

ONE SIZE FITS ALL? THE CASE FOR SPECIAL MEASURES IN CIVIL PROCEEDINGS

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ABSTRACT

In recent years, many jurisdictions have adopted a range of measures designed to protect vulnerable witnesses in criminal proceedings. By contrast, relatively little consideration has been given to date on the position of such witnesses in the civil courts. Drawing on research prepared for the Northern Ireland Law Reform Advisory Committee, this paper examines evidential and procedural protections for vulnerable witnesses in the civil courts in Northern Ireland. The research seeks to identify strengths and weaknesses within existing law and practice and argues that new legislation should be introduced so that vulnerable witnesses in civil cases are placed on an equal footing with those in criminal proceedings.

Introduction

Few witnesses called to testify in either civil or criminal proceedings are likely to relish the prospect of testifying in court. For the vast majority, the courtroom will be an unfamiliar and austere environment, dominated by lawyers and court officials. As such, research has uncovered that many witnesses may find the process of giving evidence alienating and stressful.¹ The formality of procedure, the forbidding atmosphere, and the presence of wigs and gowns are likely to contribute to this general sense of unease which results in many witnesses feeling as outsiders to a highly ritualised and professionalised process.² While feelings of stress, anxiety or consternation are commonplace among many witnesses with diverse characteristics testifying in very different types of cases, it is well established that such emotions are likely to be exacerbated among certain classes of witnesses. There is a considerable body of research charting the plight of child witnesses, complainants in sexual cases, and witnesses suffering from

* This paper is based on a report submitted to the Northern Ireland Law Reform Advisory Committee. It is envisaged that the new Law Commission for Northern Ireland will conduct a consultation with a view to reforming the law in this area in the near future. Thanks to Sean Doran for his comments on a preliminary draft of the Report. Any errors or omissions remain entirely my own.

¹ See Angle *et al*, *Witness Satisfaction: findings from the Witness Satisfaction Survey 2002* (2003) reported that 21% of all witnesses surveyed felt intimidated either by the process of giving evidence or by the courtroom environment. See also Shapland *et al*, *Victims in the Criminal Justice System* (1985); Whitehead, *Witness Satisfaction: Findings from the Witness Satisfaction Survey 2000* (2001), Northern Ireland Office, *Victims' and Witnesses' Views on their Treatment in the Criminal Justice System* (2004).

² See generally Rock, *The Social World of the English Crown Court* (1993).

physical or learning disabilities.³ Not only may their sense of despondency cause them undue distress before, during and after giving testimony, but from the point of view of the legal system, it may also negatively impact upon their ability to recall accurately past events.⁴

Following the publication of *Speaking Up for Justice* in 1998,⁵ the Government introduced a range of new evidential and procedural protections for vulnerable and intimidated witnesses in criminal proceedings. The Youth Justice and Criminal Evidence Act 1999 expanded both the range of witnesses who would be eligible for special measures, and the types of measures available to them. Articles 11-18 of its Northern Ireland equivalent, the Criminal Evidence (Northern Ireland) Order 1999, made provision for eight separate measures for eligible witnesses, these being: screening the witness from the accused;⁶ giving evidence by live link;⁷ giving evidence in private;⁸ removal of wigs and gowns;⁹ pre-recording the evidence in chief;¹⁰ pre-recording the cross-examination or re-examination;¹¹ examining the witness through an intermediary;¹² and providing aids to communication.¹³

Some of these measures merely restate what previous legislation or the common law has already provided for, but others are entirely new and sit uneasily alongside the classic adversarial paradigm.¹⁴ However, early research findings have been broadly positive. Hamlyn *et al*¹⁵ have found that high proportions of witnesses who used special measures found them helpful, and these witnesses were significantly more confident that the criminal justice system was effective in delivering justice and meeting the needs of victims.¹⁶ Similar positive findings have been reported by Burton *et al.* . .¹⁷

³ See discussion below.

⁴ For an overview of the literature on this point, see Ellison *The Adversarial Process and the Vulnerable Witness* (2001), pp.19-23.

⁵ Home Office, *Speaking Up for Justice* (1998).

⁶ Art.11, Criminal Evidence (Northern Ireland) Order 1999.

⁷ Art.12, Criminal Evidence (Northern Ireland) Order 1999.

⁸ Art.13, Criminal Evidence (Northern Ireland) Order 1999.

⁹ Art.14, Criminal Evidence (Northern Ireland) Order 1999.

¹⁰ Art.15, Criminal Evidence (Northern Ireland) Order 1999.

¹¹ Art.16, Criminal Evidence (Northern Ireland) Order 1999.

¹² Art.17, Criminal Evidence (Northern Ireland) Order 1999.

¹³ Art.18, Criminal Evidence (Northern Ireland) Order 1999.

¹⁴ While the vast majority of the measures entered into force during 2003 and 2004, it appears that Art.16 (pre-recorded cross-examination) is unlikely to do so at all now. The Government announced in December 2004 that it had decided not to implement the measure (the English equivalent of which is contained in s.28 of the 1999 Act) because of envisaged difficulties surrounding time lapse and disclosure. The Home Office minister Baroness Scotland announced that the mechanism was to be re-assessed as part of a wider review into Children's Evidence, which has not yet been published. The use of intermediaries, under Art.17 of the Order, is expected to be rolled out in the imminent future.

¹⁵ Hamlyn *et al.* *Are Special Measures Working? Evidence from surveys of vulnerable and intimidated witnesses*, HORS 283 (2004).

¹⁶ One third of all witnesses using special measures said they would not have been willing to give evidence without this help; this figure stood at 44% where the witnesses were victims of sexual offences.

¹⁷ Burton *et al.*, "Vulnerable and intimidated witnesses and the adversarial process in England and Wales" (2007) 11(1) *E & P* 1.

These researchers reported that, overall, special measures were having a positive impact in improving the experiences of witnesses at court, but argued that processes for identifying vulnerable witnesses needed to be improved, and better steps had to be taken to ensure that the views of witnesses were individually ascertained.

In contrast to the comparatively rapid development of protections that have been developed within the criminal justice system, there has been little interest in the protections available to vulnerable witnesses in civil cases. This article considers the argument that, in the interests of parity, vulnerable witnesses in civil cases should be afforded a similar level of protection as those who testify in criminal cases. It begins by considering which witnesses might be considered as ‘vulnerable’ within the civil courts, before proceeding to discuss existing law and practice in the province. Finally, the article considers the ‘way forward’, and presents a case for introducing new legislation that would codify evidential and procedural protections for vulnerable witnesses in Northern Ireland’s civil courts.

Vulnerable Witnesses in the Civil Courts

The problems encountered by vulnerable witnesses in civil proceedings have not featured prominently in law reform discourse in any common law countries. A number of reasons may be cited for this apparent disinterest. Perhaps, since the vast majority of issues are settled through negotiation before the court is required to decide liability or quantum, the need for witnesses to attend court very rarely arises. Even if it should arise, hearsay evidence is readily admissible in civil proceedings, thus avoiding the need for many witnesses to appear, particularly if they are “vulnerable” or are otherwise indisposed. It might also be assumed that civil proceedings tend to be less adversarial in nature, with judges assuming a more managerial role with a broad degree of discretion. They may therefore feel freer to exert control over the way witnesses are examined than they would do in a criminal court, given that no jury is present and there is no risk of a miscarriage of justice.¹⁸

For these reasons, it may seem that the problems facing vulnerable witnesses in civil cases are considerably less acute than in criminal cases.¹⁹ Yet civil justice, like criminal justice, depends upon witnesses being willing to give evidence; and being able to testify clearly and as effectively as possible. There is no sound basis for deeming that certain witnesses ought to be protected under a comprehensive statutory regime in criminal cases, but should be left in a much less certain position when testifying before the civil courts.

The task of determining who, specifically, ought to be eligible for protection in civil proceedings is not straightforward. A variety of factors plays a role in exacerbating the stress and anxiety that is, to some degree, inherent with

¹⁸ See discussion *infra* on the willingness of judges to regulate questioning in the courtroom.

¹⁹ It may be noted that the Witness Service do not generally offer support to witnesses in civil cases as they do in criminal cases, and the Young Witness Service is only funded to undertake criminal work.

appearing as a witness, whether that is a criminal, or a civil, court.²⁰ However, it can nonetheless be surmised that certain key groups of witnesses may be at heightened risk of secondary victimisation. Such groups include child witnesses, applicants in domestic violence cases, witnesses with physical/learning disabilities and witnesses at risk of intimidation/reprisals. Some of the potential problems that may face each of these groups of witnesses are now considered in turn.

Child Witnesses

Research has shown that children experience considerable anxiety in the lead-up to a court appearance, as well as experiencing so-called 'secondary victimisation' whilst giving evidence. In their study of 218 children in 1992, Goodman *et al* compared the behavioural disturbances of those who testified with those who did not.²¹ Of those who testified, the researchers reported that confronting the defendant in court brought back traumatic memories, caused sleep disturbance and exacerbated feelings of pain, hurt and helplessness. More specifically, the more frightened a child was of confronting the accused, the fewer questions the child would answer.²²

In particular, stress levels are exacerbated by the unfamiliar language used in court by barristers. Davies and Noon's study of child witnesses in England found that 25% of all questions were inappropriate to the witness' age.²³ Brennan and Brennan's survey of child witnesses in Australia identified thirteen different linguistic devices which were used regularly to confuse child witnesses. The use of complex sentence structures and advanced vocabulary serve to exacerbate the unfamiliar surroundings which children already experience. Questions are frequently highly stylised, and may include specific linguistic techniques such as nominalisation, juxtapositioning and multi-faceted questioning, which will obviously confuse and cause stress to many young witnesses. In the words of the researchers:

"Cross-examination is that part of court proceedings where the interests and rights of the child are most likely to be ignored and sacrificed. . . . The techniques used are all created with words, since they are the only currency of the court. . . . Under conditions of cross-examination the child is placed in an adversarial and stressful situation which tests the resilience of even the most confident of adults. . . . The right of the lawyer to directly oppose the evidence given by the child witness, the implicit hostility which surrounds cross-examination, alien language forms, and the sheer volume of questions asked, all conspire to confuse the child. It is a quick and easy step to destroy the credibility of the child witness."²⁴

A recent survey of fifty child witnesses carried out on behalf of the NSPCC by Plotnikoff and Woolfson found that over half the children interviewed

²⁰ See discussion *infra*.

²¹ Goodman *et al.* (1992).

²² *ibid.*, 121.

²³ Davies and Noon (1991). Only 36 % of barristers made extensive efforts to adapt their language so as to make it suitable for the child.

²⁴ *ibid.*, 91.

said that they did not understand some words or found some questions confusing.²⁵ Just five of the child witnesses interviewed described defence lawyers as “polite”, but nineteen said the lawyers were not polite. Defence counsel were described as “aggressive”, “sarcastic”, “cross”, “shouting”, “rude”, “harassing”, “disrespectful”, “arrogant”, “overpowering”, “badgering”, “scary” and “pushy”. Cordon *et al* cite a number of other studies which arrived at similar findings.²⁶ They note that advocates will frequently try to lure child witnesses into a false sense of security, by asking non-substantive questions about the child’s background and interests, before subtly moving on to elicit substantive information which contradicts the child’s original testimony. They also present evidence which suggests that cross-examiners typically capitalise on children’s tendencies to be suggestible and to fantasise.²⁷ The goal in many cross-examinations, they argue, is to “keep the child off balance to increase the chance of inconsistencies.”²⁸

The above studies were all conducted with reference to criminal proceedings. With specific regard to the civil courts, children tend to appear as witnesses infrequently and it is thus not surprising that there is a dearth of research in relation to their experiences. Most civil cases involving children take place before the Family Proceedings Court or the Family Care Centre. Such proceedings may be of a public nature (where a HSS Trust intervenes to remove a child from the custody of his or her parents); or private in nature (where parents dispute residency/access arrangements upon divorce or separation). In public cases, a *Guardian ad Litem* will frequently relay the child’s wishes to the court as well as advising the court as to what will be in the child’s best interests. As such, children will not usually attend court.

In private proceedings, held under Article 8 of the Children (Northern Ireland) Order 1995, hearings are usually concerned with where the child will live and the contact that an absent parent may have with the child. As observed by Lord Widgery CJ in *Humberside CC v R*,²⁹ practice in such proceedings tends to be “essentially non-adversarial”, although there is currently no provision in place for the child to have his / her views relayed to the court via legal representation or a *Guardian ad Litem* as in public proceedings. It is possible for courts to seek welfare reports under Article 4 of the 1995 Order, or even for the judge to interview the child himself/herself privately in chambers.³⁰ It is also, possible, though seemingly unusual, for a child to appear as a witness, although it is conceivable that a decision may be made to call the child if the hearing concerns an allegation of abuse or

²⁵ Plotnikoff and Woolfson, *In their own words: the experiences of 50 young witnesses in criminal proceedings* (2004).

²⁶ Cordon *et al* (2003).

²⁷ See also Ceci *et al* (2002).

²⁸ *ibid.*, 175-177.

²⁹ [1977] 1 WLR 1251.

³⁰ *H v H* [1974] 1 WLR 595. Here, the Court of Appeal described the practice of judges meeting children privately to ascertain their view as ‘often most desirable’, although curiously magistrates are forbidden from doing so – *Re T* (1974) 4 Fam Law 48.

domestic violence.³¹ However, it is worth noting that, if a *Memorandum* interview has been conducted with the child for the purposes of criminal proceedings,³² the recording could also be used as evidence in the civil courts according to *Memorandum* guidelines.

Aside from family proceedings, it is also possible, albeit uncommon, for a child to appear as a witness in general civil cases before the County Court or High Court. A child may be called by any party in any case concerning, for example, personal injury, medical negligence or even contractual disputes. In such a case, the child is both competent and compellable to give live evidence in court in the normal way, providing the relevant legal standard is met.³³

Applicants under Family Homes and Domestic Violence (Northern Ireland) Order 1998

In contrast to child witnesses who rarely appear in the civil courts, victims of domestic violence will frequently look to the civil justice system to secure a fast and effective remedy. Current remedies are provided under Family Homes and Domestic Violence (Northern Ireland) Order 1998, which provides *inter alia* for Non-Molestation Orders,³⁴ Occupation Orders,³⁵ and Exclusion Orders,³⁶ all of which are designed to protect victims from intimidation or repeat attacks.

There has been very little empirical research into the experiences of applicants in domestic violence cases before the courts. As such, the

³¹ Art.28 of the Family Homes and Domestic Violence Order (1998), which amends Art.11 of the Children Order 1995, requires the court to consider whether children have suffered or are at risk of suffering any harm through either seeing or hearing someone being ill-treated by a prohibited person when deciding whether to make residence or contact orders.

³² The *Memorandum of Good Practice*, published by the Home Office in 1992, was designed to assist those conducting recorded interviews with children in circumstances where the recording may subsequently be used in proceedings. The document contains a number of core standards and safeguards. Following the enactment of the 1999 Order, the Northern Ireland Office published *Achieving Best Evidence in Criminal Proceedings (Northern Ireland): Guidance for Vulnerable or Intimidated Witnesses, including Children* which substantially updated and amended the guidance contained in the *Memorandum*.

³³ The test for competence in civil cases is derived from *R v Hayes* [1977] 2 All. ER 288. The question for the trial judge is "whether the child has a sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth which is involved in taking an oath, over and above the duty to tell the truth which is an ordinary duty of normal social contact". Where, in the opinion of the court, the child fails to understand the nature of the oath, Article 169 of the Children (Northern Ireland) Order 1995 applies, which provides that the child's evidence may be heard if (a) he understands that it is his duty to speak the truth; and (b) he has sufficient understanding to justify his evidence being heard.

³⁴ The court can make an order to prohibit the molestation of an 'associated person' or a 'relevant child' and can run for any period specified by the court of up to 12 months.

³⁵ The court can regulate the occupation of the matrimonial home, usually through requiring an alleged abuser to vacate the residence for a specified period of time.

³⁶ A suspected abuser may be prohibited from coming within a certain range of a particular place, such as a place of residence or a child's school.

evidence tends to be mostly anecdotal. However, a joint report in England by the Children and Family Court Advisory and Support Service and Her Majesty's Inspectorate of Court Administration, *Domestic Violence, Safety and Family Proceedings*,³⁷ recognised that attendance at court was a "source of considerable stress and anxiety" for victims of domestic violence. Among the main difficulties reported were: the feeling among many applicants that they are being placed in a vulnerable position through their abuser knowing where and when they will be on a particular day; the fear of meeting their abuser outside the court; having to sit near or opposite their abuser in a waiting area, or having to answer their abuser's questions, if that party is unrepresented; and the fear that the abuser might follow them after the hearing to a previously undisclosed address, such as a refuge.

Given the ongoing nature of the threat and the applicant's relationship to the perpetrator of the violence, it is clear that applicants for Non-Molestation / Exclusion Orders are likely to experience an enhanced degree of vulnerability that is over and above that experienced by other witnesses. As the Domestic Violence, Crime and Victims Bill passed through Parliament, it was proposed that two clauses be inserted to amend section 17 of the Youth Justice and Criminal Evidence Act.³⁸ The first amendment sought to give rise to a rebuttable presumption that victims of domestic violence, like complainants in sexual offences, ought to be eligible for special measures in criminal cases under the Act. The amendment was, however, rejected by the Government, who felt that victims of domestic violence were already sufficiently protected through the use of discretionary criteria in section 17 of the Act.

A second proposed amendment in the Domestic Violence, Crime and Victims Bill sought to extend the use of special measures to applicants seeking Non-Molestation Orders in civil cases. As explained by David Heath MP:

"It is curious that section 17 of the Youth Justice and Criminal Evidence Act 1999 deals with a complainant in criminal proceedings but not with a complainant in civil proceedings. The person will come face to face with the same abusive partner or relative and have the same sense of distress, disquiet or intimidation. The measures under consideration in a civil court will be no less serious than those in the criminal court. It does not seem entirely logical that, in one case, special measures provisions are in place but not in the other."³⁹

³⁷ *ibid.*

³⁸ S.17 of the Youth Justice and Criminal Evidence Act 1999 mirrors Art.5 of the Criminal Evidence Order 1999, and concerns eligibility of adult witnesses for special measures on grounds of fear or distress.

³⁹ *Hansard*, HC Deb, 27 October 2004, Col 1479. The insertion of the Clause was also supported by Vera Baird MP, who commented that "[c]ivil cases are usually conducted in private. They are usually held in smaller courts than those used for criminal cases and fewer people tend to be present. The relative intimacy of the environment is likely to make the experience more intimidating for a woman who has suffered domestic violence or sexual abuse because the person against whom there is a complaint would be sitting within a few yards of her. Anything that

The Government, however, felt that current arrangements were satisfactory and that caution had to be exercised in respect of amending the Youth Justice and Criminal Evidence Act “because we are still in the early days of rolling out the special measures.”⁴⁰ Thus the proposed clause did not form part of the final text of the Bill and was never enacted.

Witnesses with Learning/Physical Disabilities

The adversarial system relies heavily on oral testimony, and there is something of a systemic presumption that all witnesses are able to communicate effectively. It is therefore perhaps not surprising that many witnesses with learning disabilities find the experience of coming to court particularly challenging. In their study, Sanders *et al* identified three key areas which are likely to make learning-disabled witnesses at risk of heightened vulnerability in court.⁴¹ First, such witnesses are often impaired in terms of their memory: their ability to absorb, memorise and then recall events is often lessened. Secondly, such witnesses often encounter difficulties in communicating. Many possess a limited vocabulary and a limited means of articulating themselves. A person with a learning difficulty may not be able to communicate in a conventional manner, but may be able to use simple sign language, a communication board, or a combination of speech, gestures and pointing to symbols.⁴² Finally, such witnesses often respond to aggressive questioning by attempting to pacify the questioner by offering the response he/she thinks they are looking for. The researchers concluded that witnesses with learning difficulties suffer from enhanced levels of stress and many such witnesses were reported as feeling bullied or pressurized when testifying, which, in turn, impacted negatively upon their testimony.⁴³ In addition, and in a similar fashion to the treatment of child witnesses, counsel frequently used convoluted language as a device to confuse witnesses or make them contradict themselves.⁴⁴ In spite of their powers to do so, judges rarely intervened to prevent inappropriate questioning and failed to adapt their own language to make allowances for the witness.⁴⁵

On comparing trial transcripts involving witnesses with learning disabilities and those without, Kebbell *et al*, found that the questions were broadly similar and that lawyers had done little to adjust their questioning style.⁴⁶ Another study, by O’Kelly *et al*, mirrors the findings of the studies mentioned above, again finding there were no significant differences in the

could be done to help such a woman would be every bit as valuable as a measure in the criminal context.” *Hansard*, HC Deb, 27 October 2004, Col 1483.

⁴⁰ Christopher Leslie MP, the Parliamentary Under-Secretary of State for Constitutional Affairs, *Hansard*, HC Deb, 27 October 2004, Col 1485.

⁴¹ Sanders *et al*, *Witnesses with Learning Disabilities* (1997).

⁴² Law Reform Commission of New South Wales, *People with an Intellectual Disability and the Criminal Justice System*, Discussion Paper 35 (1994), para.7.9.

⁴³ Sanders *et al*, *supra* n.41.

⁴⁴ *ibid.*, 76.

⁴⁵ *ibid.*

⁴⁶ Kebbell *et al*. “Witnesses with intellectual disabilities in court: What questions are asked and what influence do they have?” (2004) 9 *Legal and Criminological Psychology* 23-25.

readiness of the judiciary to intervene to clarify questioning among witnesses with learning difficulties and those without.⁴⁷

It is important to highlight, however, that witnesses with learning difficulties ought not to be treated as a homogenous group.⁴⁸ It will inevitably be the case that court procedures will affect people with very different cognitive abilities in different ways. Thus it could be said that some individuals may be more vulnerable than others, and the wide ranging effects of various learning difficulties means that it is not always easy to delineate which witnesses ought to be considered so vulnerable that they should be deserving of some special protection.

In relation to witnesses who are physically disabled, their needs would appear to be primarily non-legal. Research indicates that they seek practical access, information provision through Braille and loop systems and access to additional support. Concerns were recently expressed about disabled access in relation to some of the court buildings in Northern Ireland, and there was also unease about the fact that sign language interpreters were not always 100% accurate, and that even accessible buildings can be rendered inaccessible by poor management procedures and staff training.⁴⁹

It can be noted, however, that some concern was raised that prosecutors do not consider some people with disabilities as reliable witnesses “simply because of perceptions about their reliability based on ignorance and false perceptions regarding disability.”⁵⁰ Plontikoff and Woolfson cite one case where a wheelchair-user had to give evidence from a different location within the courtroom and expressed concern that jurors may not have been aware that her physical disability would have no impact on her reliability as a witness. It is also important that courts be aware that, like learning disabilities, many physical disabilities, such as epilepsy, asthma and multiple sclerosis will not be apparent to the court. Such witnesses may still experience enhanced degrees of stress; in *Stretton*,⁵¹ the cross-examination of a rape complainant had to be discontinued after she suffered an epileptic fit.

Witnesses at Risk of Intimidation

A third group of witnesses who may be particularly vulnerable are those at risk of intimidation or reprisals as a result of giving evidence. The Home Office publication, *Working with Intimidated Witnesses*,⁵² envisages that the problem of witness intimidation is on the increase: the number of cases for perverting the course of justice (which includes witness intimidation) rose by over 30% between 2000 and 2005. Working from the 1998 British Crime Survey, Tarling *et al*, concluded that intimidation occurs in almost 10 per

⁴⁷ O’Kelly *et al*, (2003) “Judicial Intervention in court cases involving witnesses with and without learning disabilities” (2003) 8 *Legal and Criminological Psychology* 229.

⁴⁸ Sanders *et al*, *supra* n.41, at 2.

⁴⁹ Plontikoff and Woolfson, *supra* n.25, at 89.

⁵⁰ *ibid*.

⁵¹ (1988) 86 Cr App R. 7.

⁵² Home Office, *Working with Intimidated Witnesses* (2006).

cent of reported crime and in 20 per cent of unreported crime.⁵³ Intimidation of victims may take various forms, from verbal taunts or threats, to physical jousting or to serious physical violence. It may range from a relatively low-key, one-off incident, to a chain of events amounting to ongoing harassment and persistent threatening behaviour.⁵⁴

Recent studies suggest that certain groups of people, or witnesses who testify in particular types of cases, are at heightened risk of intimidation. Levels of intimidation appear to be greater amongst poorer socio-economic groups,⁵⁵ victims of crime (particularly victims of violence),⁵⁶ racial and sexual minorities,⁵⁷ and women – particularly in cases involving domestic violence,⁵⁸ or those involving sexual offences.⁵⁹

The history of sectarian conflict in Northern Ireland and notorious treatment of ‘touts’ by paramilitary organisations has meant the police, courts and other criminal justice agencies in the province have been exposed to the reality of witness intimidation much more frequently than their counterparts in Britain. In 1999, the Northern Ireland Working Group on Vulnerable and Intimidated Witnesses highlighted that while a range of measures was already in place to safeguard against “higher levels” of intimidation, there were fears that intimidation at a lower level was being overlooked.⁶⁰ Certainly, as far as the civil justice system is concerned, it is probably correct to assume that such intimidation is much less widespread within the civil justice system than within criminal cases. However, there is a fear that, with the introduction of Anti-Social Behaviour Orders (ASBO’s), intimidation may become considerably more widespread.⁶¹ It can be assumed, for

⁵³ Tarling *et al*, *Victim and Witness Intimidation: Key Findings from the British Crime Survey* (2000).

⁵⁴ Tarling *et al*, (*ibid*) found that almost over two thirds of incidents featured verbal abuse, 16% physical assaults and 9% damage to property. However, the reasons underlying intimidation are unclear. In only a small minority of cases (8%) did the victim believe that the reason behind the intimidation was to prevent them giving evidence. In nearly 50% of cases victims thought it was simply that the offender wanted to ‘annoy’ or ‘upset’ them. For a further quarter the intimidation was viewed as part of an ongoing series of offences against them, for example in cases of domestic violence. See also Maynard *Witness intimidation, strategies for prevention* (1994); Fyfe and McKay, *Making it safe to speak? A study of witness intimidation and protection in Strathclyde* (1999).

⁵⁵ Tarling *et al*, *supra* n.53.

⁵⁶ Elliott, “Vulnerable and Intimidated Witnesses: A Review of the Literature” (1998). See also Angle *et al*, *supra* n.2.

⁵⁷ Elliott, *ibid*.

⁵⁸ Elliott, *ibid*., Tarling *et al*, *supra* n.53.

⁵⁹ Lees, *Carnal Knowledge: Rape on Trial* (1996), at 108.

⁶⁰ Northern Ireland Office, *Vulnerable or Intimidated Witnesses (NI) Working Group: Final Report* (1999), para.22.

⁶¹ ASBO’s are a curious civil/criminal hybrid that were introduced by the Government in England and Wales under the Crime and Disorder Act 1998. The Orders were extended to Northern Ireland under the Anti-Social Behaviour (Northern Ireland) Order 2004 to operate for a minimum period of two years as civil orders rather than criminal penalties. Under Article 3 of the legislation, a relevant authority may apply to a magistrate’s court for an ASBO if the person has acted ‘in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself’ and that ‘such an

example, that witnesses called to give evidence against alleged anti-social neighbours may be fearful of verbal or physical abuse resulting. Even the prospect of a deterioration in neighbourhood relationships may in itself be sufficient to deter individuals from testifying. Indeed, research carried out in England and Wales uncovered evidence of fear and intimidation amongst those called to testify in ASBO hearings, which in turn resulted in an under-reporting of nuisance behaviour or an unwillingness to co-operate with the ASBO process.⁶²

In recognition of these potential difficulties, the Government has opted to allow such witnesses to apply for measures normally only available in criminal proceedings. Article 6 of the Criminal Justice (Northern Ireland) Order 2005, inserting Article 6B into the 2004 Order, stipulates that it is now open to the civil courts to make use of the same range of special measures currently available to vulnerable witnesses in the criminal justice system under the Criminal Evidence (Northern Ireland) Order 1999. For other intimidated witnesses, they are unable to rely on these measures and are reliant upon the general rules of court and common law discretion to offer them protection at trial.

Current Law and Practice in Northern Ireland

Having identified certain classes of witnesses who may be most vulnerable within the civil courts, we now consider the range of protections to which they may be entitled under existing law. At the outset, it is worth underlining that the Rules of both the Supreme Court and the County Court affirm the entrenchment of the principle of orality in civil proceedings; evidence shall normally be received orally on oath.⁶³ Unlike the criminal courts, there are no statutory provisions which have been formulated with the express purpose of easing the plight of the vulnerable witness. However, there are a number of mechanisms under statute, common law and contained in the rules of court which could incidentally be used by the civil courts as tools to assist such witnesses.

Civil Evidence (Northern Ireland) Order 1997

A witness may avoid giving evidence at all in a civil case if the court chooses to admit an out of court statement, in either oral (pre-recorded) or written form. Traditionally, such statements were regarded by the common law as inadmissible hearsay evidence. In light of the recommendations of the Law Reform Advisory Committee in its 1997 report, *Hearsay Evidence in Civil Proceedings*,⁶⁴ the Civil Evidence (Northern Ireland) Order 1997 was introduced, which effectively abolished the rule against hearsay in civil proceedings.⁶⁵ As such, it is open to the court to receive an oral or written

order is necessary to protect relevant persons from further anti-social acts by him.' the standard of proof is the criminal rather than the civil standard (*R (McCann) v Crown Court and Manchester* [2003] 1 AC 787).

⁶² Campbell, *A Review of Anti-Social Behaviour Orders* (2002).

⁶³ SCR, Order 38, r.1; CCR, Order 24, r.2. Proceedings under the Children (Northern Ireland) Order 1995 are held in private, as are adoption proceedings.

⁶⁴ Law Reform Advisory Committee (1997).

⁶⁵ Art.3(1) of the Order provides that '[i]n civil proceedings evidence shall not be excluded on the ground that it is hearsay'.

statement by a party who will not be called as a witness and will not be subject to cross-examination. There would appear to be no reason why a video recording of a child or other vulnerable witness could not be admitted as a hearsay statement under the Order.

It is, however, open to any party to apply to the court to have the maker of such a statement produced for cross-examination. Article 4(1) of the Order provides that:

“where a party to civil proceeding adduces hearsay evidence... and does not call that person as a witness, any other party to the proceedings may, with the leave of the court, call that person as a witness and cross-examine him on the statement.”

If the maker of the statement is unknown, dead, or now incapable of testifying, the court should refuse leave to cross-examine and if the maker is beyond the areas or unfit to come to court, the court may grant leave to cross-examine through a live television link, or by deposition taken before an examiner.⁶⁶

There is no discretion to exclude evidence that is admissible under the 1997 Order.⁶⁷ Although a statement adduced under the Order may be used as evidence of the truth of its contents, it will generally be preferable for the court to receive testimony from the witness in person. As Greer asserts, since the maker of the statement is not subject to cross-examination such statements may carry relatively little weight before the court, and even (potentially) no weight at all.⁶⁸

The Erection of Screens

The court has a number of inherent powers at common law which it may be able to use to assist vulnerable witnesses in civil cases. Although most of the discretions outlined below stem from criminal, rather than civil, cases, it seems reasonable to assume that in most instances, a similar discretion may apply in civil proceedings.

Spencer and Flin have argued that a common law power to erect screens in court was used long before their use was given formal approval by the Court of Appeal in the case of *R v X, Y and Z* in 1989.⁶⁹ Indeed, the authors cite two civil cases as authority for this proposition.⁷⁰ In *R v X, Y and Z*, the English Court of Appeal stated that in determining whether or not the use of a screen was appropriate, the court was required to take into account the age

⁶⁶ Valentine, *Civil Proceedings – The County Court* (1999), 254

⁶⁷ *ibid.*

⁶⁸ See Greer, *A Commentary on the Civil Evidence (Northern Ireland) Order 1997* (2000), at 14-18. In determining what weight ought to be afforded to the statement, Art.5 of the 1997 Order stipulates that the court shall have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence. A range of factors for the court to take into account is set out in Art.5(3).

⁶⁹ Spencer and Flin, *The Evidence of Children* (1993), 99-100 citing *X, Y and Z* (1989) 91 Cr App R 36.

⁷⁰ *Garcin v Amerindo Investment Advisors Ltd* [1991] 1 WLR 1140; *Henderson v SSB Realizations Ltd*, *The Independent*, 20th April 1992, cited by Spencer and Flin, *ibid.*, 102.

of the child and/or the nature of the allegation; any concern expressed about the ability of the child to give cogent evidence in the presence of the defendant or concern that the child may suffer trauma as a result.⁷¹ Although the use of screens for vulnerable witnesses in criminal cases has now been placed on a statutory footing under the Criminal Evidence (Northern Ireland) Order 1999, there would appear to be no reason why the common law discretion could not be used in civil cases where the court believes the witness may be upset or traumatised by seeing the defendant in person, or knowing that he / she can be viewed on a screen.⁷² Valentine notes that it is not unusual for civil courts to order that a witness be screened in certain circumstances, including where children under 18 are giving evidence of an indecent nature.⁷³ However, he adds that “it is hard to envisage any circumstance in which such an important witness should be screened from legal representatives.”⁷⁴

Removal of a Party from the Courtroom

A possible, albeit uncommon, alternative to using a screen is simply to order that a particular person removes himself or herself from the court whilst the vulnerable witness testifies. In *Smellie*,⁷⁵ the accused was ordered to wait on the stairs at the side of the dock by the warder, so that he could not be seen by his eleven-year-old daughter, while she was testifying against him on an assault charge. The one-sentence report of the Court of Appeal’s judgment, delivered by Coleridge LJ states:⁷⁶

“If the judge considers that the presence of the prisoner will intimidate a witness there is nothing to prevent him from securing the ends of justice by removing the former from the presence of the latter.”

While, on the basis of *Smellie* and *X, Y and Z* there would seem to be no right to actual physical confrontation,⁷⁷ the common law does recognise the right of a defendant in a criminal case to be present during his trial.⁷⁸ However, citing *R v Willesden Justices ex p London Borough of Brent*,⁷⁹ Spencer and

⁷¹ The guidance laid down could be referred to in cases for both child witnesses and adult witnesses (*Foster* [1995] *Crim LR* 333), however it was stated in *Cooper and Schaub* [1994] *Crim LR* 531 that the court should only afford the protection to adult witnesses where ‘exceptional circumstances’ existed.

⁷² See, e.g. *Re W* [2003] 1 FLR 329, where a social worker was permitted to give anonymous evidence in care proceedings from behind a screen. The Order made at first instance was overturned on appeal, although the decision appears to be based on the wrongful application of the criteria laid down in as regards when witnesses are permitted to testify anonymously.

⁷³ Valentine, *supra* n 66, at 269.

⁷⁴ Valentine, *Civil Proceedings – The Supreme Court* (1997), 274.

⁷⁵ [1919] 14 Cr App Rep 128.

⁷⁶ *ibid.*, at 130.

⁷⁷ See further Doak ‘Confrontation in the Courtroom: Shielding Vulnerable Witnesses from the Adversarial Showdown’ (2000) 16(3) *J Civ Lib* 216.

⁷⁸ *Lawrence* [1933] AC 699.

⁷⁹ [1989] FCR 1. It was held that the court had an inherent power to order a person to leave care proceedings, even if he / she was entitled to attend under s.47 of the Children and Young Persons Act 1933.

Flin argue that this rule does not apply in civil cases.⁸⁰ As such, it would seem that judges are empowered to order a party to leave the courtroom when a particular witness is giving evidence as part of their general power to ensure that the interests of justice are protected.⁸¹ However, as the use of screens and video technology has become increasingly commonplace, the physical removal of a particular party from the courtroom seems likely to become an evermore infrequent occurrence.

Anonymity

The basic principle of open justice lies at the heart of most common law systems. However, in exceptional circumstances the courts are prepared to grant anonymity to protect the interests of intimidated witnesses, particularly in criminal cases where there is a clear need to facilitate the prosecution of organised or paramilitary crime. The exception to the general rule that administration of justice should take place in open court was laid down by the House of Lords in *Scott v Scott*.⁸² It was held that a decision to grant anonymity should be based “upon the operation of some other overriding principle which. . . does not leave its limits to the individual discretion of the judge.”⁸³

In the more recent case of *R v DJX, SCY, GCZ*,⁸⁴ Lord Lane CJ stipulated that, in determining whether to grant anonymity orders, judges had to ensure that fairness was safeguarded for both defendants as well as victims and witnesses, but the court was somewhat vague as to the factors that ought to be taken into account as part of this balancing act. More specific guidance was subsequently laid down in *R v Taylor*.⁸⁵ Here, the Court of Appeal upheld at first instance a decision to grant anonymity where the witness’s evidence was regarded as decisive since it was the only independent corroboration of the removal of the victim’s body from a pub where a murder was alleged to have occurred. Applying *DJX*, the Court held that courts should take a number of factors into account before granting anonymity. These should include: the question of the potential consequences of revealing the identity of the witness; the importance of the evidence he or she is providing; and no undue prejudice is caused to the defendant (although it was recognised that *some* degree of prejudice will be inevitable). In taking all of these factors into account, the court should balance the need for anonymity – including the consideration of other ways of providing witness protection (for example, screening the witness or holding an *in camera* hearing or screen) against the unfairness or appearance of unfairness in the particular case.

The most recent authority on the use of anonymity orders is the English Court of Appeal decision in *R v Davis; R v Ellis*.⁸⁶ A number of witnesses at both trials had their anonymity protected by through voice modulation and screens. The appellants contended that, since their conviction was based

⁸⁰ Spencer and Flin, *supra* n.69, at 111.

⁸¹ *ibid.*

⁸² [1913] AC 417.

⁸³ *ibid.*, at 433 *per* Lord Atkinson.

⁸⁴ (1990) 91 Cr App R 36.

⁸⁵ [1995] *Crim LR* 253.

⁸⁶ [2006] 1 *WLR* 3130.

solely or substantially on the evidence of anonymous witnesses, the practice was incompatible with Article 6 of the Convention. Dismissing their appeal, the Court held that the use of anonymity in trials was an acceptable practice where witnesses were in a state of 'justifiable and genuine fear' and whose testimony could be tested in the adversarial process.⁸⁷ Providing appropriate safeguards were in place, then the trial would not be considered to be unfair. While the Court acknowledged that witness protection programmes could provide a useful alternative to anonymity in some cases, it stressed that they best suited for professional criminals giving evidence against former associates. If these notoriously difficult cases are to come to court, then it will often be the case that anonymous testimony may be the only realistic option.⁸⁸

In spite of these decisions, the case law remains imprecise as to which specific circumstances may justify anonymity or which counterbalances should be in place in order to admit such testimony. The dangers of courts becoming overly munificent in granting anonymity orders not only risks interfering with the due process rights of the accused, but also jeopardises the age-old legal maxim that justice must not only be done, but must also be seen to be done.⁸⁹ As the law currently stands however, it is most probably Convention-compliant in so far as it permits in exceptional circumstances. Undoubtedly, the use of anonymity orders in either criminal or civil proceedings should remain exceedingly rare, but their value to a small minority of vulnerable witnesses who would not otherwise give testimony should not be underestimated.

Civil courts, like the criminal courts, are subject to the principle of open justice, and the Strasbourg jurisprudence discussed by the Court of Appeal in *Davis* would also be applicable civil cases, since Article 6 applies to criminal and civil proceedings alike.⁹⁰ However, the use of anonymity orders within the civil courts is not regarded with the same degree of concern as in criminal proceedings, where the defendant has a lot more to lose. Consequently, it seems likely that the threshold of "fear" on the part of the witness that must be attained is likely to be substantially lower in the context of civil proceedings.

Judicial Control

In both civil and criminal cases, judges are under a common law duty to intervene to prevent unduly oppressive, offensive, vexatious or irrelevant

⁸⁷ *ibid.*, 3148.

⁸⁸ At 3148.

⁸⁹ See, e.g. Costigan and Thomas, 'Anonymous Witnesses' (2000) 51(2) *NILQ* 326. Amnesty International (1996); Lusty, An Historical & Comparative Analysis of Secret Witnesses in Criminal Trials (2002) 24 *Sydney L Rev* 361; Amnesty International, "Fairness to Defendants at the International Criminal Court: Proposals to Strengthen the Draft Statute and its Protection of Defendants' Rights" (1996) 1(2) *International Criminal Court Briefing Series*.

⁹⁰ The European Court of Human Rights has found anonymity orders to be justifiable in 'exceptional circumstances' providing counterbalancing measures are in place. cf *Baegen v Netherlands* 27 October 1995 (App. No. 16696/90); *Doorson v Netherlands* (1996) 22 EHRR 330 and 14 February 2002 (App. No. 26668/95) and *Visser v Netherlands* (App No 26668/95, 14 Feb 2002

questioning during cross-examination.⁹¹ In *Mechanical and General Inventions Ltd and Lehwess v Austin and Austin Motor Co. Ltd*,⁹² Lord Sankey remarked that cross-examination was “a powerful weapon entrusted to counsel and should be conducted with restraint and a measure of courtesy and consideration which a witness is entitled to expect in a court of law.”⁹³ Lord Bingham commented in *Milton Brown* that “judges do not lack power to protect witnesses and control questioning” and went on to state that judges should also take the necessary steps to “minimise the trauma suffered by other participants.”⁹⁴

Valentine summarises the role of the Northern Ireland County Court judge in the following terms:

“The judge’s role is to hearken the evidence, control the behaviour of counsel, exclude irrelevant and inadmissible evidence, discourage repetition and ensure by wise intervention that he can follow and assess the evidence and submissions of counsel, and at the end to decide the issues.”⁹⁵

Noting the decision in *Eastwood v Channel 5*,⁹⁶ Valentine argues that judges have the power to disallow questions which “impugn the witness’s credibility if they are of minimal relevance to his credibility or grossly disproportionate to the importance of his evidence.”⁹⁷

The power to disallow a particular line of questioning also exists under Order 25, Rule 10 of the County Court Rules, which stipulates that the judge “may disallow any question put in cross-examination of any party or witness which appears to the judge to be vexatious and irrelevant.”

Concerns have nonetheless been expressed that judges are still reluctant to intervene in cross-examination. Excessive judicial interference with counsel’s questioning sits very uncomfortably alongside the orthodox view of the judge as an “umpire”; excessive judicial intervention risks usurping the functionality of the adversarial process.⁹⁸ The appellate courts have readily warned about the dangers of judicial intervention. In *Jones v National Coal Board*,⁹⁹ Lord Denning stated that “interventions should be as infrequent as possible” and that judges should exercise restraint in intervening as it risked giving witnesses “time to think out the answer to awkward questions.”¹⁰⁰ It was added that the “very gist of cross-examination lies in the unbroken sequence of question and answer.”¹⁰¹ Valentine also

⁹¹ *R v Kalia* [1975] *Crim LR* 181; *Mechanical and General Inventions Ltd and Lehwess v Austin and Austin Motor Co. Ltd* [1935] AC 346; *Wong Kam-ming v R* [1980] AC 247 at 60; *R v Milton Brown* [1998] 2 Cr App R 364.

⁹² [1935] AC 346.

⁹³ *ibid.*, at 359.

⁹⁴ [1998] 2 Cr App R. 364, 371.

⁹⁵ Valentine, *supra* n.74, at 242.

⁹⁶ [1992] 2 NIJB 58.

⁹⁷ Valentine, *supra* n.74, at 242.

⁹⁸ See Saltzburg, “The Unnecessarily Expanding Role of the American Trial Judge” (1978) 63 *Virginia LR* 1.

⁹⁹ [1957] 2 QB 55.

¹⁰⁰ *ibid.*, 65.

¹⁰¹ *ibid.*

warns that the judge “must not interfere so much as to hamper counsel in putting his case, and should not interrupt so as to encourage the witness and undermine the cross-examiner’s case.”¹⁰²

In *R v Sharp*,¹⁰³ the judge frequently interrupted the defence counsel’s cross-examination of prosecution witnesses, and left the jury in little doubt as to what he thought of the lack of merit in the defence case. In quashing the conviction, the Court of Appeal specifically alluded to the dangers of intervention in the cross-examination of witnesses:

“[T]he judge may be in danger of seeming to enter the arena in the sense that he may appear partial to one side or the other. This may arise from the hostile tone of questioning or implied criticism of counsel who is conducting the examination or cross-examination, or if the judge is impressed by the witness, perhaps suggesting excuses or explanation for a witness’s conduct which is open to attack by counsel for the opposing party.”¹⁰⁴

There would seem to be a perceived risk among the elements of the judiciary that too much intervention in cross-examination could compromise the role of the judge as a neutral arbiter, which may, in turn, provide a fruitful ground for appeal. In his study of proceedings at London’s Wood Green Crown Court, Rock observed that interventions were infrequent, and those that did occur were generally non-consequential, having little bearing on how witnesses were treated.¹⁰⁵ In their study of Diplock trials in Northern Ireland, Jackson and Doran found that judges were “acutely conscious of the danger of appearing partisan.”¹⁰⁶ Where interventions did occur, “the objection intruded very little on the questioning.”¹⁰⁷ For example, if counsel was required to clarify a line of questioning, he or she would simply rephrase the same question using different terms.¹⁰⁸ The researchers concluded that whilst judges do not lack the power to intervene, they do lack the authority to do so.¹⁰⁹

From the perspective of the vulnerable witness, empirical studies show a very limited degree of judicial intervention in cross-examination. Brown *et al*’s study of Scottish sexual offence trials reported that there was widespread unwillingness amongst judges to prevent intimidating or unfair cross-examination in rape trials.¹¹⁰ Similar findings were made by Davis *et al* in

¹⁰² Valentine, *supra* n.74, 245.

¹⁰³ [1993] 3 All ER 225.

¹⁰⁴ *ibid.*, 235.

¹⁰⁵ See Rock, *supra* n.2 at 269: ‘In practice, judges do intervene from time to time, correcting counsel for the use of disagreeable language and displays of gratuitous rudeness. They may offer a witness tissues, water or a seat. But their interventions are designed as much to preserve the general decorum of the courtroom as to protect witnesses’.

¹⁰⁶ Jackson and Doran, *Judge Without Jury: Diplock Trials and the Adversary System* (1995), at 113.

¹⁰⁷ *ibid.*, 112.

¹⁰⁸ *ibid.*

¹⁰⁹ *ibid.*, at 128.

¹¹⁰ Brown *et al.*, *Sexual History and Sexual Character Evidence in Scottish Sexual Offence Trials* (1992), 58. Also, reluctance to intervene to protect complainants

respect of the cross-examination of child witnesses,¹¹¹ and by Sanders *et al* with regard to witnesses with learning disabilities.¹¹²

As Ellison has argued, an inherent conflict therefore exists between the trial judge's paradigmatic role in adversarial proceedings and his power to intervene to protect vulnerable witnesses from abusive cross-examination.¹¹³ Despite the call in *Speaking Up for Justice* for the Lord Chief Justice to issue a Practice Direction "giving guidance to barristers and judges on the need to disallow aggressive and / or inappropriate questioning,"¹¹⁴ there have been no attempts to address this issue to date. In civil proceedings however, it may be hypothesised that, since there is no risk of an unsafe criminal conviction resulting from judicial intervention, some judges may be more willing to adopt a proactive role in protecting vulnerable witnesses.

Evidence outside Court

Order 38, Rule 3(2) of the Rules of the Supreme Court of Northern Ireland allows for evidence to be placed before the court by affidavit as an alternative to oral testimony.¹¹⁵ The scope of the provision is, however, limited. Citing *Hegarty v Henry*¹¹⁶ and *Cronin v Paul*,¹¹⁷ Valentine contends that an affidavit should not be used if oral evidence of the fact could be given, and that 'crucial facts should be proved by oral testimony'.¹¹⁸ Furthermore, the Court may, on the application of any party, order the attendance for cross-examination of such a person whose evidence was received in this manner.

A similar provision exists in respect of the County Court. Order 24, Rule 4(1) provides that the judge may at any time, make an order that any fact or facts be proved by affidavit; or that the affidavit of any witness be read at the hearing on such conditions as the judge thinks reasonable; or any witness whose attendance in court ought to be dispensed with be examined by interrogatories or before an examiner. In respect of the scope of this Rule, Valentine states that an order should not be made if the witness can conveniently be produced and the opposing party wishes to conduct a cross-examination. Furthermore, the judge may refuse to admit such an affidavit in the interests of justice.¹¹⁹

Other witnesses may be able to avoid coming to court by relying on Order 24, Rule 20(1) CCR, which provides that a judge may make an order for any

in Australian rape trials was reported by Heenan and McKelvie, *Evaluation of the Crimes (Rape) Act 1991* (1992).

¹¹¹ Davis *et al*, *An Assessment of the Admissibility and Sufficiency of Evidence in Child Abuse Prosecutions* (1999), 60-61.

¹¹² Sanders *et al*, *supra* n.41 at 78.

¹¹³ Ellison, *supra* n.4, 110.

¹¹⁴ Home Office, *supra* n.5, para.8.53.

¹¹⁵ The Rule states that the court "may, at or before the trial of an action begun by writ, order that the affidavit of any witness may be read at the trial if in the circumstances of the case it thinks it reasonable so to order."

¹¹⁶ [1990] BNIL 61.

¹¹⁷ (1881) 15 ILTR 121.

¹¹⁸ Valentine, *supra* n.74, 227.

¹¹⁹ Valentine *supra* n.66, 234.

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person to be examined on oath anywhere in Northern Ireland.¹²⁰ Similarly, Ord 39, rr 1-3 RSC permit the court to make an order for the examination of a witness through a deposition. For example, a witness may be able to testify from his or her home, from a hospital, or even from abroad. Both parties are entitled to attend such a hearing and thus the witness will be still subject to cross-examination. Like the ability to give evidence through affidavit, however, this rule was almost certainly not formulated with vulnerable witnesses in mind and it is likely that it would only be applied in a very small range of cases where the witness was indisposed, rather than vulnerable *per se*.

Lessons from England and Wales

The potential for witnesses to give evidence outside the courtroom has a much more certain foothold under the Civil Procedure Rules of England and Wales. Whilst the Rules lay down a general requirement that all hearings will be held in public,¹²¹ courts do have the power to order that hearings be held in private in a broad range of circumstances.¹²²

The most notable departure from the principle of orality is, however, to be found in Rule 32.3, which stipulates that ‘[t]he court may allow a witness to give evidence through a video link or by other means’, and Annex 3 of Practice Direction 32 gives further guidance on how the video link facility may be used. It seems likely that the rule was inserted primarily to cover the situation where a witness was out of the jurisdiction,¹²³ and was unlikely to have been formulated with the protection of vulnerable witnesses as one of its primary goals. However, courts are given a very broad discretion under the Rules as to how evidence is received, and the Judicial Studies Board of England and Wales clearly envisages that it may be utilised to facilitate vulnerable witnesses where appropriate:

“A judge in a civil court is given a wide discretion by the CPR as to how evidence is given in the proceedings, and may allow a witness to give evidence through a video link or by any other means. It follows that the video tape of a Memorandum interview conducted in the context of a criminal investigation may be used in a civil case. . . This power is particularly

¹²⁰ However, Order 24, r.20(16) provides that such a deposition is not admissible in evidence at the hearing unless “(a) the witness is dead or outside Northern Ireland or unable from sickness or other infirmity to attend the court; or (b) the parties consent to its being admitted; or (c) the judge directs it to be put in.”

¹²¹ Rule 39.2(1).

¹²² Rule 39.2(3) stipulates that a hearing, or any part of it, may be in private if – (a) publicity would defeat the object of the hearing; (b) it involves matters relating to national security; (c) it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality; (d) a private hearing is necessary to protect the interests of any child or patient; (e) it is a hearing of an application made without notice and it would be unjust to any respondent for there to be a public hearing; (f) it involves uncontentious matters arising in the administration of trusts or in the administration of a deceased person’s estate; or (g) the court considers this to be necessary, in the interests of justice.

¹²³ See, e.g. *Garcin and others v Amerindo Investments* [1991] 1 WLR 1140.

important where children are concerned in terms of achieving the overriding objective set by Rule 1: that of enabling the court to deal with cases justly, including ensuring that the parties are on an equal footing.”¹²⁴

The scope of the rule has been the subject of two recent cases: *Rowland v Bock*,¹²⁵ and, more recently, *Polanski v Conde Nast Publications Ltd*.¹²⁶ *Rowland v Bock* concerned the introduction of business tycoon, Tiny Rowland, to Dieter Bock by a third party, Norgren, to facilitate a business transaction. Norgren refused to come to England to attend trial as a witness since he feared he would be arrested under an extradition order that had been issued concerning insider dealing in the USA. This was found to be sufficient reason to make an order that he should give his evidence by video link: the High Court held that there were no pre-defined limits as to the scope of Rule 32. No defined limit or set of circumstances should be placed upon the discretionary exercise to permit video link evidence. While the court should take into account considerations of costs, time, inconvenience, etc, there was no requirement to show a pressing need, such as that a witness was too ill to attend. It was, however, added that the court should make due allowances for any technological consequences on the demeanour and delivery of the evidence by video link.

The case of *Polanski v Conde Nast Publications Ltd* concerned a libel action brought by film director Roman Polanski following the publication of an article in *Vanity Fair* magazine. The Claimant sought to give evidence through a live video link because he feared being extradited to the US if he entered the UK after he jumped bail in relation to a sex charge in 1977. At first instance, Eady J permitted the claimant to rely on Rule 32.3 and gave permission for evidence to be given through a video link from France, noting Newman J’s dictum in *Rowland v Bock* that “full access to the court for justice in a civil matter should not, save in exceptional circumstances, be at a price of the litigant losing his liberty and facing criminal proceedings.”¹²⁷ The judge concluded that receiving the evidence through video conferencing was preferable to the evidence being adduced in the form of a written statement.

The defendant appealed successfully to the Court of Appeal, which stressed that it was not normal procedure and the party seeking to give evidence in such a way had to show sufficient reason for deviating from the norm. In this particular case, the Claimant had argued that the refusal of an order would be contrary to Article 6 of the European Convention, the right to a fair trial. However, the Court of Appeal dismissed this argument, noting that the Claimant was “not being shut out from access to justice; it is entirely his decision as to whether he comes to London to give evidence in support of his claim.”¹²⁸ Distinguishing *Rowland v Bock* on the basis that the party had not been found guilty of any offence, it was noted that Polanski had admitted that he was guilty of a serious crime; his libel claim was directly linked to the

¹²⁴ Judicial Studies Board (2004), para.4.22.

¹²⁵ [2002] 4 All ER 370.

¹²⁶ [2004] 1 WLR 387 (CA); [2005] 1 WLR 637 (HL).

¹²⁷ *Rowland v Bock*, at para.9.4.

¹²⁸ [2004] 1 WLR 387 at 403.

crime for which he had pleaded guilty; and Polanski had a choice of where to sue and could have alternatively brought his claim in the USA or France. It is clear that, to some extent, the decision was based in part on public policy considerations. In the view of Parker LJ, “the court should not be seen to assist a claimant who is a fugitive from justice to evade sentence for a crime of which he has been convicted.”¹²⁹

The decision was, however, reversed on appeal by a majority decision in the House of Lords.¹³⁰ Their Lordships held that the use of video conferencing would be likely to contribute to the efficient, fair and economic disposal of the litigation, as required by Practice Direction 32 of the 1998 Rules, and the respondent would not be disadvantaged to any significant extent. Approving *Rowland v Bock*, it was underlined that giving evidence by video link was entirely satisfactory if there was a sufficient reason for departing from the normal rule that witnesses gave evidence in person before the court. In these particular circumstances, if the appellant were not able to give evidence by video link, he would be gravely handicapped in the conduct of the proceedings, but it would not alter his status as a fugitive. The fact the claimant was a fugitive from justice could amount to ‘sufficient reason’ for the purposes of making a video conferencing order under Rule 32.3.¹³¹

It was also noted by their Lordships that evidence through a video link had become a readily acceptable alternative to giving evidence in person, provided there was sufficient reason for departing from the normal rule that witnesses give evidence in person before the court and that fair trial rights under Article 6 of the European Convention were not endangered. Although the issue as to whether the rule would cover vulnerable witnesses was not dealt with specifically, the fact that the House of Lords recognised in *Polanski* that the use of video conferencing was a satisfactory means for vulnerable witnesses to give evidence in criminal proceedings surely implies that it ought to be regarded as such in civil proceedings too. Certainly, it seems highly unlikely that fair trial rights under Article 6 would be jeopardised simply because the principle of orality was not rigidly followed throughout the legal process.

Minor Procedural Adjustments

Judges in civil cases may also exercise a number of powers to make minor amendments to conventional procedures to accommodate the interests of vulnerable witnesses. For example, the power to clear the court exists at

¹²⁹ *ibid.*, at 402.

¹³⁰ Lord Slynn and Lord Carswell dissented on the issue of public policy.

¹³¹ It was also stated, obiter, that had a video conferencing order been refused, the court would not have been bound to make an order excluding the claimant’s statements from evidence if he did not present himself in court for cross examination. Such an exclusionary order should not be made automatically in respect of the non-attendance of a party or other witness for cross examination. Such an order should be made only if, exceptionally, justice so required. The overriding objective of the 1998 Rules was to enable the court to deal with cases justly. The principle underlying the Civil Evidence Act 1995 was that in general the preferable course was to admit hearsay evidence and let the court attach to the evidence whatever weight might be appropriate, rather than exclude it altogether.

common law where the interests of justice so demand. In *R v Richards*,¹³² the Court of Appeal upheld the decision of a trial judge to clear the public gallery (the press being allowed to remain) where a prosecution witness in a murder trial refused to give evidence unless this was done. Where a party establishes that there is a genuine risk of threats or reprisals to a witness, the court may order that the identity of a witness be held back from the public.¹³³ The interests of justice may also require the public gallery of the court to be cleared when a witness is uncomfortable and unwilling to give evidence, even in cases where there is no immediate evidence of fear or intimidation.¹³⁴

With specific regard to Northern Ireland, Valentine notes that proceedings may be held in camera or in chambers if 'publicity may defeat justice'.¹³⁵ He cites the examples of use of a secret document, the inhibition of witnesses by the presence of the public, arbitration or minor administrative matters. The same criteria can be used to make an order for in camera proceedings in the County Court.¹³⁶ It is also worth noting that Art 170(1) of the Children (Northern Ireland) Order 1995 stipulates that the court may exclude the public when a child under 18 is giving evidence of an indecent nature and that child care proceedings may be held in private.¹³⁷ As with the power to clear the public gallery, this power was originally exercised by the courts at common law.

Child witnesses have traditionally benefited from a common law power for judges to order that wigs and gowns be removed where the interests of justice so require.¹³⁸ However, the research conducted by Sanders *et al* into the experiences of witnesses with learning disabilities, found, however, that the power was used in a haphazard fashion. Witnesses who gave evidence whilst counsel wore their full regalia described the proceedings as 'scarier'.¹³⁹ Although such a power has now been given a statutory footing in criminal hearings,¹⁴⁰ its basis in the civil courts is still the common law. It has, however, been mooted that some witnesses may feel that they prefer the judge and counsel to wear their wigs and gowns so that the trial is a formal rather than a casual procedure and gives them a sense that the process is being taken seriously.¹⁴¹ Ellison has also suggested that some witnesses may expect wigs to be worn from their knowledge of the legal system and may thus be thrown by their absence.¹⁴² Obviously if the child has indicated that he or she does not want this sort of special treatment, no such application

¹³² [1999] *Crim LR* 764.

¹³³ *Shaw v DPP* [1962] AC 220. S.11 of the Contempt of Court Act 1981 permits the court to 'give such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the court to be necessary for the purpose for which it was so withheld'.

¹³⁴ *R v Richards* [1999] *Crim LR* 764 (CA).

¹³⁵ Valentine, *supra* n.74, at 273, referring to RSC Order 32, r.17.

¹³⁶ Valentine, *supra* n.66 at 269.

¹³⁷ In child care proceedings, Art.170(2)(4) of the Order stipulates that it is an offence to publish the identity of a minor without leave of the court.

¹³⁸ Spencer and Flin, *supra* n.69, at 116.

¹³⁹ Sanders *et al.*, *supra* n.41 at 64-65.

¹⁴⁰ Art.14, Criminal Evidence (Northern Ireland) Order 1999.

¹⁴¹ *The Guardian*, 17 January 2003.

¹⁴² Ellison, *supra* n.4, 34.

would normally be made, and he or she would be free to give evidence in the normal setting.

Summary

The Northern Ireland civil courts do have some existing powers to allow certain special protections to be used. Such measures include anonymity and the use of screens. However, the nature of the current regime is extremely piecemeal, drawing together common law rules and practices, statutory instruments and rules of court. The scope and extent of these powers is somewhat unclear. While it may be possible for vulnerable witnesses to avoid coming to court altogether through the adduction of a statement under the Civil Evidence (Northern Ireland) Order 1997, this is clearly an imperfect solution since it denies the witnesses the opportunity of relaying their version of events to the court, and may carry little weight before the trier of fact. Fresh legislation is clearly needed to codify the law, which would consolidate reinvigorate those rules and practices that work well, whilst simultaneously amending or removing those which are rarely used or are largely ineffective.

The Challenge Ahead

The Criminal Evidence (Northern Ireland) Order 1999 overhauled the rules relating to vulnerable witnesses giving evidence in criminal cases, and represents a forward-looking and relatively comprehensive attempt to afford them with a better level of protection. By contrast, there is no regime in place offering similar protections to witnesses in the civil courts. Although the differences between civil and criminal courts should not be underestimated, witnesses testifying in civil cases may feel just as vulnerable and frightened as those attending a criminal trial. Proceedings are structured and conducted along broadly the same lines; so witnesses will still have to give evidence in an austere and unfamiliar environment and will still have to undergo cross-examination. The nature of cross-examination is unlikely to differ substantially from that which has proved so problematic for vulnerable witnesses testifying in criminal hearings. It thus seems anomalous that the testimony of a vulnerable witness in a criminal case, where the liberty of the accused may well be at stake, can be relayed through a pre-recorded video or through a televised link, but that same witness would be expected to provide live testimony before a civil court.

There are, however, still some commentators who express doubt about the appropriateness of certain protections. Research carried out for the Scottish Office in 2002 found that some consultees were concerned about the prevalence of a “vulnerable witness culture” whilst others felt courts already had adequate powers to protect vulnerable witnesses.¹⁴³ In addition, certain commentators express concern over the use of televised testimony from a due process point of view,¹⁴⁴ or that it risks distorting the demeanour of the

¹⁴³ Scottish Office, *Vital Voices: Helping Vulnerable Witnesses Give Evidence* (2002), para.163.

¹⁴⁴ See, e.g. Massaro, “The Dignity Value of Face-to-Face Confrontations” 40 *Florida Law Rev* 863; Friedman (1998) “Hearsay and Confrontation: Thoughts from Across the Water” *Crim L R* 697 (1998).

witness.¹⁴⁵ However, it is now well established that the use of televised testimony neither interferes with common law rights nor those enshrined in Article 6 of the European Convention,¹⁴⁶ and the value of demeanour as an indicator of reliability is also subject to increasing doubt.¹⁴⁷ Alternative means of giving evidence have been readily accepted to be compliant with international human rights standards and have been made available in all major international fora, including the International Tribunal for the Former Yugoslavia, the International Tribunal for Rwanda, and the International Criminal Court.¹⁴⁸ As such, there would seem to be no rational basis for the distinction in the current legal position that special measures should be the norm for vulnerable witnesses testifying in criminal cases, but have virtually no legal basis in the civil courts. In the interests of certainty and consistency, new legislation should be introduced to empower all civil courts to provide special protections for vulnerable witnesses.

Criteria for Eligibility

One of the most formidable challenges that legislators face when devising new statutory protections for vulnerable witnesses is the task of drawing up eligibility criteria. Vulnerability may stem from either personal characteristics of the witness or the specific nature and circumstances of a particular event. Most jurisdictions have tended to adopt one of two main approaches for the purposes of determining which witnesses ought to be eligible for special protections.

The first approach may be labelled a “categorisation” approach, whereby witnesses were considered vulnerable, and thereby eligible to apply for such protections, if they fell within a list of closed categories. Such categories have traditionally covered children; witnesses with learning disabilities; complainants in sexual cases and witnesses at risk of intimidation. The alternative approach which might be labelled ‘needs-based’, assumes that all witnesses are eligible to apply for special measures, but requires the court to determine, on the basis of individual needs, which witnesses should use them. Often legislation will require the court to take into account a range of factors, such as age, race, sexuality, religious or political beliefs in determining whether the witness ought to be granted protections. It may also stipulate that the nature of the incident in question can heighten the vulnerable status of a particular witness. For example, allegations involving sexual offences, domestic abuse or organised or paramilitary crime may well be taken into account. Whilst the “categorisation” approach offers some measure of consistency and certainty, it also risks excluding certain witnesses who fell outside the specified categories. The “needs-based”

¹⁴⁵ See, e.g. Montoya, “On truth and shielding in child abuse trials’ (1992) *Hastings L Rev* 1259.

¹⁴⁶ See *R v Camberwell Green Youth Court ex p D*; *R v Camberwell Green Youth Court ex p G* [2005] 1 WLR 393.

¹⁴⁷ See generally Spencer and Flin, *supra* n.69, at 279-283; Ellison, *supra* n.4, at 76-77.

¹⁴⁸ See Doak, “The Victim and the Criminal Process: An analysis of recent trends in regional and international tribunals” (2003) 23(1) *Legal Studies* 1; Garkawe, “Victims and the International Criminal Court: Three Major Issues” (2003) 3 *Int Crim Law Rev* 345.

approach offers less certainty, but means that no witness will be excluded from applying for special measures.

Most common jurisdictions have tended to move away from a categorisation approach in recent years, as research would appear to indicate that vulnerability is very much subjective and may stem from a variety of factors, as explained by the Law Commission of England and Wales in its Consultation Paper, *Mentally Incapacitated and Other Vulnerable Adults, Public Law Protection*:

“Vulnerable people are, of course, not a homogenous group and arriving at a definition of vulnerability which is neither under-inclusive nor over-inclusive presents some difficulties. Vulnerability is, in practice, a combination of the characteristics of the person concerned and the risks to which he is exposed by his particular circumstances.”¹⁴⁹

As one consultee informed the Scottish Office, vulnerability tends to manifest itself “in different forms, at different times, in different people”.¹⁵⁰ As such, any new legislation should be drawn widely enough to encompass anyone where there is a significant risk that the quality of their evidence may be diminished by reason of fear or distress in connection with giving evidence at the trial.

However, there has also been a trend for legislation to create special rules that are applicable for child witnesses. As noted by the New Zealand Law Commission, it is relatively straightforward to draw a distinction between child witnesses, who are easily identifiable as a class through age alone, and all other vulnerable witnesses.¹⁵¹ A vast body of literature documents the fact that they often find giving evidence traumatic and confusing. Most people agree that children are particularly vulnerable; young children especially are likely to find the process of testifying distressing or traumatic. Offering child witnesses an automatic entitlement to special protections would enable them to be advised in advance of the trial about how their evidence will be given, thus rendering the experience less confusing and unsettling. Were no special category to be made available for child witnesses, there would be no possibility of the child being given a reassurance in advance of the trial as to how they would be expected to testify. In this event, child witnesses could not be given any guarantee that they would definitely not have to give live evidence in court; at best they could be told that an application would be made to ask that special arrangement be put in place.

The Role of Discretion

Assuming child witnesses are deemed automatically eligible for special protections, the question as to whether the legislation ought to lay down mandatory requirements concerning the form of the testimony needs to be

¹⁴⁹ Law Commission, *Mentally Incapacitated and Other Vulnerable Adults, Public Law Protection* (1993), para.7.2.

¹⁵⁰ Scottish Office, *supra* n.143, at para.16.

¹⁵¹ New Zealand Law Commission *The Evidence of Children and Other Vulnerable Witnesses*, Preliminary Paper 27 (1996), para.137.

considered. In the criminal courts, the powers of the judge are limited in deciding which measure(s) to order under the Criminal Evidence (Northern Ireland) Order 1999. Article 9 lays down a 'primary rule', dictating that courts must issue certain measures to specified classes of witnesses in specified circumstances. In a nutshell, the legislation provides that under 17 year-olds who are witnesses in cases of sex or violence are given no choice in having certain special measures, such as pre-recorded evidence-in-chief or live TV links applied to them, whether they wish to use them or not.

It must be questioned whether such restrictions upon judicial discretion are either necessary or, indeed, desirable. The series of rules and presumptions laid down in the legislation are tirelessly complex, and serve to disenfranchise individual witnesses by discouraging consultation with them as to how they would prefer to give evidence. Moreover, the rules have removed the ability of the court to tailor solutions to the needs of individual witnesses or the circumstances of individual cases. Lord Justice Auld, in his *Review of the Criminal Courts*, criticised the eligibility provisions as being "extraordinarily complicated and prescriptive", and observed that "those drafting them have no idea of what judges and criminal practitioners have to cope with in their daily work of preparing for and conducting a criminal trial or what they need as practical working tools for the job."¹⁵²

Anecdotal evidence would indicate that the "primary rule" has been poorly received both in Northern Ireland and in England and Wales. As observed by Baroness Scotland in the House of Lords, a 16½ year-old who has witnessed any sort of violent crime, even where he was not himself involved, would be forced to give evidence in this way.¹⁵³ The rule is also notoriously inflexible, and is perceived as being overly complex and excludes the child from having any input into the decision-making process. For some child witnesses, they may actually *want* to give evidence in court, and feel that the use of pre-recorded evidence or live links served to exclude them from proceedings. On occasions, it may be that the use of a screen in court would be more appropriate. The lack of choice was reflected in Plontikoff and Woolfson's research, which found that although 44 of the 50 child witnesses they interviewed had given evidence through a televised link, only ten felt they had a choice about how to testify. Section 21 of the English legislation (which mirrors Article 9) is currently under review with "the aim of delivering the greater flexibility"¹⁵⁴ and, as such, would seem likely to be amended in the near future. It should also be underlined that a more flexible system which seeks to take into account the views of individual child witnesses would also conform to international standards of best practice.¹⁵⁵

It would therefore be undesirable for any new legislation to lay down mandatory requirements dictating how any one class of witness is to give evidence. Removing the mandatory nature of the rule would, of course, give

¹⁵² *Review of the Criminal Courts of England and Wales* (Cmnd. 9376) (2002), Chap.11, para.126.

¹⁵³ *Hansard*, HC Deb, 22 Jul 2004 : Col. WS48.

¹⁵⁴ *ibid.*, per Baroness Scotland.

¹⁵⁵ See, e.g. Art.12 of the UN Convention on the Rights of the Child which provides that children have "the right to participate in decision-making processes that may be relevant in their lives and to influence decisions taken in their regard."

rise to the possibility that measures may be applied by the courts in an inconsistent and haphazard fashion. There should be some degree of certainty that would enable a child witness to be informed prior to trial that he or she was, at least, very likely to receive some form of protection. It may be possible to facilitate such a mechanism by devising a legislative provision that mirrors the Scottish approach. The Vulnerable Witnesses (Scotland) Act 2004, which codifies the protection of vulnerable witnesses in Scotland, extends the use of special measures to civil proceedings and children's hearings.¹⁵⁶ In attempting to strike a balance between flexibility and the need for some degree of certainty, section 12(4) provides that the court may order that a child witness is to give evidence without the benefit of any special measure only if satisfied that the child witness has expressed a wish to give evidence without the benefit of any special measure and that it is appropriate for the child witness not to do so; or where such a measure may result in a significant risk of prejudice to the fairness of the trial, and that risk significantly outweighs any risk of prejudice to the interests of the child witness.

It is contended, however, that child witnesses alone should be the only category of vulnerable witness to benefit from this automatic entitlement. Some may argue that other classes of witnesses, such as those with physical or learning disabilities could also benefit from an automatic entitlement. This may well be so, but the difficulty in extending an automatic entitlement to other vulnerable witnesses is that not all witnesses would require the use of special protections. For example, it is conceivable that a witness with a mild learning disability would still be able to give clear and intelligible evidence without the use of a special protection. Likewise, someone suffering from a physical disability may still be mentally alert and would not need any special assistance. Furthermore, as noted by the New Zealand Law Commission, the identification of these witnesses may not always be straightforward owing to the very wide range of different physical and learning disabilities.¹⁵⁷ For these witnesses, the court should usually be in a good position to determine whether special protections are needed on a case-by-case basis, according to the needs of individual witnesses.

It would be more difficult still to legislate for an automatic entitlement for applicants under the Family Homes and Domestic Violence (Northern Ireland) Order 1998, many of whom will have suffered from domestic violence. Such witnesses may indeed be genuinely unnerved by the prospect of giving evidence in court in the presence of their attacker. However, imposing a mandatory requirement here would be made all the more difficult because the factors that underpin their vulnerability arise from a particular set of circumstances, rather than any inherent factor, such as age, sex or cognitive capacity. While there are certainly sound policy arguments for extending the entitlement to those fearful of domestic violence, the problem could then arise that similar arguments would be levied in favour of other classes of witnesses. For example, in the unlikely, though legally possible,

¹⁵⁶ Currently, the legislation applies to both child and adult vulnerable witnesses in High Court and Sheriff Court criminal trials and Children's Hearings, and will be rolled out to cover civil cases from late 2007.

¹⁵⁷ New Zealand Law Commission, *supra* n.151, para.137.

scenario where a rape victim sought civil damages from her attacker, then should she not also be entitled to automatic protection? And what if the victim was subjected to a physical assault, or even a indecent assault; should they not also be automatically protected? Such witnesses may be very deserving of protective measures, laying down such requirement based on particular circumstances or type of case is clearly problematic. Potentially, there could be huge discrepancies between the facts of individual cases and the personal circumstances of each applicant, which would totally overlook the practical ability of witnesses to give clear and coherent testimony.

For these reasons, a safer course would be for any new legislation to stipulate that child witnesses should be the only class of vulnerable witness to receive an automatic entitlement. In relation to all other witnesses, it should be for the party calling the witness to demonstrate that the use of protective measures would improve the quality of evidence, using a non-exhaustive list of factors such as those laid down in s 11(2) of the Vulnerable Witnesses (Scotland) Act 2004.¹⁵⁸ Crucially, it should also provide a means for any application for special protections to outline the views of the witness as to how his or her evidence should be received, which should be taken directly into account by the court in deciding which measure(s) may be used to maximise the quality of the witness's evidence.

The Range of Special Protections

The Criminal Evidence (Northern Ireland) Order 1999 provides for a relatively comprehensive range of measures compared with those available in other common law jurisdictions. It is anticipated that these should be transferable to the civil courts with relative ease, given that many court centres in Northern Ireland are now equipped with video-conferencing facilities. Articles 12, 13, 14, 15, 17 and 18 of the 1999 Order could all be replicated, with minor adjustments, for the purpose of civil proceedings. Whilst some investment would be undoubtedly required to meet the demands of any new legislation, any capital expenditure should not be recurrent.

Although the use of special measures in the criminal courts have been broadly welcomed, one of the special measures, video-recorded cross-examination or re-examination under Article 16 of the 1999 Order, has not yet been implemented and is unlikely to be brought into force in its current form. As previously noted, the procedure is currently under Review in England by the Home Office. If the provision is likely to be dropped or amended from the criminal legislation for fears that it would prove unworkable, it may be prudent to avoid inserting any new legislation covering the civil courts – at least until we know what the future holds for in the criminal arena. The recent decision of the European Court of Justice in *Pupino*¹⁵⁹ suggests that the Government should act urgently to find an

¹⁵⁸ These being: the age/maturity of the witness; any risk of intimidatory behaviour towards the witness by anyone else in relation to the proceedings; the social, racial or ethnic origins of the witness; the sexuality of the witness; the religious belief or political opinion of the witness; any physical or learning disability or impairment.

¹⁵⁹ Case C-105/03, 16 June 2005, which concerned the compatibility of the certain provisions of the Italian Criminal Code with the EU Framework Decision on the Standing of Victims in Criminal Proceedings.

alternative mechanism that enables children to testify without attending court at all, lest they should find themselves in violation of EU Law. It may be that a successor to Article 16 could be implemented in a way that is much more closely related to pre-recorded cross-examination in Western Australia. Here, the child's entire evidence (including cross-examination and re-examination) may be given at one pre-trial hearing, presided over by the judge and video-recorded to be played at the later trial.¹⁶⁰ Thus examination-in-chief and cross-examination would take place during this hearing, and the child need not attend court at all.

Regulation of Questioning

In addition to special measures that seek to shield vulnerable witnesses from the court, a number of jurisdictions have placed statutory limitations on the way in which vulnerable witnesses may be questioned. For example, section 85 of New Zealand's Evidence Act 2006 provides that judges "may disallow, or direct that a witness is not obliged to answer, any question that the Judge considers intimidating, improper, unfair, misleading, needlessly repetitive, or expressed in language that is too complicated for the witness to understand." Similarly, section 41 of New South Wales's Evidence Act 1995 provides that the court may disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the question is misleading; or unduly annoying, harassing, intimidating, offensive, oppressive or repetitive. The court may also take into account any relevant condition or characteristic of the witness, including age, personality and education; and any mental, intellectual or physical disability. Although the higher courts have actively encouraged trial judges to make use of the provision,¹⁶¹ the Australian Law Reform Commission has expressed some concern that the provision is not used by judges as frequently as it should be to stop the use of harassing or offensive questions in sexual cases or those involving other vulnerable witnesses.¹⁶²

No similar statutory duty currently exists in Northern Ireland, although, as noted above, the common law imposes a duty on judges to intervene to prevent aggressive or intimidatory questioning. One particular difficulty with this type of legislation is that many of the techniques which advocates use to unsettle witnesses are non-verbal. It is hard to foresee how Parliament could legislate to prevent the use of a sarcastic voice, a gesticulation, a sneer, a raised voice or a rolling of the eyes. It is likely that many judges would have different interpretations of what may constitute an acceptable or fair question, and for this reason, it is questionable whether legislation on this point would be effective. Although a number of concerns are highlighted above regarding the effectiveness of the common law duty on judges to

¹⁶⁰ Evidence Act 1906 (WA), s.106K. See further Hoyano, 'Variations on a Theme by Pigot: Special Measure Directions for Child Witnesses' [2000] *Crim LR* 250

¹⁶¹ See, e.g. *R v TA* (2003) 57 NSWLR 444, where it was held that trial judges were entitled to reject any line of questioning even if it was relevant to the facts in issue.

¹⁶² Australian Law Reform Commission, *Review of the Evidence Act 1995*, Issues Paper 28 (2004), paras.3.23-3.34. Similar provisions exist in Queensland (Evidence Act 1977 (Queensland), s.20), the Northern Territory (Evidence Act 1939 (NT), s.13), and Western Australia (Evidence Act 1906 (WA), s.26).

control questioning, there is no reason to assume that a statutory control would prove more effective. It is also worth noting that the lack of intervention was primarily attributable to the need to ensure a fair trial in criminal cases. It may, however, be the case that judges are more willing to intervene to prevent vexatious or oppressive questioning in civil cases.

Many common law jurisdictions have also enacted legislation to prohibit the cross-examination of child witnesses and complainants in sexual cases by the defendant in person. In the criminal courts, the 1999 Order has curtailed the right of a defendant to conduct cross-examination in person in cases involving violence against children or child sex abuse and complainants in sex cases.¹⁶³ While cross-examination in person is unlikely to arise frequently in civil cases, the New Zealand Law Commission envisaged that it could arise in a small number of civil proceedings, most notably family cases.¹⁶⁴ As such, under section 95(2) of the Evidence Act 2006 judges are empowered to make a direction barring such cross-examination in civil cases. The creation of such a power in statute, even if rarely resorted to in practice, could constitute a useful additional safeguard as part of any new legislation aimed at protecting vulnerable witnesses in the Northern Ireland civil courts.

Conclusions

There is a considerable body of psychological and socio-legal literature that documents the plight of vulnerable witnesses within the adversarial trial system. While such research has been primarily based within the context of the criminal justice system, there is no reason to suppose that the experience of testifying in a civil court would be any less stressful for vulnerable witnesses. While early indications from England and Wales on the operation of special measures are positive, it might be added that, even for those vulnerable witnesses who do receive special protections in court, the excesses of the adversarial trial are only partially curbed, rather than removed. Even, for example, if witnesses give evidence via a television link, for example, they will still be then subjected to the same techniques and devices commonly used to disorientate or intimidate witnesses during cross-examination. As Ellison has argued, as long as orality and cross-examination are regarded as sacrosanct features of the adversarial trial, the lot of the vulnerable witness is unlikely to be substantially improved. She maintains that there is an inherent “basic conflict between the needs and interests of vulnerable witnesses and the resultant evidentiary safeguards of the adversarial trial process.”¹⁶⁵

That point, however, is something for a much more protracted discussion, and the overnight introduction of an inquisitorial method in either the civil or criminal courts of Northern Ireland is certainly not an imminent prospect. For the time being, much can be done to improve the experience of vulnerable witnesses who are called upon to give evidence in the civil courts. If the new Law Commission decides to recommend reforms to the current law, there would be a clear opportunity for the province to position itself as a

¹⁶³ Criminal Evidence (Northern Ireland) Order 1999, PT3.

¹⁶⁴ New Zealand Law Commission, *supra* n.151 at 179.

¹⁶⁵ Ellison, *supra* n.4 at 60.

leader in best practice, in ensuring civil procedures fully conformed to human rights standards and the emerging international consensus as to the best ways for vulnerable witnesses to give evidence in court.

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