woods, 2010). In the United Kingdom (UK) in 2011 it was announced that the National Policing Improvement Agency would be wound down and its functions transferred to other organisations; the Home Office, the Serious Organised Crime Agency and the newly established College of Policing (Pinel, 2012). It is against this backdrop that police officers receive training in how to conduct PEACE model interviews. PEACE represents the interview stages of Planning and Preparation, Engage and Explain, Account, Closure and Evaluation; elements which map directly onto procedures used across international contexts and investigative domains (Wheatcroft, Wagstaff & Russell, 2013). Within this recognised framework [and levels 1-4 of Professionalising Investigative Practice (PIP; see College of Policing for details)] the methods of interviews have been scrutinised. What follows is a summary of some of the findings of the literature and what research informs of their usefulness.

One significant development in the context of investigative interviews is the enhanced cognitive method (ECI; Fisher, Brennan & McCauley, 2002; Geiselman, Fisher, MacKinnon, & Holland, 1986), which has over the years been compared with other memory enhancement methods (Wheatcroft, *et al.*, 2013). The main elements are ‘report everything’ (RE), ‘context

reinstatement' (CR), 'change perspective' (CP), 'change order' (CO), and 'build rapport' (BR). Evidence suggests that, if used appropriately, the procedure does not necessarily disrupt confidence-accuracy relationships (Dornburg & McDaniel 2006; Wright & Holliday, 2007). However, more recently, the investigative interviewing literature has looked broadly toward the development of a toolbox approach (Wheatcroft, *et al.*, 2013) incorporating potentially useful aspects, such as the Sketch Reinstatement of Context procedure (Dando, Wilcock, Milne & Henry, 2009) and Self-Administered Interview (SAI; Gabbert, Hope & Fisher, 2009). While the toolbox approach offers benefits, one study has suggested that CR alone yields as much information as the complete ECI (Milne, 1997). This, amongst other work demonstrates the superior usefulness of CR (Hammond, Wagstaff & Cole, 2006; Milne & Bull, 2002). CP and CO however are rarely used (Clifford & George, 1996; Wheatcroft, *et al.*, 2013). Moreover, in practise, because of time and complexity issues police investigators are known to not adhere to the procedures (Dando, Wilcock & Milne, 2009; Wheatcroft *et al.*, 2013).

Whilst the ECI may have, at one time, been recommended limitations are clearly evident. For example, young children's free reports can be restricted and leave the interviewer little information upon which to base follow-up questions (Davies, Wilson, Mitchell & Milsom, 1995). Transcripts illustrate that children are still questioned repeatedly, assertively and with suggestion such that they may be misled (Taylor, 2004) as compared to adults, particularly at the latter end of the judicial process (Wheatcroft, 2016c). The importance of child evidence comes to the fore when jurists may hold misconceptions about witnesses' credibility or where stereotypical beliefs of the witness exist (Quas, Thompson & Clarke-Stewart, 2005). Despite the fact that young children are capable of accurate autobiographical recall (Fivush & Shukat, 1995), memory improves from 3 years to the age of 12 (Aldridge, 1999), the strength of children's

memories is good if asked neutral, direct/simple questions (Gordon, Baker-Ward & Ornstein, 2001), and lasting memories for salient events can be evident from a very young age (Howe, 2000) difficulties for children remain. Yet, herein lays a contradiction. On the one hand, children are classified as vulnerable, yet research suggests their memories are fairly robust in certain circumstances. It is recognised that the process hinders those who are vulnerable in giving their best. For example, witness testimony can be influenced by question type, both in police interviews and in court (Wheatcroft, Wagstaff & Kebbell, 2004; Wheatcroft, Caruso & Krumrey-Quinn, 2015) and it is therefore likely that any effects will be enhanced when those with specific difficulties give evidence. To illustrate, while persons with learning difficulties (LDs) generally provide less information they appear to give relevant details. Still, on a cautionary note, there is a wide range of intellectual disability that fall under the general LD term, varying in nature and severity; thus, it is not entirely useful to categorise individuals with a LD, nor indeed examine the literature in broad terms (see Advocates Training Council, 2011). Even young children then can report accurate free recall information if interviewed in an age appropriate manner, and if that interview includes appropriate questioning (Wheatcroft *et al.*, 2015).

In 2011, the UK released a revised version of Achieving Best Evidence in Criminal Proceedings: which provides guidance on interviewing victims and witnesses, and guidance on using special measures (ABE 2011, originally drafted in 2002 as *Guidance for Vulnerable or Intimidated Witnesses, Including Children*). Of course, adult female rape complainants are too considered vulnerable within this framework; though the rhetoric for female rape complainants continues to be myth-laden with consequent echoes of revictimization (Wheatcroft, *et al.*, 2009; Jordan, 2004; Kelly, 2010). One key element of the interaction between victim and/or vulnerable witnesses and investigator or judicial agent is that of trust and belief, and it is these elements are

particularly salient for victim witnesses. As the literature is large and diverse the chapter here will draw upon sexual assault victims as an example to illustrate the importance of communication and rapport.

In 2014, Wheatcroft and Walklate discussed the concept of belief and trust in the context of false allegations in sexual crime. The extent of false allegations made by children has been suggested to be *circa* 1% (Jones & McGraw, 1987), and Kelly (2010) similarly notes that false allegations are no higher for rape where adults are concerned than for other crimes (see also Gilmore & Pittman 1993). The same is the case for children. Yet in both child sexual abuse and adult cases of rape/sexual assault the practitioner role in the investigation of crime is not only core (ACPO, 2004) it is crucial in the contribution made to the value of the information provided by complainants, witnesses, and victims of crime (Wheatcroft & Walklate, 2014).

In approaching interactions with children, research indicates advantages of rapport (Wheatcroft & Walklate, 2014). For example, Collins and Eaton (2013) have recognised the necessity of rapport in highlighting that interpersonal styles show improvements in children's communication during interviews. A position supported by psychological evidence (Warren, *et al.*, 1996; Patterson, 2011). It is therefore important to recognise that the interaction between investigator and victim witnesses can strengthen or weaken an investigation and thereby impact on whether a case is prosecuted or not. For example, police investigators have tended to dominate interviews of rape complainants (Kebbell & Westera, 2011), which has been shown to be a factor relevant to the potential to retract a statement (Hopkins, Walklate & Wheatcroft, 2015). Other factors include the interview atmosphere which can facilitate or hinder trust (Saywitz & Camparo, 1998) and authoritative style which can be equally intimidating affecting reliability by increasing compliance (Leichtman & Ceci, 1995). In a study on the impact of

interviews on rape survivor's reduction of hierarchy accomplished through mutual dialogue resulted in greater levels of comfort and disclosure (Campbell *et al.* 2010). A technique of rapport (i.e., commencement or maintenance of a trusting relationship perhaps through discussion of neutral topics, process, and/or interpersonal approach to the victim) can be an especially effective tool to encourage truthful disclosure (Wheatcroft & Walklate, 2014). In addition, most individuals have limited knowledge of the legal system which can contribute to heightened anxiety during investigative interviews. On this basis, Wheatcroft and Walklate (2014) proposed *interactional belief* as the method of initial interaction in interviews and communications with victim witnesses. The authors state that "in order to move this process from one that is rooted in disbelief to one rooted in belief it is important to appreciate the truth generating process as a holistic one in which there are competing perspectives and interests" (p. 7). For instance, for the rape complainant there exist three potential interfaced perspectives that are relevant to understanding how 'what happened' might be made sense of: the experiential, the practice, and the legal. What this means is that in the case of police officers, they may have a tendency to seek an explanation for the allegation and how it might be invalidated, rather than take the allegation to be the basis of what did happen. What is important here is to recognise that the interview context is complex and the interactions that take place are multi-layered and multi-faceted and which convey messages to the victim. Clearly, without some measure of trust and belief the process of police interview can be burdensome and add to the stresses and strains already experienced - and being experienced by the victim. A number of agencies who work with victims are aware of the importance of belief in the reports of victims of crime (e.g., Crime Survivors; Victim Support).

In addition, evidence shows that high levels of anxiety and stress hinder cognitive function, divert attention, and reduces motivation; all vital for accurate memory retrieval (ABE, 2011). The phenomenon of flashbulb memories highlights the impact that emotion has on memory (Brown & Kulik, 1977), in which people report they can remember shocking emotional events vividly, with almost detailed perceptual clarity. Although laboratory studies have found anxiety can enhance memory, for both central and peripheral details (Ginet & Verkampt, 2007), a large body of the literature tends to confirm that it has damaging effects. Waring, Payne, Schacter and Kensinger (2010) found anxiety results in an automatic mood-congruent attentional bias towards threatening information, probably serving as an evolutionary response mechanism for survival (Öhman & Mineka, 2001). The consequence is a trade-off in memory in which memory enhancement for negative arousing stimuli is at the expense of neutral peripheral information (Kensinger, Garoff-Eaton & Schacter, 2006). Valentine and Mesout (2009) argue laboratory studies undermine the detrimental effects of anxiety on memory performance because of the difficulty in replicating the experience of real eyewitness anxiety. Results of their naturalistic study showed that 75% of participants who were below the median state anxiety score correctly identified the culprit. However, substantial impairments were found with those who scored above the median, with only 17% correctly identifying the culprit, as well as reporting significantly fewer correct descriptors overall. The varying results can be explained by Deffenbacher's (1994) catastrophe model of anxiety on memory performance, and the experimental differences in level of anxiety inducement. Deffenbacher (1994) termed lower anxiety conditions as having an arousal-mode of attention control. This refers to physiological responses, including slightly increased heart rate, blood pressure and skin conductance, allowing for alertness and responsiveness to the environment, orienting attention to the most informative



aspects of the scene. Conversely, high anxiety conditions are termed as having an activation-mode of attention control. Deffenbacher (1994) expands on the notion of the 'worry' component associated with anxiety, in that it results in a preoccupation of internal sensations and interfering negative thoughts about task performance (Clarke & Wells, 1995). The processing efficiency theory states that the attention to worry results in reduced cognitive resources available to allocate to the task at hand (Eysenck & Calvo, 1992). This response, along with a conscious perception of increased physiological activation, once the optimal point is passed, leads to a catastrophic drop in performance.

Research also shows even the mere presence of another individual is arousing enough to potentially impair memory performance (Wagstaff, Wheatcroft, *et al.* 2008). Kebbell, Hatton and Johnson (2004) also explain how the task that interviewers employ further affects performance. They propose cued recall can place increased demands on social-cognitive processing than free recall for anxious individuals. Performance may be impaired because rather than having mental capacity to choose whatever they find easiest to recall from memory, as in free recall, witnesses may feel the demands of the task change to satisfying the interviewer in cued recall; increasing arousal levels of stress and uncertainty. Therefore, although anxious individuals may compensate by allocating further resources to the task, there is only limited capacity available (Macleod & Matthews, 2004) which can result in anxious individuals potentially exhibiting poorer cued recall performance. Interestingly, research shows anxious arousal and negative affect largely consumes right hemisphere resources (Davidson, 1992). This could explain why Ready, Bothwell and Brigham (1997) found, when anxiety was induced, that CR was an ineffective technique for producing accurate factual memory in response to cued recall questions. Perhaps the experimental conditions (i.e., inducing high anxious arousal right hemisphere processing) did not

allow for beneficial executive left hemisphere processing. On balance, the research suggests some mixed findings in respect of CR and cued recall on memory performance in certain circumstances.

As noted earlier, because the ECI is a complex procedure which requires substantial training to learn and a long time to conduct many trained officers can end up avoiding the use of recommended procedures (Dando, Wilcock, & Milne, 2009) or favour some components as more useful than others irrespective of what the literature tells us about their effectiveness (Wheatcroft, Wagstaff, & Russell, 2013). In light of these limitations, and as part of the toolbox approach, the Liverpool Interview Protocol (LIP) has been developed (Wagstaff & Wheatcroft, 2012) by re-examining useful components (i.e., relaxation, context reinstatement [with report everything], and eye-closure, with a view to presenting them in a brief, easily understood format which is easy to learn and apply (Wheatcroft & Wagstaff, 2014). The LIP is thus a memory facilitation tool which is currently used across a range of investigatory departments (e.g., police investigators, governments and in critical contexts worldwide). As a result LIP has been positively received by investigators and researchers in terms of its ease of use and documented ability to enhance memory whilst reducing error rates (Wheatcroft & Wagstaff, 2014).

The success of such techniques lie in the cognitive effects of the processes applied; context reinstatement increases the likelihood of other memory details being cued, focused meditation calmly instructs witnesses to focus on breathing rhythms which reduces distraction and optimizes frontal and temporal processing (Wagstaff, Brunas-Wagstaff, Cole, & Wheatcroft, 2004; Wagstaff, Wheatcroft, *et al.*, 2008), whilst the option to close ones eyes, if one feels comfortable to do so, reduces visual interference and enhances visualisation (see Wagstaff, 1982; Wagstaff, *et al.*, 2004; and more recently, Perfect, *et al.*, 2008; Vredeveldt, Hitch, & Baddeley,

2011). The cognitive effects seem clear. Neuropsychological research explains that the process of relaxing the witness in particular reduces cognitive load and demands anxiety may place on executive and prefrontal lobe areas (Wagstaff, *et al.*, 2008), freeing systems for attentional tasks.

Advances have been made in methods of obtaining best information using investigative interviews. As the evidence can be mixed as to what is the most effective procedure, the toolbox approach holds most promise in this domain. LIP seems intuitively helpful for use with victim witnesses as they are likely to experience anxiety as a result of observing, being a victim of crime, and/or being asked to recall events via a standard interview procedure. It is also recognised that witnessing a crime can be psychologically and physically traumatic (Shepherd, Mortimer, Turner & Watson, 1999), that police interviews are unpleasant experiences involving probing tasks (Malone, Hoffman, & Bocchino, 2007) and testifying in court can be re-traumatizing (Wheatcroft, Wagstaff & Moran, 2009). Given that witnesses, in particular victim witnesses, continue to remain vulnerable in court this chapter will turn its attention to the leading issues and steps taken in consideration of those issues which affect victim witnesses in court.

### *Victim Witnesses and Court Processes*

*The context of legal process and court in the production of evidence and the leading issues affecting victim witnesses*

One key aspect of justice is the right of the defendant to confront the witness (Dennis, 2010) usually through means of a confrontation (i.e., challenge). The role of challenge is considered a central and defining feature of adversarial criminal trials (Lusty, 2002) and fundamental to the

concept of 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’ (Davis, 2008; p. 5). Further, the case of *Saidi v France* (1994) 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 (Dennis, 2010).

The right to a public trial and the principle of orality, as opposed to private depositions, assist in ensuring and improving the accuracy of testimony. In discussing the heart of the Anglo-American system Friedman (2004) notes that transparency ensures ‘the witness’s testimony is not the product of torture or milder forms of coercion and intimidation’ (p. 15) and that confidence in the administration of criminal justice is maintained. Lord Hewart CJ notably commented ‘that justice should not only be done, but should manifestly be seen to be done’ (*R v Sussex Justices*, 1924). In the modern day however that very transparency can impact on other parts of the judicial process and some argue, for example, that problems associated with the rise of social media have gone too far and thereby provided potential for conflict. To illustrate, concerns have been raised in the England and Wales (and NI) jurisdiction around juror access to the internet during trials to assess material (e.g., a defendant’s past history). Lord Chief Justice, Lord Judge was reported to have noted that ‘the jury system may not survive if it is undermined by social networking sites’ (BBC News, 2010). Furthermore, according to preliminary research led by Thomas (2013), almost a quarter of jurors (23%) are unclear about the rules surrounding internet use during a trial; thus, conditions for juror contempt were growing. Tensions can be seen to be rising between the principles of fairness and transparency and the ability of the modern system to maintain these aspects of justice. Legitimacy of verdicts could also be called

into question as quality of verdict are such that the state is entitled to call for its acceptance and respect, as an authoritative adjudication (Dennis, 2010).

Never before has the justice system been under so much scrutiny and pressure to consider the impact of procedures on those who are victims and, by definition, vulnerable (Wheatcroft *et al.*, 2009). Where the cross-examination of witnesses is concerned this is of note and some concern. The term confrontation conjures up images and meanings that surround terms such as, hostility, war, battle, fight, and so on. Dennis (2010) notes ‘puzzling features’ (p. 256) of this fundamental right, as whilst ‘there is acceptance on the right there is less consensus about its scope’ (p. 256). The claim to fair treatment is not unique to the defendant either; it applies to all - defendants, victims and witnesses alike. However, the foundation of challenge [rightly, author emphasis] remains but, subject to numerous limitations and exceptions, is a ‘shrinking right’ (Dennis, 2010). The concept of the right and its long and unquestioned application together with the appetite for procedural change has informed the range of special measures (i.e., processes and procedures to assist participants to give of their best evidence in court) available to vulnerable and intimidated witnesses, which now sit in stark opposition to that right (Dennis, 2010).

As a backdrop, in 1998 the Home Office introduced the ‘Speaking up for Justice Initiative’ (summarized in Burton, Evans & Sanders, 2006). The initiative attempted to make the criminal justice system more victim-centred with emphasis on the 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). It discussed more effective evidence collection through ABE interview procedures and video recorded evidence in chief which would be played in court. Protection for witnesses at court; such as, live TV links which means the witness could

provide evidence from a room separate to the courtroom, provision of screens or curtains which could be placed around the witness box to prevent the witness confronting the defendant, and clearing the gallery. The provision of social support through specially trained interviewers, pre-trial and trial support; and the moderation of adversarial conventions (court dress, use of intermediaries and video cross-examination). Such special measures were introduced under the Youth Justice and Criminal Evidence Act (YJCEA, 1999), 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 (Ewin, 2016).

In order to trigger a measure or for the individual concerned to be able to access the support it is first necessary to determine whether that individual is classified as vulnerable. In England & Wales (and NI) vulnerable witnesses are those who are under 18 years of age at the time of the hearing of the application for special measures; a mental disorder; significant impairment of intelligence and social functioning; a physical disability or a physical disorder. Further, if the quality of evidence is likely to be reduced because of fear of intimidation or distress in relation to giving evidence then the vulnerable and victim witness will be eligible for special measures to assist them in giving the best evidence possible.

Importantly, at what point vulnerability would be assessed and by whom has been raised by the Scottish Evidence and Procedure Review: Next Steps (2016) report. Whilst the age or the nature of offence is often clear, the report notes the capacity of police officers, as first responders or in interview, to reliably identify vulnerability may be problematic. Neither the police themselves are experts nor is the process of assessment a straightforward one. Thus, identification of vulnerability will be a more difficult task where the needs of the witness may not be immediately apparent or requires some professional expertise in recognising those needs

and how best to provide for them (for example, with a witness who has a mild learning disability or one who is on the autistic spectrum, respectively). Importantly, implications exist for those individuals to be enabled to participate in interviews and in the subsequent court proceedings where any vulnerability is missed. One key issue here is in the consideration of how the police can access appropriate information.

In 2016, in the England & Wales (and NI) jurisdiction, special measures have grown to include a major significant change; the attention given to communication through the use of aids and intermediaries (Plotnikoff & Woolfson, 2014). Registered intermediaries are available to vulnerable and/or intimidated witnesses to help victims, witnesses and defendants who find it difficult to understand questions and give answers. The intermediary assists the 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 (e.g., 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 the findings have shown there is little to fear from the intermediary system (Henderson, 2015). Nevertheless, whilst improvement and support for witnesses is ongoing, victim witnesses continue to suffer impediments in process when coming to court to give evidence.

As alluded to earlier, one significant part of giving evidence in court is the challenge process of cross-examination. Lawyers have controlled interactions with witnesses in the courtroom since the 1700s (Wheatcroft, 2016), but, of course, the mechanism of cross-examination is designed to break down dubious testimony and if it does then it is to be applauded. However, as early as 1907, research has demonstrated witness reliability drops when

witnesses answer questions applied during cross-examination (Munsterberg; see also Wheatcroft *et al.*, 2015 for a detailed review of the current position). Research has also shown that lay witnesses (Wheatcroft, Wagstaff & Kebbell, 2004), and experts (Gudjonsson, 1996; 2008) are vulnerable to cross-examination procedures. It is reasonable therefore to say that those classified as vulnerable are especially susceptible to the process of cross-examination. For example, research interviews conducted with rape victim witnesses found one theme emergent from the data was court re-victimisation (Wheatcroft, Wagstaff & Moran, 2009). Sally (anonymised) reflected on her courtroom experience and gave a brief account. She notes:

“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).”

Further, a girl aged nine who faced aggressive cross-examination says she has never recovered (The Independent, 2015). She describes her experience of being cross-examined over video link below:

“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.”

Frances Andrade, a talented violinist, took her own life after being called a liar and a fantasist in court by the barrister (The Guardian, 2013). It was reported the overdose was a way of the witness coping with the trial. Such cases illustrate the in-court process as very stressful for witnesses and highlight the need for the development and maintenance of *effective* support to assist witnesses in the giving of their best evidence (Wheatcroft, 2016b).

Despite the amendments to procedure and rule it remains that witnesses still find the cross-examination process arduous and stressful. In 2005 it was recognised by the English courts that witnesses in court face a difficult task and that such parties to court could be familiarised to the process. The method, endorsed in *R v Momodou* (2005), 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 (Wheatcroft & Ellison, 2012). The advice is essentially 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. As Riding (1999) notes, witness services 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 (Ellison & Wheatcroft, 2010).

At that time, little research had empirically considered the effects of preparing witnesses for cross-examination. In order to explore the utility of witness familiarisation Wheatcroft and Woods (2010) conducted an initial study focused upon short familiarisation statements and leading question style effects upon witness accuracy and confidence. The findings revealed that directive leading questioning styles, as used in cross-examination (e.g., ‘He didn’t touch you did he?’) had clear detrimental effects upon witness accuracy. Nevertheless, 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 to assess familiarisation to complex and simple cross-examination questioning strategies. One group of community participants received preparation whilst another group received no preparation. Initial analysis showed that those who received familiarisation gave more accurate responses, made fewer errors, and enabled to seek clarifications from the cross examining lawyer. Further analysis revealed that familiarisation to certain question types found increased accuracy and reduced errors to multiple-parts, and reduced errors made in response to negatives, 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 (Wheatcroft & Ellison, 2012).

The findings nevertheless lend initial support to those who assert that witness preparation is essential for the improvement of witness evidence in court. However, as familiarisation is in its infancy and complex reflection on the permissibility of directive leading questions during cross-examination in court could well be warranted (Wheatcroft & Woods, 2010). Moreover, Scotland's most senior judge, Lord Justice Clerk, Lord Carloway, has warned judges must step in to protect complaining witnesses from ‘protracted or vexatious questioning’ from counsel who

insult alleged rape victims during cross-examination (Herald Scotland, 2015). The comment in part was made as an advocate had begun cross-examination with the opening line; ‘You are a wicked, deceitful, malicious, vindictive, liar?’ (see *R v Begg*, 2015). For examples of convoluted questions used in actual criminal trials see Fielding (2006) who author 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).

It could be argued that tinkering with the process to assist witnesses in abilities to cope with cross-examination techniques would be alleviated more readily by dealing with the root of the difficulty; the question types and forms themselves. A recently published paper outlines in detail the empirical research which strongly suggests 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 victim witnesses the authors put that the question form shown to create the primary mischief in meeting trial goals is that which is directive; its prohibition in cross-examination is proposed (Wheatcroft, Caruso & Krumrey-Quinn, 2015). The work also draws attention to the idea that there is no right to put a case to a witness in child cases. In the beginning of this section of the chapter the right to challenge was noted as the central and defining feature of adversarial criminal trials (Lusty, 2002). The concept is now tested as a number of cases in England and Wales have supported the idea that children in particular require additional support (see *R v Dixon*, 2013 and *R v Lubemba*, 2014). Indeed, the debate 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 (Henderson, 2015), and that leading questions may not even be a suitable

and proper means of challenging robust adult witness accounts (Wheatcroft, Wagstaff & Kebbell, 2004; Cooper *et al.*, 2015).

*Importance of issues and new directions in criminal justice*

In respect of investigative interviews, Kebbell *et al.*, (1996) asked how often eyewitnesses provide the major leads in investigations, 36% stated 'always/almost always' and 51% responded 'usually'. It is critical for justice that when victim witnesses are interviewed that the most accurate information is enabled. Getting the information right as soon after the event as possible is a leading and significant issue that underpins criminal justice. Methods of investigation, and in particular those of interviews, are paramount in the production of the most accurate reports available. Rationalization through austerity cuts is likely to play a significant role in the development of future pressures on investigative authorities worldwide and will necessarily impact on the quality of procedure and effective support. The tool-belt approach and shorter but effective protocols, such as the LIP, are likely to be in greater demand over the coming years.

It has been recognised that support is important for some when being interviewed by investigators. The use of intermediaries in police interviews and in court has showed promise. However, it is essential to ensure that any joint investigative interview is consistently of a high standard, and follows a methodology that produces the best possible outcome in terms both of the witness' experience and the quality of the evidence elicited (Evidence & Procedure Review: Next Steps, 2016). There are issues to address in respect of joint investigative interviews. For example, the appropriateness of investigators in the assessment of vulnerability (age, mental capacity and so on) and the welfare of victim witnesses (including emotional health). Similar issues align themselves to the court process. In addition, the prevention of further offences taking

place, such as intimidation, may be tackled is also important. The balance between the right to challenge and the right of the victim witness to speak honestly and openly without fear of the investigative 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.

There has also been considerable interest shown, for example, in the Norwegian Barnehus model in terms of the environment in which vulnerable witnesses provide evidence, in particular, child witnesses. The concept of a purpose-built multi-agency centre which provides a 'wraparound' service seems highly attractive. In the words of one English commentator there is a strong argument for: *"...the establishment of Young Witness Advocacy Centres, where children and young people between 4 and 18 years and their families would have a wraparound support pathway from identification of the crime to the post-trial period. Specialist key workers would operate from a single child-centred hub, alongside multi-agency professionals including the CPS, police, social care, intermediaries and therapists, coordinating individual support plans. The Centres would be equipped with the technology for pre-trial cross-examination, and trial testimony through remote live link. The notable success of the one-stop Norwegian Children's Houses in reducing secondary traumatisation for children makes a powerful case for its translation into the English CJS. Other aspects of the Norwegian system, such as forensic medical examination suites and on-going family therapy, should be considered"* (Hoyano, 2015). Specialist centres with multi-disciplinary teams seem a more efficient way of engagement with and management of some of these issues.

### *Summary Conclusion*

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’ (p. xiii; 2016). As such, serious reconsideration of how justice systems treat vulnerable (and victim) witnesses in the criminal justice process has been one which has been talked about in the England and Wales (and NI) jurisdiction since around 1988. New approaches to obtaining information from interviews and special measures for those classed vulnerable have been introduced and found to be helpful. However, more needs to be done both in the investigative interview approach and to processes in court to assist the aim of investigation and trial. Some of these are to rethink the ways in which we obtain information, the environment, and how a society positions oneself when speaking with and questioning victims and witnesses in the legal process in order that they may provide the most accurate information, intelligence and evidence possible. Only then will adversarial justice systems around the world enable the aim of the investigation and trial procedure to be met; the search for truth is fulfilled.

### *Discussion Questions*

1. Discuss issues relevant to victim witnesses in police interviews
2. Consider the impact of court process on victim witnesses
3. Evaluate victim witnesses with reference to interview and cross-examination questioning
4. Assess the relevance and usefulness of special measures for vulnerable witnesses

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