

Soanes, M. (2014). The Well-educated Witness: Witness Familiarisation Training in England & Wales. *The Law Teacher*, 48(2), pp. 196-208. doi: 10.1080/03069400.2014.914733



**CITY UNIVERSITY  
LONDON**

[City Research Online](#)

**Original citation:** Soanes, M. (2014). The Well-educated Witness: Witness Familiarisation Training in England & Wales. *The Law Teacher*, 48(2), pp. 196-208. doi: 10.1080/03069400.2014.914733

**Permanent City Research Online URL:** <http://openaccess.city.ac.uk/3733/>

### **Copyright & reuse**

City University London has developed City Research Online so that its users may access the research outputs of City University London's staff. Copyright © and Moral Rights for this paper are retained by the individual author(s) and/ or other copyright holders. All material in City Research Online is checked for eligibility for copyright before being made available in the live archive. URLs from City Research Online may be freely distributed and linked to from other web pages.

### **Versions of research**

The version in City Research Online may differ from the final published version. Users are advised to check the Permanent City Research Online URL above for the status of the paper.

### **Enquiries**

If you have any enquiries about any aspect of City Research Online, or if you wish to make contact with the author(s) of this paper, please email the team at [publications@city.ac.uk](mailto:publications@city.ac.uk).

## **The Well-educated Witness: Witness Familiarisation Training in England & Wales**

### Keywords

Witness familiarisation training, storytelling, witness contamination, ethical trial preparation

### Subject & Themes

1. Story-ownership in the context of witness familiarisation
2. Common Law adversarial trial tradition
3. Court of Appeal (England and Wales) guidance on acceptable and unacceptable forms of trial preparation for witnesses
4. Whether witness familiarisation training compromises the witness as a pristine evidence source

### Abstract

The conference presentation promoted respect for witnesses' ownership of their narratives and explained how effective witness training can successfully avoid unethical coaching whilst remaining client-centred. Witnesses' roles within the Common Law adversarial trial tradition were analysed, and the English and Welsh Court of Appeal's guidance to lawyers on acceptable and unacceptable forms of trial preparation for witnesses was outlined and critiqued in its historical context and compared with other common law jurisdictions' practices. It was argued that witnesses can be educated ethically to enhance their effectiveness in the witness box whilst respecting them as pristine evidence sources.

This article develops these themes to argue that in England and Wales witness familiarisation trainers are educators rather than partisan trial strategists. Case law and research literature in the field of witness familiarisation and ethics are relied upon to support this argument. In addition, the author draws on several years' experience of the courtroom and witness familiarisation training with witnesses of fact, expert witnesses, and criminal investigators. [164]

### Introduction

Witness familiarisation training is designed to equip witnesses to assert, defend, and re-assert their narratives; and, in particular, to resist cross examiners' attempts at distortion, editing, and trashing. This training also addresses the examination-in-chief and re-examination stages of testimony, ones that enable a party to fit its witnesses' stories into their case theory and facilitate co-operation between the examining lawyer and the witness. The aim is to create optimum conditions for storytelling and to establish rapport with the advocate, the fact-finders and the judge. In adversarial trials, cross-examining advocates seek to manipulate or suppress opposing witnesses' narratives with the ultimate aim of persuading fact-finders to return a verdict in their side's favour. With high stakes and formidable forensic arms available to both sides' advocates, parties are frequently sufficiently motivated by the desire to win that they resort to pre-trial training for their witnesses so that they better understand the adversarial process and improve their performance in the witness box.

Witness familiarisation training typically occurs late in the litigation process and often very close to the trial date. Although a legitimate form of pre-trial preparation for witnesses, witness familiarisation events offer opportunities for illicit editorial control of witnesses'

accounts to promote a party's case, possibly, at the cost of the truth. For that reason lawyers in England and Wales have had placed upon them severe restrictions on witness training to distance both litigation and trial lawyers from the witnesses who are to receive this assistance. This article analyses the English and Welsh Court of Appeal's guidance on acceptable forms of pre-trial assistance for witnesses. It concludes that permitted forms of training enhance witnesses' effectiveness in the witness box, respect them as unique evidence sources, and ultimately serve the interests of justice. The article concludes that witness familiarisation training is therefore best understood in the context of the courts' growing recognition of the need for a programme of systematic witness care, and if it is conceived as an opportunity to educate witnesses in their role and function at trial. Legitimate forms of witness preparation in this jurisdiction are specifically designed so that they may not become tools for partisan trial strategists to exploit witnesses and their testimony at trial. The article recommends that the current forms of witness familiarisation, which are expensive and limited to the few, offer models upon which to design educational opportunities that could be offered to the many and thus widen access to services from which all witnesses would benefit. However, this will only be possible if less costly and at the same time effective forms of witness familiarisation are designed. If this is possible, an educational experience would be made available to all witnesses that would ultimately improve the administration of justice.

#### Historical Background and Overview of Court of Appeal Guidance on Witness Familiarisation

The common law adversarial trial tradition to this day exhibits various forms of pre-trial training for witnesses. Currently there is a sliding scale of tolerance towards witness familiarisation training in those jurisdictions.<sup>1</sup> At one end is the USA, which permits witness coaching.<sup>2</sup> Witnesses are offered assistance in how best to communicate the evidence they intend to give at court and receive assistance with more neutral factors such as courtroom orientation and instruction on what to expect when testifying in court. At the other end of the scale is the English and Welsh jurisdiction that takes a highly cautious approach to witness preparation.<sup>3</sup> Between them are common law jurisdictions that, whilst not condoning overt witness preparation for testifying, do permit trial advocates to offer support to their own witnesses prior to taking the oath.

Given the occurrence of widely divergent approaches within the adversarial tradition, witness familiarisation is not an ethical issue but rather one that is procedural albeit strongly influenced by rules of professional conduct. Therefore, each jurisdiction's approach to what is and what is not permitted at training events with witnesses must be studied within in its own context. England and Wales offers a particularly interesting context as its Court of Appeal has recently offered cautious approval and encouragement for witness familiarisation training whilst, at the same time, reiterating its own abhorrence of witness coaching. A review of the Court of Appeal's guidance and the rationale for it reveals the underlying

---

<sup>1</sup> S.V. Vasiliev, "From Liberal Extremity to Safe Mainstream? The Comparative Controversies of Witness Preparation in the United States", *International Commentary on Evidence* (2010) Volume 9, Issue 2, ISSN (Online) 1554-4567: 2012-01-10

<sup>2</sup> S.M. Goldman and D.A. Winegardner, "The Anti-False Testimony Principle and the Fundamentals of Ethical Preparation of Deposition Witnesses" 59 *Cath. UL Rev.* 1 (2009-2010); F.C. Zacharias and S. Martin, "Coaching Witnesses" (1999) 87 *KY L J* 1001.

<sup>3</sup> A. Levin and S. Whitham (2013) "Red Card for Witness Coaching" (2013) 24 *5 Cons. Law* 26; P. Cooper, "Witness Preparation – Staying within the Rules", *New Law Journal*, (2004) 154(7154), 1768-1769

tension between parties' desire to address witnesses' concerns about giving evidence and the judiciary's belief that fact-finders can best evaluate testimony if it is challenged head-on in trial without prior partisan coaching. This witnessed-centred approach is understandable if it is seen through the historical development of the trial from the 19th century to the present day.

Defendants in criminal trials not able to give sworn evidence in their own defence until the late 19th century.<sup>4</sup> And in the early 19th century, defence counsel in England and Wales were not able to address the jury and so were unable to comment on the fruits of their own cross-examination or the credibility of witness at the end of trials; hence challenging prosecution witnesses was the focus of defence advocacy.<sup>5</sup> The Prisoners' Counsel Act 6 & 7 Will. 4, c.114 (1836) removed what was left of the common law prohibition on assistance of counsel for the accused of capital crimes. The statute's passage through Parliament opened debate on the need for lawyers' speeches in the face of witnesses' testimony in chief and under cross-examination. The Act's opponents, who included the majority of the judiciary and barristers, argued that speeches were superfluous as jurors already had the means to discern the truth from witnesses' testimony and defendants' own statements to them.<sup>6</sup> Speeches by lawyers, it was argued, would only interfere with the truth.<sup>7</sup> Additionally it was during the course of the 19th century that the division of the barrister and solicitor professions was largely achieved, and so well into the 20<sup>th</sup> century witnesses first met the advocates of the party for whom they appeared when they began to give evidence from the witness box. These developments made jurors more susceptible to lawyers' questioning and speeches than to the impact of witnesses' testimony itself. Witnesses continue to this day to be vulnerable to forensic questioning – good as well as bad – arguably to the detriment of the quest for the truth.

At the end of the last century, following a growing awareness that complainants and witnesses deserved better treatment, alleged victims of crime and, eventually, witness in general were offered support through the courts' services.<sup>8</sup> About the same time the legal professions relaxed rules that restricted advocates' communication with witnesses prior to their entering the witness box. Witnesses are now, as a matter of course, to receive brief explanations about courtroom procedure and the general purpose of oral evidence, but not their own role in that trial. In parallel there was a relaxation of rules on advocates taking pre-trial statements from witnesses.<sup>9</sup>

---

<sup>4</sup> Criminal Evidence Act 1898

<sup>5</sup> D.J.A. Cairns, *Advocacy and the Making of the Adversarial Criminal Trial 1800-1865* (Oxford, Clarendon Press 1998) p. 30

<sup>6</sup> *Supra*, n. 4, pp. 67-91

<sup>7</sup> *Supra*, n. 4, p. 4

<sup>8</sup> The latest GOV.UK guidance is available at <https://www.gov.uk/going-to-court-victim-witness/extra-protection-in-the-courtroom> (accessed 21 March 2014); Crown Prosecution Service's Witness Care Units [http://www.cps.gov.uk/news/fact\\_sheets/witness\\_care\\_units/](http://www.cps.gov.uk/news/fact_sheets/witness_care_units/) (accessed 21 March 2014); and Victim Support <http://www.victimsupport.org.uk/> (accessed 21 March 2014)

<sup>9</sup> See the Bar Standards Board's former *Code of Conduct Part VII - Conduct of Work by Practising Barristers*, para 705; for more detailed guidance, see *Written Standards for the Conduct of Professional Work 6. Witnesses*. The new code, which came into force at the beginning of 2014, is outcomes focussed and does not offer specific guidance on this aspect of professional conduct.

A high-water mark for acceptable contact between trial lawyers and witnesses in the criminal justice system was reached in December 2004, when the Attorney General published a report on pre-trial interviews which concluded that prosecutors in criminal trials should be able to speak to witnesses for the purpose of clarifying or assessing the reliability of the evidence they could give.<sup>10</sup> This was a significant relaxation as the Crown Prosecution Service had generally received its evidence from the police and had had no direct contact with prosecution witnesses. This was a little-advertised but significant departure from the separation of the investigatory and prosecutorial stages. The most up-to-date guidance is given on the Crown Prosecution Service's web site.<sup>11</sup> In summary, a pre-trial interview may take place at any stage of the proceedings (including pre-charge) until the witness starts to give evidence. However, no interview should be conducted until the witness has provided to the police a signed witness statement; and prosecutors must not under any circumstances train, practise or coach the witness, or ask questions that may taint the witness's evidence. Prosecutors are warned to remain dispassionate and never to suggest to witnesses that they might be wrong, or indicate approval or disapproval in any way to any answer given by the witness. To depart from this standard carries with it the risk of allegations that the witness has been led or coached in their evidence. The code of conduct does not apply to other meetings with witnesses such as special measures meetings, court familiarisation visits, or meetings to explain a decision to discontinue a case or to significantly alter a charge.

By the beginning of the present century, complainants and witnesses were of central importance to English and Welsh trials, and advocates have had to accept a less powerful role in trials themselves. However, at the same time, lawyers have had greater freedom to make pre-trial contact with witnesses; and it was inevitable that the acceptable limits of that interaction would be tested. From 2004, the Court of Appeal of England and Wales has defined permissible pre-trial preparation for witnesses through a number of criminal and civil appeal judgments. In *R v Salisbury* (19 May 2004) unreported, on appeal from Chester Crown Court, the Court of Appeal stated that witness familiarisation training was acceptable but without offering clear guidance to practitioners. Giving judgment, Lord Phillips, the then Lord Chief Justice of England and Wales, commended the remarks from the judge of first instance Mr Justice Pitchford. Pitchford's ruling on the admissibility of testimony from a witness, who had received witness familiarisation training, was described as '[a] model of clarity and balance'.<sup>12</sup> Mr Justice Pitchford's observations focussed on the emotions of the witness and describe the act of giving evidence as an 'ordeal', and witness familiarisation as an exercise any witness would be entitled to enjoy.<sup>13</sup> He went on to attempt to define the parameters of acceptable forms of that training. It is to be no more than preparation for the exercise of giving evidence, an application of sound common sense and be such that it is incapable of converting a lying but incompetent witness into a lying but impressive one.<sup>14</sup> The educational experience of witnesses on these events is a means by which they gain an understanding of the trial process so that they know what is to come. However, coaching witnesses in how to lend a specious quality to their evidence is expressly banned. Indeed permitted forms of the training should not to be a means to an unfair advantage over any

---

<sup>10</sup> The Rt Hon. Lord Goldsmith Q.C., Attorney General, *Pre-Trial Witness Interviews by Prosecutors Report*, (Office of the Attorney-General, 2004)

<sup>11</sup> [http://www.cps.gov.uk/victims\\_witnesses/resources/interviews.html](http://www.cps.gov.uk/victims_witnesses/resources/interviews.html) (accessed 21 March 2014)

<sup>12</sup> *R v Salisbury* (19 May 2004) unreported, the Court of Appeal, [60]

<sup>13</sup> *Ibid.*, [28] of Pitchford, J's ruling quoted at [60]

<sup>14</sup> *Ibid.*, [29] of Pitchford, J's ruling quoted at [60]

other witness. The training should enable witnesses to be better able to give a sequential and coherent account of their evidence to the court, in other words the training is for the greater good of justice not for one party alone.<sup>15</sup>

More practical guidance was offered in *R v Momodou and Limani* [2005] EWCA Crim 177. This was an appeal following a four-month Crown Court trial for violent disorder at which issues were raised about pre-trial witness training. Their lordships stated categorically that witness training for criminal trials is prohibited and stated that there was a dramatic distinction between witness coaching and witness familiarisation.<sup>16</sup> It reaffirmed that discussions between witnesses should not take place, and that statements and other evidence of one witness should not be disclosed to another.<sup>17</sup> At the heart of the guidance was the principle that witnesses should give their evidence, so far as practicable, uninfluenced by what anyone else has said informally or formally so as to reduce risks of witnesses tailoring their evidence or being perceived to have done so.<sup>18</sup> Their lordships went on to outline the inherent risks in witness training. Even if training was conducted with a single witness and by someone completely remote from the facts of the case, that witness may discern which aspects of their testimony are inconsistent with the other evidence. As a result, honest witnesses may alter their evidence to accommodate what they think may be a different, more accurate, or simply better-remembered account; and that dishonest ones will calculate how their testimony may be improved. These and other risks are dramatically higher if witnesses are trained jointly. In contrast to witness coaching, pre-trial witness familiarisation was a good thing, something designed to assist witnesses to give their best at the trial so that they not taken by surprise at the way trials work (including presumably how trial lawyers operate). Witness familiarisation was evaluated as something that may improve the manner in which witnesses give their evidence, for example by reducing nervous tension, and that it is not only permitted but generally to be welcomed.<sup>19</sup> The Court reiterated that no form of witness familiarisation training should involve discussions about proposed or intended evidence, and that courtroom testimony must remain the witness's own uncontaminated evidence.<sup>20</sup> The Court of Appeal's guidance also addressed the special position of expert witnesses. Expert witnesses training in courtroom skills will assist to make specialist evidence better understood by the court at both the evidence-in-chief and cross-examination stages; it will also help experts to resist the pressure to go beyond matters covered by their specific qualification.<sup>21</sup>

The role of witness familiarisation training in the civil justice system was addressed by the Court of Appeal in *Ultraframe (UK) Ltd v Gary fielding and Others* [2005] EWHC 1638 (Ch). In that case, it was acknowledged that in civil cases it is common for witnesses to see and respond to the statements of other witnesses; but nonetheless at the heart of civil litigation, as with criminal litigation, is the principle that witnesses' evidence should be their honest and independent recollection, expressed in their own words. With the near disappearance of oral

---

<sup>15</sup> Ibid.

<sup>16</sup> *R v Momodou and Limani* [2005] EWCA Crim 177, [61]

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid. at [62]

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

evidence-in-chief from civil cases,<sup>22</sup> the importance of witnesses' independent recollection during cross-examination was evaluated as all the greater. Once again, there was an approval of witness familiarisation practices, but the only explicit reference to what that training was to cover was general guidance on behaviour in court to be offered to the potential witness. The guidance is set at a basic level, for example, trainers can tell witnesses to stand with their feet pointing at the decision maker, to walk slowly and purposefully to where they will be giving evidence from, to listen carefully to questions, and not to lose their temper. However, significantly the Court of Appeal did approve the use of mock cross-examination, but acknowledgement of this as a legitimate training method was coupled with a stern warning that it was highly undesirable for the potential witnesses to compile their own case study or choose topics for mock cross-examinations. One may conclude that to date the Court of Appeal's endorsement of witness familiarisation is cautious and the parameters set for its legitimate forms are narrow. A 2013 judgment from the Court of Appeal helps to explain why.

*R v Sarwar and another* [2013] All ER (D) 65 (Mar) was an appeal from a trial involving an accomplice turned informer prosecution witness who gave a number of witness statements to police officers following an astounding 48 police interviews. At the request of prosecuting counsel, and with the intention of "clearing up" inconsistencies in his accounts, the witness was further interviewed by police in breach of the Attorney-General's guidance and *Achieving Best Evidence*,<sup>23</sup> the best practice standards on interviewing witnesses. Most significantly the witness was warned that the inconsistencies in his versions of events may lead to attacks on his credibility. The Court of Appeal held that the approach taken was improper and no interview ought to have taken place, but what took place:

[W]as not frank witness coaching of the kind under consideration in *Momodou*. There was no attempt to advise him on how to approach the business of answering questions. There was no practice cross-examination. [9]

However, their lordships declared that the further interview thereby denied the jury of seeing the informer witness deal with difficult question on those inconsistencies "freshly". The defendants were deprived the opportunity of questioning him on which account he adhered to at trial:

The time to test his evidence and his general credibility was in the witness box. [11]

Despite these breaches, on the facts, the conviction was safe and so upheld. Nonetheless, the Court of Appeal took the opportunity to offer further succinct and clear guidance on witness familiarisation. It confirmed that witness familiarisation is a good thing, whereas anything that smacks of training witnesses in their evidence is unacceptable as it runs the risk of interfering with the jurors' function as finders of fact. Educating witnesses in their role, court procedure and etiquette is permitted and positively encouraged. Mock examinations

---

<sup>22</sup> See *Civil Procedure Rules Part 32 – Evidence, Evidence of witnesses – general rule*, 32.2, available on <http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part32> (accessed 21 March 2014)

<sup>23</sup> *Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses, and guidance on using special measures* (Ministry of Justice, March 2011)

that offer witnesses the experience of having their version of events thoroughly and even sternly tested albeit in simulated situations are permissible.

These cases illustrate that the Court of Appeal disapproves of witness preparation that rehearses witnesses in their testimony and also presentation training that might affect the apparent credibility of witnesses before the fact-finder. Presumably the Court of Appeal is less concerned about prompts from lawyers conducting the training that would affect the content of testimony because it has confidence in investigative guidelines and professional codes of conduct that address this evil; and because rules on the advance disclosure of evidence are designed, in part at least, to expose such inconsistencies. However, the Court of Appeal has consistently taken opportunities to indicate its approval of witness familiarisation training. Is it right to do so?

### Storytelling and Story-listening: Unacknowledged Influences on Witnesses' Narratives

An event that results in litigation is frequently borne out of conflict that, in turn, precipitates evidential and legal issues that need to be resolved. Disagreement about the background facts to an event, the event itself, and its aftermath will put facts into issue. Where those facts, their contexts, and consequences are not recorded in real-time; one can expect to encounter many factual issues. The facts in issue frequently only have significance to witnesses after the event itself and, thus, the act of human memory is required. When significant consequences follow such as allegations of a crime or a civil wrong, one can expect to encounter highly competing versions of events. Human recall is neither infallible nor always orderly and is rarely complete and wholly accurate. Accounts of those memories will often include superfluous facts and digressions. To call humans to give evidence at court without applying some scaffolding and filters would result in a fog of disorganised facts that would lead to delay and even chaos in litigation. Investigators, lawyers and judges have to recognise that potential witnesses do not present as 'testimony-on-legs'; but merely as potential sources of relevant admissible evidence. A growing body of research supports the dangers of influence on accounts and testimony, and offer suggestions to reduce risk for contamination by questioner on the interrogated person.<sup>24</sup>

The operational needs of the justice systems demand that investigations and litigation are efficient. This includes ensuring that the testimony that witnesses are expected to give at court is recorded and packaged so that it focuses on relevant legal as well as factual issues and is evidentially admissible wherever possible. One unacknowledged or, at least, rarely unarticulated consequence of this is a toleration of investigators and lawyers taking controlling roles in the construction of witnesses' narratives and, to a lesser extent, the presentation of those stories in court. Forensic science has a concept that, if two objects come into contact with one another, it is highly likely that each will leave a little of itself on the other. For example, if someone breaks a window whilst wearing woollen gloves, shards of glass will be embedded in the knit of the gloves and wool fibres will adhere to the

---

<sup>24</sup> See, for example, A. Keane, "The Use at Trial of Scientific Findings Relating to Human Memory", (2010) 1 Criminal Law Review 19-30; J.M. Wheatcroft, "Effectiveness of Witness Preparation and Cross-examination Non-directive and Directive Leading Question Styles on Witness Accuracy and Confidence", *International Journal of Evidence and Proof*, (2010) 14/3, 187; J.S. Baxter, J.C.W. Boon and C. Marley, "Interrogative Pressure and Responses to Minimally Leading Questions", (2006) 40(1) *Personality and Individual Differences* 87; and J.M. Wheatcroft, G.F. Wagstaff, and M.R. Kebell, "The Influence of Courtroom Questioning Style on Actual and Perceived Eyewitness Confidence and Accuracy", (2004) 9 *Legal and Criminological Psychology* 83.



shattered window pane. This is known as the Locard exchange principle.<sup>25</sup> By analogy, the act of seeking witnesses' versions of events and the act of responding to those enquiries are dynamic interactions, ones that leave open the high probability of cross contamination.

Professionals in the civil and criminal justice systems employ strategies to address witnesses' messy and incomplete narratives. Using interviews, they employ well-trying schema of questions and invitations to aid the reconstruction and presentation of sustained narratives.<sup>26</sup> Would-be witnesses participate in highly structured conversations directed by the interviewer who are often partisan to one side's case notwithstanding codes of conduct that place high value on investigative doctrines and procedural fairness. Investigations operated under such conditions risk story contamination. The risk is higher if the interviewee is vulnerable<sup>27</sup> or disempowered in some other way, such as negatively stereotyped minorities.<sup>28</sup> But, even empowered adults remain susceptible to the influence of narrative turn and their stories may be thereby influenced. Outside of formal interview situations, there are further opportunities for story contamination. Conversations with friends, families, fellow witnesses to events may be classified as informal interviews; those with emergency services, medical staff, and lawyers' support staff offer further Locard Principle-style contact-contamination opportunities.<sup>29</sup>

Thus storytelling and story-eliciting, or narrative turn, create situations where the question and answer cycle creates influence and interference. This is something that the scholarship of research methodology has long recognised<sup>30</sup> and is explicitly acknowledged by those who conduct interviews in the criminal justice system.<sup>31</sup> With that in mind, the Court of Appeal's desire that witnesses should, so as is possible, give their evidence wholly uninfluenced and uncontaminated by others is to be understood as a prohibition on rehearsing witnesses in how to give their evidence. One may discount the notion that this a naïve view of how witnesses' versions of events are structured, edited, and even influenced in the processes through which real-world experiences are converted into written records and ultimately oral testimony. Understanding the effects of those processes on witnesses' stories helps to explain how the parameters around acceptable forms of witness familiarisation training in England and Wales are set.

---

<sup>25</sup> W.J. Chisum and B. Turvey, "Evidence Dynamics: Locard's Exchange Principle & Crime Reconstruction", *Journal of Behavioral Profiling*, January, 2000, Volume 1, No. 1

<sup>26</sup> See, for example R. Samwell-Smith and M. Soanes, *Conference Skills*, (Oxford: Oxford University Press, 2012); D.A. Binder, P. Bergman, P.R. Tremblay, and I.S. Weinstein, *Lawyers as Counselors: A Client-Centered Approach*, (Eagan MN: West Publishing Co, 2011)

<sup>27</sup> *Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures* (Ministry of Justice, 2011)

<sup>28</sup> J. Armour, "Stereotypes and Prejudice: Helping Legal Decision Makers Break the Prejudice Habit, (1995) 83 *California Law Review*, 733-772

<sup>29</sup> In addition, but beyond the scope of this article is the influence of loyalty. In the adversarial legal system witnesses are placed into the opposing sides' camps rapidly, even as early as the investigative stage. The contribution of collective loyalty by trial participants cannot be overlooked. Witnesses as well as parties who give evidence in their own case have direct and indirect interests in the outcome of trials and invest in them in illicit as well as licit ways.

<sup>30</sup> N. Gough, "Storytelling" in *The Sage Encyclopedia of Qualitative Research Methods*, (Thousand Oaks CA: Sage Publications 2008), pp. 833-835

<sup>31</sup> *Supra*, n. 26

Although safely removed from testimony creation and trial preparation, legitimate forms of witness familiarisation in England and Wales nonetheless take place in the wider context of the adversarial trial system. Parties select which witnesses are to receive this assistance, choose who is to deliver it, and have an input into the conditions under which the training is to take place. Witness familiarisation trainers are educators who communicate knowledge as disinterested guides to trial procedure and practice. Their role is not that of strategic trial advisor and far less that of trial coach or testimony copyeditor. However, it would be naïve to deliver this training without acknowledging that witnesses are frequently interested in their own evidence and appear for parties that have an interest in trials' outcomes.

Witnesses in the adversarial tradition participate in highly regulated and pressurised environments. Witness familiarisation trainers are advised therefore to acknowledge the special context within which they operate and the ethical challenges it presents. Following the training witnesses will give evidence in environments that are adverse to good storytelling, but they should be better equipped to tell their stories in chief clearly and to resist attempts in cross-examination to confuse the storyteller. The trainers must therefore acknowledge that witnesses' stories are not sealed scrolls waiting to be opened before the jury, but rather that those stories are dynamic and susceptible to external factors. The injunction to have nothing to do with the case in which the witness is to appear should never be ignored. Any attempt to discuss a witness's evidence should be resisted as it presents a high-risk opportunity for narrative contamination, one that may be riskier than the informal conversations and formal interviews that preceded the training.

### Is Witness Familiarisation Training Effective?

So far, this paper has accepted the premise that witness familiarisation is a good thing, but without questioning its effectiveness beyond a presumption that witness would favour an explanation of what their role is and what to expect from the experience of giving evidence in court. The existence of a market for witness familiarisation training suggests that the legal professions recognise the benefit of this form of education, but there is limited empirical research to evaluate its effectiveness in this jurisdiction. In 2012 Wheatcroft and Ellison<sup>32</sup> published research that tested two hypotheses about the effect of witness familiarisation. The first hypothesis was that complex cross-examination will inhibit accurate responses from witnesses and increase errors made. Second, that preparation of witnesses will facilitate significantly higher levels of accurate responses and fewer errors made when compared with non-prepared witnesses. Sixty adult observers of a mock crime event were each cross-examined by a barrister either with a scripted complex version of cross-examination or by a simpler but equivalent scripted examination. Half these witnesses received written guidance on cross-examination and the other half received no familiarisation to the process.

The study demonstrated that the familiarisation of witnesses to cross-examination increases accuracy and reduces errors; suggesting that the written guidance allowed accessibility to cognitive information that enabled them to process information more effectively. Wheatcroft and Ellison concluded that witnesses are commonly confronted with complex questions containing multiple parts, double negatives, and difficult vocabulary; and that this indicates that these questions can be difficult to decipher and respond to with accuracy. They further

---

<sup>32</sup> J.M. Wheatcroft and L.E. Ellison, "Evidence in Court: Witness Preparation and Cross-Examination Style Effects on Adult Witness Accuracy", *Behavioral Sciences and the Law*, Nov 2012, Volume 30 Issue 6, 821-840

noted that more complex tasks, such as answering cross-examination questions, require greater cognitive effort and thereby increased potential for fewer correct responses as a result of lowered processing capacity. Moreover, the inhibition of correct responses may also be influenced by witnesses drawing upon cognitive coping methods, such as defaults to more autonomic responses that require little in the way of cognitive work yet result in less accuracy.

This research and its literature base supports the Court of Appeal's observation that giving evidence in court is traumatic; and explicates how trauma affects the intellectual processes that are central to recall and articulation of past events. Wheatcroft and Ellison's research indicated that introducing witnesses to cross-examination techniques prior to examination allows them to organise knowledge of events so that information may be accessed more readily in response to complex questioning. The mock witnesses who were not given prior guidance were likely to work much harder to answer cross-examination questions accurately and tended to become nervous and frustrated in court. As we have seen, this is just the sort of witness box behaviours that the Court of Appeal wants to avoid. Advance written information regarding courtroom procedure is commonly provided by services that help witnesses, but it does not explicitly warn of the negative effects of lawyerly influence—particularly that questions may be misleading in character. Research is yet to be conducted on what the most effective form of education for witnesses is and what risks attend it, but the predominate model in practice is bespoke one-to-one witness familiarisation sessions typically funded by private clients. This, itself, raises issues of access and fairness.

#### Universal Generic Witness Familiarisation Training

If witness familiarisation training is an effective method of improving witnesses' cognitive performance, aids fact finders, and ultimately serves the ends of justice; its rarity in practice should be surprising. The most likely reason for this is lack of resources. Employing lawyers who are unconnected with the trial case to conduct mock cross-examination is costly, and it is in high-value civil cases where witness familiarisation is most likely to be offered. Thus, the witnesses who benefit most are people whose evidence will be crucial to such major disputes and who may be expected to be used to dealing with pressure, public speaking and, in some cases, would have given evidence in the past. In my own experience as a witness familiarisation trainer, such witnesses appear to respond well to witness familiarisation training that covers courtroom orientation, explanations about how trials run, and generalised discussions about the purpose of examination-in-chief and cross-examination. They frequently but not always prove to be quick studies during mock cross-examinations that are based on brief case studies. Their co-operation is partly motivated, no doubt, by their interest in the outcome of the litigation. This is not surprising given the likely significance of their evidence—itsself suggested by the trial party's willingness to fund the training event. There is, of course, no reason why witnesses in valuable litigation should not receive the benefits of the witness familiarisation training, but there is an inequality of opportunity to access to it for most witnesses.

Inequality of access of itself does not preclude classifying witness familiarisation training as a beneficial educational experience, but it does suggest that less resource-heavy forms should be designed and be made available to more witnesses. This want can be classified as a need if one accepts that witness familiarisation can combat the cognitive interference caused by cross-examination. It may be argued that the development of cost-effective

universal witness familiarisation would serve the interest of justice, but, in order to achieve this, more research is required. A highly important area to investigate is the interplay between stories told by witnesses at court and their earlier accounts elicited and recorded by investigators and lawyers. During these processes, story schemas and legal schemas meet and meld until messy real-world narrative is converted into orderly witness statements that then form the basis for courtroom testimony for both the advocate and the witness. A better understanding of the witness' account creation processes and the advocate-witness relationship at trial is needed. This knowledge would offer a starting point for understanding the contamination between witnesses and investigators and lawyers. Then it would be possible to conduct further evaluative research into the effectiveness – and dangers – of witness familiarisation training and so begin both to improve bespoke witness familiarisation training and to design generic educational tools for all witnesses within the parameters set by the Court of Appeal. [5570]