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VULNERABLE WITNESSES

RIGHTS AND RESPONSIBILITIES

Sue Moody
Director Victim Information and Advice
Crown Office and Procurator Fiscal Service

This paper expresses my own views and should not be taken as a statement of the views of Crown Office and Procurator Fiscal Service. Any errors are also my responsibility alone.

Vulnerable and Intimidated Witnesses: Rights and Responsibilities

Introduction

Witnesses make a vital contribution to many criminal cases. Their role is particularly significant in Anglo-American legal systems where the focus of trial proceedings is on oral evidence (*Egglestone* 1978). Witnesses' accounts in court can be a decisive factor in determining the outcome of a case. Increasingly, inquisitorial systems are also relying on oral evidence from witnesses, as is clear from the line of cases regarding witnesses that have been referred to the European Court of Human Rights.

The role of the witness can be a demanding and stressful one. Research in a variety of jurisdictions has demonstrated that witnesses seldom find giving evidence a positive experience (*Rock* 1993; *Stafford and Asquith* 1992; *Goodman et al.* 1992). They may not know what is expected of them and most are unlikely to find the laws of evidence and procedure easy to understand. Some may complain of aggressive and intensive cross-examination. They may have to wait for long periods in uncongenial surroundings and they may have little guidance about what is likely to happen or explanations for the decisions and outcome in their case. Reluctant witnesses, who may have genuine reasons for fearing retaliation if they give evidence, are not infrequently treated as recalcitrant and penalised accordingly (*Fyfe and McKay* 2000).

In spite of these difficulties, the position of witnesses in most jurisdictions revolves around responsibilities rather than rights (*Mackarel et al.* 2001). For instance, in Scotland at the present time witnesses must give statements to the police when asked to do so. In serious cases they must agree to be interviewed by the prosecutor and in all cases they must allow the defence to interview them (*Monson* 1893).¹ They must give their names and addresses even in circumstances where they would prefer to remain anonymous because of fear of intimidation. In addition, they must make themselves available to be examined and cross-examined in court, regardless of whether the date, location and mode of giving evidence is suitable for them. The requirement to comply with a witness citation to appear in court in a serious case has

¹ See sections 155 and 291 of the Criminal Procedure (Scotland) Act 1995.

been strengthened in Scotland by recent provisions, which permit a warrant for the witness's arrest to be issued in such cases.²

Some recognition, however, has been given to the problems faced by certain witnesses in giving evidence. For example, the Council of Europe has acknowledged the needs of intimidated witnesses, particularly in cases of organised crime or crime against the family, in a wide-ranging Recommendation on the Intimidation of Witnesses and the Rights of the Defence (*Council of Europe* 1997). In Scotland, alternative ways of giving evidence (using what are called "special measures") have been available to children since 1990. Children (defined as those under 16 years old) may, in any criminal case, give their evidence from behind a screen, by CCTV, or by means of a commissioner, subject to judicial approval. In 1997, this legislation was extended to include a limited range of vulnerable adults, namely those with certifiable mental illnesses or with severe learning disabilities.³ A complete revision of this area took place between 1998 and 2003, involving an extensive consultation exercise with interested parties (*Scottish Office* 1998; *Scottish Office* 2002) and culminating in the Vulnerable Witnesses (Scotland) Act 2004.

This paper examines four key issues associated with provisions permitting vulnerable witnesses to give their evidence in non-conventional ways, drawing particularly on the recent Scottish legislation. The issues are:

- a) the determination of eligibility for special measures;
- b) the compatibility of special measures for vulnerable witnesses with the rights of the accused;
- c) the role of the judiciary in ensuring successful implementation of special measures;
- d) the advantages and disadvantages for witnesses in giving evidence using special measures.

² Under Section 90A of the Criminal Procedure (Amendment) (Scotland) Act 2004.

³ Under Section 271A of the Criminal Procedure (Scotland) Act 1995.

The focus of this paper is on adult vulnerable witnesses in criminal cases. The application of special measures to them appears to be more problematic and open to greater legal challenge than in the more established case of child witnesses. The paper concentrates on provisions directly concerned with the giving of evidence at a trial, while acknowledging that other measures, such as clearing the court or arranging for support before the trial, may be equally important for the witness (*Reid Howie 2002; Ellison 2001*).

Eligibility for Special Measures

Eligibility for special measures is clearly a key aspect of any protective legislation. Initially in most adversarial systems only child witnesses were permitted to depart from the usual mode of giving evidence, with all other witnesses required to be physically present in the courtroom, standing in the witness box and able to see and be seen by the accused. Over time a much broader definition of eligibility has been adopted, encompassing the witness's personal characteristics, vulnerability arising from the nature or circumstances of the offence and the exposure of the witness to intimidation as the result of giving evidence.

A recent review of provisions for vulnerable witnesses in a variety of jurisdictions notes that the term 'vulnerable witness' is used "to identify those witnesses who, for a range of reasons, face particular barriers to giving evidence ... it is the *process* itself which renders them 'vulnerable' "(*Reid Howie 2002*). This definition is to be welcomed, as it emphasises the responsibility of the legal system to adjust its practices and procedures to suit witnesses' different circumstances and acknowledges the distress and trauma that giving evidence may cause to certain witnesses. A more flexible approach should also enable witnesses to give evidence who otherwise might not be able to do so or who would be unable to provide comprehensive, accurate accounts under the normal conventions. Research undertaken in England and Wales in the 1990s demonstrated that witnesses whose vulnerability stemmed from

personal characteristics (for example, learning disabilities) were often excluded from the criminal justice process since their evidence was regarded as unreliable or difficult to obtain (*Sanders et al.* 1996). This discriminatory approach contrasted with the pressure put on other witnesses to give evidence, regardless of their obvious reluctance or distress.

The Scottish and English statutes adopt a broadly similar approach to eligibility for special measures.⁴ In both jurisdictions, it is not sufficient to show that the witness is likely to experience distress by giving evidence in the conventional way. An application for special measures must also demonstrate that “there is a substantial risk that the quality of the evidence [to be given by that witness] will be diminished by reason of mental disorder...fear or distress in connection with giving evidence at the trial”.⁵ The quality of evidence is defined as referring to the completeness, coherence and accuracy of evidence given by the witness. Both statutory definitions seek to avoid rigid categorisation and exclusive lists of eligibility criteria. Instead, trial judges are given guidance in the legislation about the kinds of factors that may make a witness vulnerable and therefore eligible for consideration as to special measures. These fall roughly into the three groups already indicated, namely personal characteristics⁶, offence-related issues⁷ and intimidation concerns⁸. The Scots list is the broader of the two, since it includes the relationship between the witness and the accused. There is also a provision in each statute that allows for witnesses to be included who do not come within the categories listed.

In both jurisdictions (and in others such as New South Wales and Queensland), the aim of such a broad definition is to create eligibility that is inclusive and therefore likely to afford access to special measures when the witness requires them (*Reid Howie* 2002). However, there are difficulties about this approach. Traditionally, adult witnesses have always given their evidence in the courtroom with the accused physically present and able to see them. Prosecution, defence and the judiciary tend, not surprisingly, to prefer this approach. It accords with their view of ‘best evidence’, does not require any pre-trial applications or reports and is not dependent on the use of equipment which may not be available or may fail ‘on the day’. This view persists

⁴ Under Sections 16 and 17 of the Youth Justice and Criminal Evidence Act 1999 and Section 271 of the Vulnerable Witnesses (Scotland) Act 2004.

⁵ Section 271 (1) of the Vulnerable Witnesses (Scotland) Act 2004.

⁶ Age and maturity, social and cultural background and ethnic origins, sexual orientation, domestic and employment circumstances, religious beliefs or political opinions, physical disability or physical impairment.

⁷ Nature of the offence, nature of the evidence, relationship with the accused.

⁸ Including not only behaviour by the accused but also by his or her family and associates or any other accused or witness in the same proceedings.

amongst some legal practitioners, in spite of the fact that robust and rigorous research in many jurisdictions has demonstrated that conventional methods of giving evidence have severe limitations and can be counter-productive as a means of eliciting accurate, complete and coherent testimony from certain witnesses (*Ellison 2001*). Legislative provisions that are permissive rather than mandatory may be unlikely, therefore, to encourage significant cultural change in a profession noted for its caution and adherence to the traditions of its craft. In the United Kingdom only very limited use was made of special measures in the case of child witnesses when such measures were merely permissive. Recent research in England and Wales suggests that this is likely to be the case in relation to adult witnesses also (*Home Office 2004*).

A key concern raised by agencies working with vulnerable adult witnesses is the impact on witnesses of not knowing how they will give their evidence. While the new arrangements should mean that this issue will be determined some time before the trial applications for special measures in the case of vulnerable adults are not automatic⁹ and the other party must have the opportunity to challenge the proposed use of special measures. This may add yet another uncertainty into an already complex process for witnesses, leading to heightened anxiety.

In England, complainants in sexual offences are now presumed to be vulnerable and will therefore automatically be entitled to special measures unless they wish to give their evidence in the usual manner. It is submitted that this is appropriate and desirable given the intimate, private nature of their evidence and the wealth of research evidence highlighting the particular difficulties faced by complainants in such cases (*Temkin 2002; Lees 2002*). The Scottish legislation, on the other hand, does not include any such presumptions, in spite of the fact that the much publicised cases highlighted in the Scottish Parliament's debates on the Vulnerable Witnesses Bill all concerned complainants in sexual offences. The opportunity to provide such complainants with automatic protection and to introduce certainty into the procedures from the outset was therefore missed. While it may be that other means might be found to facilitate most complainants in sexual offence cases in Scotland giving their evidence by special measures if they desire to do so (perhaps through guidance from the judiciary or a policy decision by the prosecution) an explicit statutory right would, I consider, have been preferable.

⁹ Except in relation to complainants in sexual offences and subject to the witness's consent- see Section 17(4) of the Youth Justice and Criminal Evidence Act 1999.

The Rights of the Accused

The United Kingdom is required to pay particular attention to the terms of Article 6(3)(d) of the European Convention of Human Rights, which states that the accused has a right “to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him”.

Decisions of the European Court of Human Rights and recent English House of Lords and Privy Council opinions provide useful clarification of this right.¹⁰ Before any trial, all witnesses must, except in very limited circumstances, be identified (*Kostovski* 1990; *Baegen* 1995; *van Mechelen* 1998). The accused’s legal representative must have access to statements witnesses have made, with only restricted opportunity for redaction by the prosecution (*Holland* 2005). The defence must have the opportunity to test out the credibility and veracity of the witness (*D* 2005). However, the decisions do not require the witness to be physically present in the courtroom with the accused (*Doorson* 1996). Neither do they prevent the witness from having a supporter present with them wherever and however they give their evidence.

There are uncertainties that remain in spite of these decisions. In Scotland, these include the use of evidence on commission¹¹, which remains largely unknown territory, the format for introducing prior statements, and the identity of a supporter. Nevertheless, in spite of these “grey” areas, and the fact that Article 6 gives witnesses no rights in relation to trial proceedings¹², it appears that special measures are compatible with the European Convention on Human Rights. The Scottish legislation may, in particular, offer a robust affirmation of the right to a fair trial as the accused is also entitled to make application for special measures.¹³

Recent English cases suggest that the legislative provisions there concerning vulnerable witnesses can withstand ECHR challenges. For instance, in *Brown* the Court of Appeal decided that there was no prejudice to the accused where special

¹⁰ Scottish criminal courts are not bound to follow House of Lords decisions but they will be persuasive in relevant cases.

¹¹ Evidence on commission requires the appointment of a commissioner by the court to question the witness. His or her examination of the child has to be recorded on video and witnessed by the accused or their legal representative.

¹² Although witnesses do have rights under Articles 2, 3, 5 and 8, according to ECHR cases. See *Baegen* 1995; *Doorson* 1996 and the article by de Than 2003.

¹³ Under 271F of the Vulnerable Witnesses (Scotland) Act 2004.

measures were only used by three of four witnesses speaking to the same set of circumstances. It was held that the trial judge had directed the jury appropriately on the use of the particular special measure (a screen that prevented the witness from seeing or being seen by the accused) and therefore no adverse inference could be drawn on the basis of his direction in the case.

A recent House of Lords case deals at some length with the degree to which special measures (under the Youth Justice and Criminal Evidence Act) are compatible with Article 6 (*D* 2005). While the case is concerned with child witnesses, some of their Lordships' remarks can be applied to vulnerable witnesses more generally. For example, Lord Rodger, a Scottish Law Lord, sees special measures not as a radical departure from conventional practices but rather as "examples of modifications [to the trial process] which have been made possible by advances in technology" and considers that "there is no reason to suppose that today's norm represents the ultimate state of perfection or that the procedures will not evolve further, as technology advances" (*D*, 2005 at para 9).

This case summarises the key decisions in a line of ECHR case law between 1986 and 1997. (*Unterpertinger* 1991; *Kostovski* 1990; *Doorson* 1996; *van Mechelen* 1998). According to these cases, the defence generally has a right to know the witness's identity and should always be able to assess his or her reliability. However, provided the defence is able to challenge and question the witness, the requirements of the Convention may be satisfied, regardless of the stage at which such questioning takes place. The witness need not be physically present in the courtroom during the trial nor be subject to cross-examination at trial proceedings. Thus, evidence obtained at the pre-trial stage from a witness can be used at the trial provided that the defence had an adequate and proper opportunity to challenge and question the witness, either at the time the witness was making the statement or at some later stage in the proceedings (*Kostovski* 447-8 para 41). Lord Rodger did note that the Sixth Amendment of the U.S. Constitution guarantees the right of an accused "to be confronted with the witnesses against him", making cross-examination "under the very gaze of the accused" an essential part of the protection. However, English case law (*Smellie* 1919) and several European Commission of Human Rights decisions (*Hols* 1996¹⁴,

¹⁴ where the witness gave evidence away from the courtroom with both counsel present while the judge and the accused remained in the courtroom but were linked to the witness by a live TV link.

SW 2002¹⁵) confirm that the accused need not be physically present when a witness is giving evidence or is being questioned on that evidence by the defence.

A further challenge was made in the *D* case that there had been a violation of the right to equality of arms, given that the English legislation does not include the accused as a potentially vulnerable witness. This was dismissed, partly on the basis of the court's inherent jurisdiction to make an order in relation to an accused and also because the accused does not need to give evidence and has a legal representative to assist him or her. However, I consider that the Scottish legislation, by extending some special measures to include vulnerable accused, is in a stronger position to rebut any challenge under the right to equality of arms. In discussions on the new provisions lawyers representing accused in Scotland considered that many of their clients would be eligible for special measures and welcomed the opportunity afforded to vulnerable accused to give evidence in alternative ways.¹⁶

Judicial Management of Vulnerable Witness Applications

A key aspect of successful implementation requires judges to ensure that both the spirit and the letter of legislation concerning vulnerable witnesses be embedded in the criminal process. Traditionally, the judiciary in the United Kingdom has left case management in the hands of the parties and of court officials. Judges have been unwilling to take a more managerial, directive stance and have adopted a non-interventionist, reactive approach. However, this is changing in the face of public criticism about perceived inefficiencies in the criminal justice process and the need to deal with the increasing volume of serious crime more effectively. In relation to child witnesses, for instance, judges in Scotland must ensure that where applications for special measures are not made the reasons are given and the judge has to be satisfied in each case that this is in the best interests of the child.¹⁷ While there is no such requirement in relation to vulnerable adult witnesses the court has the power to authorise the use of special measures of its own motion where it appears to the court that a person who is giving or is to give evidence is a vulnerable witness (section 271 D).¹⁸ This provision would appear to imply that the court has an obligation to consider whether any adult witness may be vulnerable, even where no application for

¹⁵ where a video recording of a police interview with the witness and a subsequent audio recording involving questions from the accused's counsel put by the same police officer were both used as evidence.

¹⁶ See also *T v U.K.*; *V v U.K.* [2000] Crim. L R. 187 where the issue of the rights of vulnerable accused was considered by the European Court of Human Rights.

¹⁷ Under Section 271 A(5)(6)(ii) of the Vulnerable Witnesses (Scotland) Act 2004.

¹⁸ Under Section 271D.

special measures has been made by prosecution or defence. It is conceivable that a challenge could be mounted under Articles 3,5, or 8 of the ECHR where no application was made in relation to a witness who appeared to fall within the eligibility criteria.¹⁹

The Impact of Special Measures on Witnesses

In Scotland, it is too early to measure the impact of the provisions in the Vulnerable Witnesses (Scotland) Act 2004. It is being phased in from April 2005, beginning with child witnesses in serious cases. However, similar (though not identical) provisions contained in the English Youth Justice and Criminal Evidence Act 1999 have been evaluated. A report published by the Home Office suggests that special measures are seen as a positive improvement, at least in the eyes of the witnesses (*Home Office* 2004). However, the main beneficiaries appear to have been child witnesses, rather than vulnerable adults. Not all of the special measures were in place when the evaluation was undertaken and suitable equipment was not available in all courts. In addition, a qualitative study of child witnesses in serious case suggests that some children still find the experience of giving evidence very stressful. They perceive a lack of consideration and a fragmented approach to support and information on the part of criminal justice agencies (*Plotnikoff* 2004).

Apart from the benefits to the witness while giving evidence the use of special measures, particularly video-recordings of evidence in court (in the form of a prior statement), appears to have an impact on the likelihood and timing of a guilty plea. It is difficult to single out the use of video-taped evidence as the decisive factor because of other changes which undoubtedly have had an impact, such as better management of cases by judges, reductions to sentences following an early plea of guilty and a more streamlined approach by the prosecution. However, research on the outcome of criminal cases seems to support the contention that video-tapes of the witness's statements (which are disclosed to the defence in advance) may well be one of the key factors in bringing about an early guilty plea (*Hoyano* 2000; *Dawson and Dinovitzer* 2001).

Are there any potential disadvantages in special measures? The fundamental concern about "best evidence" seems to have evaporated in the face of decisions upholding the

¹⁹ See also *X and Y v Netherlands* 1985; *Doorson* 1996.

use of special measures. However, some lawyers still hold strongly to the view that their inability to examine and cross-examine witnesses in a conventional court setting is damaging. On the prosecution side, it is felt by some that juries will be less receptive to witnesses who give their evidence using special measures and by a few that those witnesses who show obvious signs of distress while giving evidence in front of the jury may be considered more credible (*Reid Howie* 2002, 50-52). From the defence point of view, special measures may mean that prosecution witnesses are less likely to crack during cross-examination (*Ellison* 2001).

One concern that has been raised, particularly by prosecutors, is the possibility that the disclosure of a witness's vulnerability, specifically where such vulnerability relates to a personal characteristic of the witness, may prejudice that person's credibility. For example, the witness may be alcohol or drug dependent, or may suffer from a personality disorder. Such factors may quite legitimately bring the witness within the scope of the Scottish legislation since the mood swings and paranoia that may be associated with such vulnerabilities may lead to fear or distress in giving evidence, affecting the quality of that evidence. However, the disclosure of such vulnerabilities could, it is claimed, be used by the defence to undermine the witness's credibility.²⁰ Issues around the witness's right to privacy may also be significant. In all cases the wishes of the vulnerable witness must be taken into account but are not decisive. Witnesses may be concerned about the disclosure of personal matters and may prefer to forego the possibility of using special measures rather than expose themselves to attacks by the defence on the basis of their vulnerability.

Conclusion

The use of special measures to assist vulnerable adult witnesses in giving their evidence is a positive development and one that can be successfully implemented without compromising the rights of an accused to a fair trial. It has considerable advantages for the witness and for the criminal process. However, successful implementation requires a commitment on the part of the judiciary and other legal practitioners to address the needs of vulnerable witnesses and a greater understanding of the distress that can result from witnesses' involvement in the criminal justice process.

²⁰ The recent Privy Council case, *Holland*, requires the prosecution to disclose any information which would tend to exculpate the accused or be of material assistance to the proper preparation and presentation of the accused's case, including outstanding relevant charges against witnesses.

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