

A short paper for the 3rd IARS International Annual Conference: “A victim-led criminal justice system?” 19-20th November 2014 9am–5pm

Vulnerable witnesses – dignity and respect¹.

By Felicity Gerry QC²

“A review of aggressive courtroom cross-examination of vulnerable victims in England and Wales is to be launched. Justice Minister Damian Green cited a recent child prostitution case in which one victim was cross-examined for 12 days by seven defence barristers. He said work would be carried out over the summer to find ways to curb hostile practices after cases where witnesses were left “deeply traumatised”. Victim Support said the justice system often overlooked the victim. Mr Green said vulnerable victims currently often faced reliving the “most horrific experience they have ever had”, sometimes for days on end, when cross-examined in court....The growing number of cases where victims report being left deeply traumatised by aggressive cross-examination from multiple defence barristers mean that questions must be asked.....I have ordered an investigation into how we might reduce the

¹ Taken in part from an article by Felicity Gerry QC and Jonathan Wheeler for APIL Magazine.

² **Felicity Gerry QC** was appointed Queen’s Counsel in 2014 after 20 years at the criminal Bar in England and Wales. She has been recognised in the Legal 500 as a “Fearless and effective advocate” and “Tenacious in court” and “An expert in the field of sex offences” and in Chambers and Partners as “A vastly experienced advocate noted for her expertise in serious sexual offences, homicides and complex frauds. Commentators note her bold style of advocacy and her skill in dealing with young and vulnerable defendants. At the independent Bar, Felicity has prosecuted and defended in numerous cases involving major, serious and complex crime, often with an international element. This has included cross-jurisdictional rape, murder by foreign nationals involving evidence obtained from abroad, conspiracy to import illegal immigrants and international fraud. Her significant trial and appellate experience has also led to an expertise in online offending in the context of online abuse and exploitation, money laundering and online fraud. She has, for example, used data and metadata as evidence in criminal cases. She is co-author of The Sexual Offences Handbook that sets out all the English law, practice and procedure from 1957 to date in this difficult field of law and has a dedicated chapter on indecent images and obscene publications. She regularly publishes in the broadsheet and legal press as well as peer reviewed papers and is on the Management Committee for The Advocates Gateway that produces the toolkits for advocacy involving the vulnerable. Since 2013, Felicity has also held a research active post at Charles Darwin University, Australia, focussing on data and rights, particularly in the context of violence against women and girls and the rule of law online. She lectures in crime, evidence, torts and practical advocacy and is Chair of the Research and Research Training Committee in the School of Law at Charles Darwin University. She specialises in vulnerable offenders including women and speaks regularly on gender equality issues including chairing the G20 televised section of the gender equality summit. She recently published a paper in Computer Law and Security on the rule of law online and is currently reporting for ILRS of the ABA on the draft Cyber Law for Cambodia.

distress caused to victims without compromising the fundamental right to a fair trial."

BBC News June 2013

The NSPCC has launched a campaign to protect child witnesses in cases where they have alleged they are the victim of abuse.³ The charity cites examples of advocacy which did not apply expected good practice and it makes for grim reading. One mother, Erica, says that the barristers for both prosecution and defence were so insensitive in their questioning that one day in the witness box destroyed her children's self-confidence which took years to re-build. Concern has been expressed that the presiding judge must have taken the view that there was nothing wrong with this and did not step in. Such examples are being used as part of a campaign to demand better treatment of child witnesses. The same issues have been raised by a few practitioners for a long time and are now, finally, being heard by the judiciary. It is vital that witnesses in all proceedings are supported to be able to give their best evidence.

The suicide of Frances Andrade in February 2013 was a wake-up call for everyone in the criminal justice system which many perceived had failed her abysmally. Having just finished giving evidence against Michael Brewer at his criminal trial, whom she accused of abusing her when she was a child, Frances took an overdose of prescription drugs and died 3 days later. She didn't live to see Brewer convicted of offences against her. In cross examination, Brewer's counsel had put his instructions that Frances was a liar and a fantasist. She had texted a friend after her ordeal in court saying that the experience made her feel like she had been "raped all over again". Frances had a known history of mental health problems, and her treatment as a victim of crime is not uncommon. It is also not necessarily unlawful but is it good practice? Traditionally, witnesses are required to relive their traumatic experiences in the unfamiliar, very formal and sometimes hostile environment of a court room. An analysis of the cross examination shows no irrelevant questioning. Arguably the issue there was the facilities and support but in other cases it is the approach of the whole process.

Courts are also daunting and unfriendly places, where very personal issues, often traumatic to the individual concerned, are ventilated in a similar way. Advocates and the judiciary in criminal cases are changing the way they practice to recognise that it is incumbent on a system of justice to protect the vulnerable and disadvantaged. Research as set out by The

³ http://www.nspcc.org.uk/news-and-views/our-campaigns/current-campaigns/young-witnesses/order-in-court_wda102903.html

Advocate's Gateway⁴ has demonstrated that trials involving vulnerable witnesses and suspects need to be approached in a developmentally appropriate and effective way by all parties and the judiciary. This applies throughout the trial in any justice system. Proper presentation of cases involving vulnerable people involves the provisions of special measures which might include; picture boards for witnesses with limited communication; or signers for deaf defendants; or pre-recorded video interviews for children giving evidence.

I prosecuted a recent child rape trial at Lincoln Crown Court which was held to be fair where the child did not come to court at all⁵. Evidence of pre-recorded video and audio was admitted along with drawings and writings by the child which gave ample scope for comment. The only real issue was whether mother had put her up to concoct a false story and mother was available for cross examination. Leave to appeal was refused and the conviction stands largely because there was ample supporting evidence which demonstrates the need for a quality investigation although this paper will focus on in-court advocacy.

There is no need to shout. Good prosecutors effectively mother their witnesses through the system and effective defence advocates can disarm a witness with kindness. Thus balance and fairness is maintained without loss of dignity or respect.

On a practical level, the use of intermediaries and of pre-recorded oral evidence, for example, can enable vulnerable witnesses to participate in the hearing in a manner that best meets their needs by ensuring that the evidence they give is the best evidence achievable. Inconsistencies can be agreed on paper and the jury can receive proper directions on the law on how to approach statements made out of court. Training in this area, of both judges and advocates, is vital. If everyone does their job properly, judges need not intervene at all. Several of us at The Advocate's Gateway have pioneered the sensitive approach to be taken, particularly in cases involving sexual offending. A well prepared examination in chief or cross examination can effectively challenge the evidence of a witness and show it to be wrong without the witness having to be bullied or humiliated by the experience. It can be done with dignity and respect, whether the witness is the alleged victim or the accused.

The approach to such cases needs to be balanced and collaborative. It is not a lawyer bashing exercise nor is it an opportunity for judges to become autocratic or enter the arena. It really is time to recognise that people with vulnerabilities and disabilities can be assisted to fully

⁴ www.theadvocatesgateway.org

⁵ <http://www.bbc.com/news/uk-england-lincolnshire-20594179>

participate in the trial process without in any way compromising the effectiveness of the advocate.

The old fashioned adversarial approach is based on historic rules of competence. Calling evidence from women and children and other vulnerable witnesses was believed to be inherently dangerous⁶. Corroboration was required and judges routinely warned juries that such testimony was unreliable. The modern approach recognises research that, given the right assistance, witnesses can be questioned and cross questioned without unnecessary trauma in a balanced way that allows for a fair hearing for all concerned.

This has been recognised and is being applied in criminal and family cases and the civil courts will have to follow suit. Many psychiatrists believe that the stress and trauma of the litigation process can prolong or exacerbate the psychological symptoms with which witnesses suffer. The justice system, must be robust to root out the incredible and improper and malicious but it need not be abusive to those who participate in it.

Interestingly, by November 2015, EU member states will need to have demonstrated that they have modified their domestic laws to give effect to the Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime by adopting various means, combining legislative, administrative and practical measures, and taking into account good practices in the field of assistance and protection for victims. To begin to understand how this might interest civil practitioners, it is worth noting that, for the purpose of the directive, a victim is defined as follows:

- a natural person who has suffered harm (including physical, mental or emotional harm or economic loss) directly caused by a criminal offence — regardless of whether an offender is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between them (see Recital 19).
- family members of the deceased victim, who have suffered harm because of person's the death directly caused by a criminal offence (paragraph 1(a)(ii)). The criterion 'harm' should be interpreted in the context of the individual emotional relationship

⁶ *R v Brasier* (1779) 1 Leach 199; 169 ER 202

and/or direct material inter-dependence between the deceased victim and the relative(s) concerned.

Victims and defendants may be vulnerable. This needs to be recognised and our processes adapted to accommodate them to deliver a fair result. The Interim Report of the Children and Vulnerable Witnesses Working Group, set up by Sir James Munby, President of the Family Division was published in August 2014. It draws on the experience of the Advocacy Training Council after a decade's research into the treatment of vulnerable witnesses in criminal cases. There are 20 recommendations, largely taken from the toolkits prepared and published by the Advocate's Gateway. The toolkits demonstrate that a sensitive approach does not inhibit cross examination and fair trials are perfectly achievable.

A pilot scheme which allows vulnerable witness's cross-examination to be pre-recorded⁷ is running in three crown courts – Kingston, Leeds and Liverpool. The judges are 'vetting' the cross-examination questions before they are put. Subject to a positive evaluation, the Justice Minister has pledged to roll out the scheme for child witnesses throughout England and Wales.⁸ In addition, the Ministry of Justice has announced that by March 2015 it will devise a requirement that publicly funded criminal advocates undergo specialist vulnerable witness training before being allowed to take on sexual assault and rape cases.⁹

The approach to vulnerable witnesses requires training for judges and advocates communicating with children and other vulnerable witnesses, increased support for such witnesses and the more effective and efficient use of court time. The practical application of the work of the Advocacy Training Council is already underway in the form of the toolkits prepared by *The Advocates' Gateway* in both criminal and family proceedings and procedures that recognise the more modern approach including:

- i. Improved practice directions and court rules on special measures for vulnerable witnesses.

⁷ Section 28, Youth Justice and Criminal Evidence Act 1999

⁸ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/354723/commitment-to-victims.pdf

⁹ Ibid

- ii.** Recognising that vulnerable witness can cover suspects as well as witnesses (on either side).
- iii.** Early consideration on how best to provide for the participation and support of vulnerable witnesses so that he or she can be supported and assisted to give best evidence.
- iv.** Recognising vulnerability in order to make provision for such support, special measures or other assistance they may need to properly and fully participate in the proceedings and to give best evidence;

Implementation will inevitably be by training although there is concern that the current proposed QASA will not achieve what is really required in this field, particularly since the judges also need the training. The slow process of improvement in the criminal courts has been as a result of the efforts of a few practitioners. The effect of the EU Directive will make that process imperative and those who are out of step will need to adapt and adapt soon. It is a brave new world and we all need to engage with and be a part of a future that ensures vulnerable people in justice systems are treated with dignity and respect.