

Vulnerable Witnesses and Cross-Examination: A Path to Reform

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Cross-examination is considered an integral aspect of the adversarial trial process and of the accused's right to a fair trial. However, there has been insufficient attention in Ireland on the detrimental impact that it can have on the ability of vulnerable witnesses to give their best possible evidence. This article proposes that cross-examination should be reformed to better accommodate the unique needs of vulnerable witnesses. It outlines a working definition of who is a vulnerable witness and then demonstrates that, by analysing the Irish and European case law, the right to cross-examine does not prevent reform. Finally, it makes limited proposals for the reform of the manner in which cross-examination is conducted in Ireland.

“Not even the abuses, the mishandlings and the puerilities which are so often found associated with cross-examination have availed to nullify its value. It may be that in more than one sense it takes the place in our system which torture occupied in the mediaeval system of the civilians. Nevertheless, it is beyond any doubt the greatest legal engine ever invented for the discovery of truth.”¹

I – Introduction

Wigmore's vivid description of cross-examination as “beyond doubt the greatest legal engine ever created for the discovery of truth” has been cited for generations as evidence of its unquestionable importance to the adversarial trial process. However, even this great proponent of cross-examination qualified his praise of it with a recognition of its flaws in the preceding sentences. Modern research has revolutionised our understanding of the impact of cross-examination on witnesses, in particular vulnerable witnesses, and its questionable success in actually discovering the truth.² The Australian Law Reform Commission noted that in “so far as obtaining accurate testimony is concerned, [cross-

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¹ J. H. Wigmore, *Evidence in Trials at Common Law*, vol. 5, Chadbourn revised ed. (New York: Aspen Publishers, 1974) at para. 1367 [hereinafter Wigmore].

² Law Reform Commission, L.R.C. C.P. 60–2010, *Consultation Paper on Hearsay Evidence in Civil and Criminal Cases* (Dublin: Law Reform Commission, 2010) at paras. 2.88–2.90; A. L.-T. Choo, *Evidence*, 3rd ed. (Oxford: Oxford University Press, 2012) at 79; *Re. W. (children) (care proceedings: evidence)* [2010] U.K.S.C. 12, [2010] 2 All E.R. 418 at para. 27 (Lady Hale).

examination] is arguably the poorest of the techniques employed by the common law courts”.³ This article will seek to address the question of whether cross-examination should be reformed in light of modern research in order to obtain the best available evidence from vulnerable witnesses. In Part II, what constitutes a vulnerable witness will be examined. In Part III, the qualified nature of the right to cross-examine under the Constitution of Ireland (Constitution) and under the European Convention of Human Rights (E.C.H.R.) will be analysed. In Part IV, proposals will be made for the Irish courts to reform the manner in which cross-examination is conducted in light of the revolutionary judgments of the Court of Appeal of England and Wales.

II - Who is a Vulnerable Witness?

There are two categories of vulnerable witnesses: children and vulnerable adults. Children are considered by definition vulnerable because of their young age, emotional and educational immaturity, and unfinished physical and psychological development. They also suffer from a general imbalance when they face adults with authority in criminal proceedings, such as defence counsel, and may be further disadvantaged by other vulnerabilities, such as learning disabilities and communication difficulties.⁴ The relaxation of the rules governing the competence of children to act as witnesses has resulted in a sixty percent increase in the number of children who were called to give evidence in England and Wales between 2006/2007 and 2008-2009.⁵ There are no Irish statistics in this area but it would seem likely that the number of child witnesses in Irish courts has also increased in recent years.

Although the greatest focus has been on child witnesses, it must be recognised that vulnerable adult witnesses are equally worthy of protection. Vulnerable adults may be defined as individuals who “cannot understand or effectively exercise their legal rights because of, for instance, disability, mental impairment, a physical or psychological

³ Australian Law Reform Commission, *The Manner of Giving Evidence Research Paper No 8* (Sydney: Australian Law Reform Commission, 1982) at para. 10.5.

⁴ European Commission, *Impact Assessment: Proposal for a Directive on Procedural Safeguards for Children Suspected or Accused in Criminal Proceedings* (Brussels: European Commission, 2013) at 9 [hereinafter European Commission]; United Nations, A/RES/14/1386, *Declaration of the Rights of the Child* (New York: United Nations, 1959) at Preamble.

⁵ J. Plotnikoff & R. Woolfson, *Young Witnesses in Criminal Proceedings: A Progress Report on Measuring Up?* (2009) (London: N.S.P.C.C., 2011) at 2 [hereinafter Plotnikoff & Woolfson].

weakness”.⁶ Vulnerability may arise either through a cause inherent to the witness, such as old age, mental illness or learning disability, or because the circumstances of the case have induced in the witness a state of fear or distress, such as a rape complainant, or by a combination of both factors.⁷ The assumption underlying the adversarial trial process is that vulnerable adults are only a small proportion of all witnesses. This is supported by the estimation in the *Speaking up for Justice* report, that only between seven and ten percent of all adult prosecution witnesses in England and Wales would be vulnerable and intimidated witnesses.⁸ However, more recent research conducted by Burton, Evans and Sanders has proven this analysis to be erroneous. They concluded that, on a very conservative estimate, twenty-four percent of adult witnesses are probably vulnerable and intimidated witnesses according to the legislative criteria in England and Wales.⁹ Therefore, based on this understanding of vulnerability, a far greater number of witnesses may be considered vulnerable witnesses than was previously the case.

Cross-examination is particularly detrimental to vulnerable witnesses because they may have difficulty with long term memory recall, with communicating information, with cognitive overload or are vulnerable to questioning that invites suggestibility, acquiescence and compliance.¹⁰ However, this is not to say that a vulnerable witness cannot be an accurate witness and give reliable evidence, rather that cross-examination should be conducted in a manner which is sensitive to their unique needs so to obtain the best quality evidence. Out-dated notions as to how cross-examination should be conducted must be rejected, along with attitudes regarding who is considered to be a reliable witness. For example, children as young as five years old have been proven in a recent study to have an 82.5% rate of correct recollection and reporting.¹¹ Conversely, it has also been established

⁶ European Commission, *supra* note 4 at 9.

⁷ D. Birch, “A Better Deal for Vulnerable Witnesses” [2000] *Crim. L.R.* 223 at 224.

⁸ Home Office, *Speaking up for Justice: Report of the Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System* (London: Home Office, 1998) at 97.

⁹ M. Burton, R. Evans & A. Sanders, “Implementing Special Measures for Vulnerable and Intimidated Witnesses: The Problem of Identification” [2006] *Crim. L.R.* 229 at 233.

¹⁰ Irish Council for Civil Liberties, *An International Review of the Legal Provisions and Supports for People with Disabilities as Victims of Crime* (Dublin: Irish Council for Civil Liberties, 2014) at 43; C. Edwards, G. Harold & S. Kilcommins, “Victims of Crime with Disabilities in Ireland: Invisible Citizens within an Adversarial Paradigm of Justice” (2013) 23(2) *I.C.L.J.* 45 at 51–54; J. Robinson, “The Experience of the Child Witness: Legal and Psychological Issues” (2015) 42-43 *Int'l J.L. & Psychiatry* 168 at 169.

¹¹ J. Ramon, J. López and E. Sala Berga, “Interviewing Children Preschool Victims of Sexual Abuse and/or Family Abuse: The Effectiveness of Forensic Interview Models” <<http://www.recercat.cat/handle/2072/170061?show=full>> (date accessed: 12 January 2017); Special

that the manner in which cross-examination is currently conducted has a detrimental impact on the accuracy of child witnesses. Researchers have found that cross-examination resulted in the vast majority of child witnesses, 85%, changing at least one aspect of their earlier account and they were just as likely to change a correct response as they were to correct an error.¹²

The paucity of data in Ireland makes it difficult to determine the exact numbers of vulnerable persons giving evidence as witnesses in Irish courts. This lack of data has been subject to criticism from numerous different bodies,¹³ and is arguably as a result of a failure by the criminal justice agencies to identify vulnerable witnesses at a strategic level.¹⁴ A rare exception to this is the database of the Rape Crisis Network Ireland on the survivors of sexual violence who have disabilities.¹⁵ It is hoped that the eventual enactment of the *General Scheme of the Criminal Justice (Victims of Crime) Bill 2015 (2015 Bill)*, which seeks to transpose into Irish law the *Victims' Rights Directive*,¹⁶ will result in the better collection of data. Head 29(1) requires An Garda Síochána, the Courts Service and the Director of Public Prosecutions to provide the Minister for Justice and Equality with statistical information concerning the operation of the Act.¹⁷ The Joint Committee on Justice, Defence and Equality, in their pre-legislative scrutiny, recommended that consideration be given to extending the provisions of the *2015 Bill* to the Coroner, the Probation Service and the Health Service Executive.¹⁸ Head 29 seeks to give effect to Ireland's obligation under

Rapporteur on Child Protection, *Fifth Report of the Special Rapporteur on Child Protection: A Report Submitted to the Oireachtas* (Dublin: Special Rapporteur on Child Protection, 2011) at paras. 3.12.2-3.12.3.

¹² R. Zajac, S. O'Neill and H. Hayne, "Disorder in the Courtroom? Child Witnesses Under Cross-Examination" (2012) 32 Dev. Rev. 181 at 186.

¹³ For instance: Joint Committee on Justice, Equality, Defence and Women's Rights, *Report on a Review of the Criminal Justice System* (Dublin: Joint Committee on Justice, Equality, Defence and Women's Rights, 2004) at para. 111; Law Reform Commission, L.R.C. 109-2013, *Report on Sexual Offences and the Capacity to Consent* (Dublin: Law Reform Commission, 2013) at paras. 5.06, 5.37; J. Kline and E. Flynn, *Access to Justice for Children with Cognitive Disabilities: Ireland Country Report* (Galway: Centre for Disability Law and Policy National University of Ireland Galway, 2015) at 34.

¹⁴ C. Edwards, G. Harold & S. Kilcommins, *Access to Justice for People with Disabilities as Victims of Crime in Ireland* (Cork: School of Applied Social Studies and Centre for Criminal Justice and Human Rights, Faculty of Law University College Cork, 2012) at 103 [hereinafter Edwards *et al.*].

¹⁵ C. Counihan & E. Mears, "Sexual Violence, Disability and Justice: Rape Crisis Network Ireland Perspectives" [2015] 5 I.J.L.S. 68.

¹⁶ Directive 2012/29/E.U. of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/J.H.A. [2012] O.J.L. 315/57.

¹⁷ *General Scheme of the Criminal Justice (Victims of Crime) Bill 2015*, Schedule.

¹⁸ Joint Committee on Justice, Defence and Equality, 2015/5/B/34, *Report on the General Scheme of the Criminal Justice (Victims of Crime) Bill 2015* (Dublin: Joint Committee on Justice, Defence and Equality 2015) at 2.

Article 28 of the Directive, which requires Ireland to collect data in relation to the number of victims, their age and gender and the support provided to them. By collecting such data on victims of crime, a clearer picture will emerge as to the numbers of vulnerable witnesses testifying in Irish courts.

III - The Right to Cross-Examine

The argument that reform of the manner in which cross-examination is conducted would violate the accused's right to cross-examine has been the main stumbling block upon which many reform proposals have perished. There would appear to be a disconnect between judicial rhetoric, which emphasises the importance of this right to cross-examine, and the reality, where the courts have accepted often substantial limitations on this right. It is hoped that by analysing the seminal cases of the Irish courts and the European Court of Human Rights (E.Ct.H.R.) it will be shown that the right to cross-examine does not prevent reform of the manner in which cross-examination is conducted for the benefit of vulnerable witnesses.

A. Constitutional Right to Cross-Examine

Cross-examination has been described as the procedure in which a witness has "his evidence questioned, tested, challenged and contradicted and his credit impeached".¹⁹ The benefits arising from cross-examination are based on the underlying assumption that since each side will seek to extract from the witness all that is favourable to him, the total extract will approximate not only to the truth, but to the whole truth and nothing but the truth.²⁰ In *Maguire v. Ardagh*, Hardiman J. described cross-examination as "the means of the vindication of innocent people" and used the exoneration of Charles Stuart Parnell as a result of the skilful cross-examination of his accuser as evidence of this.²¹ This powerful judicial rhetoric makes it unsurprising that the right to cross-examine has been recognised as a constitutional right in Ireland. Although it is not explicitly protected by the Constitution, it has been held to be constitutionally guaranteed in both civil and criminal cases. In *State (Healy) v. Donoghue*, Gannon J. articulated that the right "to hear and test by

¹⁹ *People (D.P.P.) v. Kelly* [2006] I.E.S.C. 20, [2006] 3 I.R. 115 at 136 (Fennelly J.) [hereinafter *Kelly*].

²⁰ W.A.N. Wells, ed., & J. Stone, *Evidence: Its History and Policies* (Sydney: Lexis Law, 1991) at 631 [hereinafter Wells & Stone]; *Berkeley Peerage Case* (1811) 4 Camp. 401 at 405 in Wigmore, *supra* note 1.

²¹ [2002] 1 I.R. 385 at 704-707; *O'Callaghan v. Mahon* [2005] I.E.S.C. 9, [2006] 2 I.R. 32 at 58; *Kelly*, *supra* note 19 at 136.

examination the evidence offered by or on behalf of his accuser” was protected as a “natural right” under Article 38.1.²² In *Donnelly*, Hamilton C.J. described the accused’s right to a fair trial under Article 38.1 as “one of the most fundamental constitutional rights accorded to persons” and “a superior right”.²³ Hamilton C.J. also noted that “[a]n essential ingredient in the concept of fair procedures is that an accused person should have the opportunity to, in the words of Gannon J., ‘hear and test by examination the evidence offered by or on behalf of his accuser’”.²⁴ It was also held to be constitutionally protected in civil cases by the Supreme Court in *Re. Haughey*, where O’Dalaigh C.J. held that the defendant should be allowed “to cross-examine, by counsel, his accuser or accusers”.²⁵ This is because “Article 40.3 ... is a guarantee to the citizen of basic fairness of procedures”.²⁶ The courts have continued to ensure the protection of the right to cross-examine and in *D.S. v. Minister for Health and Children*, O’Neil J. aptly described the right to cross-examine as “though not an absolute right, [it] is in general terms a right protected by the Constitution”.²⁷

Although the Irish Courts have emphasised the importance of the right to cross-examine, as O’Neil J. noted in *D.S.*, it has never been recognised as an absolute right.²⁸ For example, the numerous common law and statutory exceptions to the rule against hearsay all constitute limitations on this right. This is because they allow for the admission as evidence of a statement made by a person who has not been subject to cross-examination. Similarly, in *People (D.P.P.) v. Kelly*,²⁹ the Supreme Court unanimously upheld the constitutionality of section 3(2) of the *Offences Against the State (Amendment) Act 1972 (1972 Act)*. Section 3(2) allows the prosecution to admit as evidence the belief of a Garda chief superintendent that the accused is a member of an illegal organisation. This limits the accused’s right to cross-examine because the Garda chief superintendent is entitled to rely on informer privilege to protect the identity of informers who are the source of this belief. There were concerns

²² *Ibid.* at 335-336, 349-350 (O’Higgins C.J.); [1998] 1 I.R. 348 at 350 (Hamilton C.J.) [hereinafter *Donnelly*].

²³ *Donnelly*, *ibid.* at 348.

²⁴ *Ibid.* at 350; *In the Matter of Article 26 of the Constitution and in the Matter of the Criminal Law (Jurisdiction) Bill 1975* [1975] I.R. 129 at 154.

²⁵ [1971] 1 I.R. 217 at 263.

²⁶ *Ibid.* at 264; *Kiely v. Minister for Social Welfare (No. 2)* [1977] I.R. 267 at 281.

²⁷ [2005] I.E.H.C. 58; *Murray v. Commission to Inquire into Child Abuse* [2004] 2 I.R. 222 at 304-305; *Borges v. Medical Council* [2004] I.E.S.C. 9, [2004] 1 I.R. 103.

²⁸ G. Hogan and G. Whyte, *JM Kelly: The Irish Constitution*, 4th ed (Dublin: Bloomsbury Professional, 2003) at paras. 6.1.60, 6.5.69-6.5.71.

²⁹ *Kelly*, *supra* note 19.

surrounding the compatibility of section 3(2) with Article 6 of the E.C.H.R.³⁰ The separate judgment of Fennelly J. in *Kelly* agreeing with the Court's decision provides the most in-depth analysis of the accused's right to cross-examine. Fennelly J. stated that restrictions may be placed on the right to cross-examine "for overriding reasons of public interests", but they "must not go beyond what is strictly necessary and must, in no circumstances, ... 'imperil the overall fairness of the trial'".³¹ This serves to indicate that the powerful judicial rhetoric has not necessarily been manifested in actual decisions of the Irish courts holding unconstitutional restrictions placed on the accused's right to cross-examine. Rather, the Irish courts have adopted a much more measured approach and accepted the constitutionality of often significant limitations on the accused's right. This suggests that the adoption of additional measures in the interests of vulnerable witnesses may not necessarily violate the constitutional right of the accused to a fair trial under Article 38.1.

B. Right to Cross-Examine under Article 6 of the E.C.H.R.

In contrast to the implicit protection of the right to cross-examine in the Constitution, there is explicit protection of this right in Article 6(3)(d) of the E.C.H.R., which states that "everyone charged with a criminal offence" has the right "to examine or to have examined witnesses against him". This right constitutes one of the "minimum rights" protected by the fair trial guarantee in Article 6(1). In the seminal case of *Kostowski v. the Netherlands*, the E.Ct.H.R. held that "[a]s a rule, ... an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage of the proceedings".³² However, the accused's right under Article 6(3)(d) is not absolute, it represents a specific aspect of the right to a fair trial and may be limited to accommodate competing interests.³³ In *Doorson v.*

³⁰ C. Kelly, "The Right to a Fair Trial v. The Claim of Privilege" (2007) 17(1) I.C.L.J. 17 at 23. See the recommendations of A.J. Hederman, W. Binchy and D. Walsh in *Report of the Committee to Review the Offences against the State Acts 1939-1998 and Related Matters* (Dublin: Committee to Review the Offences against the State Acts 1939-1998 and Related Matters, 2002) at para. 6.196.

³¹ *Ibid.* at 146; L. Heffernan & E.J. Barnett, "The Accused's Constitutional Right to Introduce Critical, Demonstrably Reliable Exculpatory Evidence" (2005) 40 Ir. Jur. 111 at 125-126.

³² (1990) 12 E.H.R.R. 343 at para. 41 [hereinafter *Kostowski*]; *Van Mechelen & Others v. The Netherlands* (1997) 25 E.H.R.R. 647 at para. 69 [hereinafter *Van Mechelen*]; *Al-Khawaja and Tahery v. the United Kingdom* (2012) 54 E.H.R.R. 23 at para. 118 [hereinafter *Al-Khawaja*].

³³ See *Gani v. Spain*, App. No. 61800/08 (Third Chamber, 19 February 2013) at para. 38; M. Biral, "The Right to Examine or Have Examined Witnesses as a *Minimum* Right for a Fair Trial" (2014) 22 Eur. J. Crime Cr. L. Cr. J. 331 at 336.

the Netherlands,³⁴ the Court upheld the use of anonymous statements because defence counsel was able to question the witnesses at the appeal stage, which distinguished it from *Kostowski*.³⁵ The Court held that the “principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify”.³⁶ More recently, in *Al-Khawaja*, the Grand Chamber held that hearsay may constitute the sole or decisive evidence against an accused where the detriment to the defence is offset by safeguards that include an adequate opportunity for the defence to contest the evidence.³⁷ The Grand Chamber also implicitly endorsed a qualified reading of the rights in Article 6(3)(d), by characterising them as “specific aspects of the right to a fair hearing ... which must be taken into account in any assessment of the fairness of proceedings”.³⁸ This has resulted in a situation where the explicit “minimum rights” in Article 6(3)(d) must be balanced against other competing interests to ascertain whether the fair trial guarantee has been violated.³⁹ This restricted approach to the accused’s right to cross-examine under Article 6(3)(d) can be seen in *Donohoe v. Ireland*,⁴⁰ where the E.Ct.H.R. upheld the compatibility of s. 3(2) of the 1972 Act with Article 6. The E.Ct.H.R. stated that “while the scope of cross-examination was restricted ..., the possibility to cross-examine the witness on his evidence was not entirely eliminated. The possibility to test the Chief Superintendent’s evidence in a range of ways still remained”.⁴¹

It also must not be forgotten that witnesses also have rights under the E.C.H.R., such as a right to life (Article 2), to freedom from torture and inhuman or degrading treatment (Article 3), to liberty (Article 5) and to privacy (Article 8).⁴² In *T. v. Slovenia*,⁴³ the E.Ct.H.R. had to consider whether the manner in which cross-examination was conducted by the accused personally violated the complainant’s right to privacy under Article 8. The Court stated that “cross-examination should not be used as a means of

³⁴ (1996) 22 E.H.R.R. 330 [hereinafter *Doorson*].

³⁵ *Kostowski*, *supra* note 32 at para. 42; *Van Mechelen*, *supra* note 32 at para. 82; *Lüdi v. Switzerland* (1993) 15 E.H.R.R. 174 at paras. 85-87.

³⁶ *Doorson*, *supra* note 34 at para. 70.

³⁷ *Al-Khawaja*, *supra* note 32 at para. 118.

³⁸ *Ibid.* at para. 118; L. Heffernan, “Hearsay in Criminal Trials: The Strasbourg Perspective” (2013) 49 Ir. Jur. 132 at 139.

³⁹ L. Hoyano, “What is Balanced on the Scales of Justice? In Search of the Essence of the Right to a Fair Trial” [2014] Crim. L.R. 4 at 6; W. E. O’Brian, “The Right of Confrontation: US and European Perspectives” (2005) 121 L.Q.R. 481 at 494.

⁴⁰ App. No. 19165/08 (E.Ct.H.R., 12 December 2013).

⁴¹ *Ibid.* at para. 92.

⁴² I. Dennis, *The Law of Evidence*, 5th ed. (London: Sweet & Maxwell, 2013) at para. 15.001.

⁴³ (2016) 62 E.H.R.R. 3.

intimidating or humiliating witnesses” and that the accused’s questions “were also meant to degrade her character”.⁴⁴ The Court found that the accused’s question “exceeded the limits of what could be tolerated for the purpose of enabling him to mount an effective defence”.⁴⁵ The Court noted that “considering the otherwise wide scope of cross-examination afforded to X, ... curtailing his personal remarks would not have unduly restricted his right to defence”.⁴⁶ It concluded that Article 8 was violated because of the failure “to afford the applicant the necessary protection so as to strike an appropriate balance between her rights and interests protected by Article 8 and X’s defence rights protected by Article 6”.⁴⁷ It is significant that the Court expressly acknowledged that the curtailment of cross-examination in the interests of a vulnerable witness does not necessarily violate the accused’s right to a fair trial under Article 6. It would therefore appear that it is not correct to state that Article 6 of the E.C.H.R. prevents reform of the manner in which cross-examination is conducted in order to accommodate vulnerable witnesses, so long as a fair balance is struck between the rights of witnesses and the rights of the accused.

C. Evolving Nature of the Concept of a Fair Trial

There is an increasing trend in human rights jurisprudence to conceptualise the right to a fair trial as involving a “triangulation of interests”. In *Attorney General’s Reference (No. 3 of 1999)*, Lord Steyn stated that “[t]here must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family and the public”.⁴⁸ This is in contrast to the traditional approach to a fair trial as only involving a balancing between the interests of the accused and the State. The evolving nature of the right to a fair trial was recognised in *R. v. H.*, where Lord Bingham noted that “the standards and perceptions of fairness may change, not only from one century to another but also, sometimes, from one decade to another”.⁴⁹ As the L.R.C. noted, there is no conflict between the different interests involved, “the underlying goal is the same - that the guilty are convicted and the innocent

⁴⁴ *Ibid.* at para. 136.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ *Ibid.* at para. 138.

⁴⁸ [2000] U.K.H.L. 71, [2001] 2 A.C. 91 at 118, 124 (Lord Cylde); *R. v. A.* (No. 2) [2001] U.K.H.L. 25, [2002] 1 A.C. 45 at 65 (Lord Steyn); *R. v. H.* [2004] U.K.H.L. 3, [2004] 2 A.C. 134 at 146 [hereinafter *H.*]; *R. v. T.* [2010] E.W.C.A. 630 at para. 6.

⁴⁹ *H.*, *ibid.* at para. 11, 145. Cited with approval in *D.P.P. (Walsh) v. Cash* [2007] I.E.H.C. 108 at para. 49. See also *R. v. Khelawon* [2006] S.C.C. 57, [2006] 2 S.C.R. 787 at para. 48.

acquitted”.⁵⁰ This broader concept of a fair trial was the basis for the Court of Appeal of England and Wales’s reform of the manner in which cross-examination is conducted and they have continuously emphasised that it does not undermine the accused’s right to a fair trial. For instance, in *R. v. Lubemba*, Hallett L.J. noted that that “[i]t is now generally accepted that if justice is to be done to the vulnerable witness and also to the accused, a radical departure from the traditional style of advocacy will be necessary. Advocates must adapt to the witness, not the other way round”.⁵¹

This concept of a fair trial has been adopted by the E.Ct.H.R.,⁵² and there has also been increasing emphasis by the Irish Courts in recent years on the rights of victims and the interest of society.⁵³ In *D.P.P. (Walsh) v. Cash*, Charleton J. noted that, in relation to the exclusion of unconstitutionally obtained evidence, “[t]he two most fundamental competing interests, in that regard, are those of society and the accused. I would also place the rights of the victim in the balance”.⁵⁴ These considerations were also relied upon by the majority of the Supreme Court in *D.P.P. v. J.C.*,⁵⁵ in their reformulation of the exclusionary rule set out in *D.P.P. v. Kenny*,⁵⁶ because it was considered to place insufficient weight on the right of victims of crime to see offenders brought to justice.⁵⁷ This concept of a fair trial would allow for reform of the manner in which cross-examination is conducted without it being considered unconstitutional for violating the accused’s fair trial right to cross-examine. Therefore, a broader concept of a fair trial, would enable a reassessment of how the accused’s fair trial right to cross-examine might be implemented to overcome unfairness to

⁵⁰ Law Reform Commission, L.R.C. 81-2006, *Report on Prosecution Appeals and Pre-Trial Hearings* (Dublin: Law Reform Commission, 2006) at para. 1.03; R. Coen “The Rise of the Victim-A Path to Punitiveness?” (2006) 16(3) I.C.L.J. 10 at 12-13.

⁵¹ [2014] E.W.C.A. Crim. 2064 at paras. 40-45; *R. v. Willis* [2011] E.W.C.A. Crim. 1938 at para. 30 [hereinafter *Willis*]; *R. v. E.* [2011] E.W.C.A. Crim. 3028 at para. 28 [hereinafter *E.*]; L. Hoyano, “Reforming the Adversarial Trial for Vulnerable Witnesses and Defendants” [2015] 2 Crim. L.R. 107 at 107.

⁵² *P.S. v. Germany* (2003) 36 E.H.R.R. 61 at para. 22; *Doorson*, *supra* note 34 at para. 70.

⁵³ I. Bacik, L. Heffernan, P. Brazil & M. Woods, *Report on Services and Legislation: Providing Support for Victims of Crime* (Dublin: Law School Trinity College Dublin, 2007) at 37; B. Glynn, “In the Name of the Victim: How the Criminal Justice System Adequately Protects the Interests of Victims” (2012) 30 I.L.T. 152.

⁵⁴ [2007] I.E.H.C. 108 at para. 65; *People (D.P.P.) v. James T.* [1988] Frewen 141 at 160 (spousal compellability); *D. v. D.P.P.* [1994] 2 I.R. 465 at 474 (Denham J.) (S.C.) (right to a trial without unreasonable delay); Y.M. Daly, “Exclusion of evidence: *D.P.P. (Walsh) v. Cash*” [2011] E. & P. 62.

⁵⁵ [2015] I.E.S.C. 31 [hereinafter *J.C.*].

⁵⁶ [1990] 2 I.R. 110 (S.C.).

⁵⁷ *J.C.*, *supra* note 55 at paras. 73 (MacMenamin J.), 4.8, 4.15 (Clarke J.); C. Leon & T. Ward, “Case Comment: *D.P.P. v. J.C.*” (2015) 79(4) J.Crim.L. 238 at 239.

witnesses.⁵⁸ If the Irish courts were to maintain a traditional narrow interpretation of the right to a fair trial, this could have a chilling effect on the reform of the adversarial trial process to better accommodate vulnerable. For instance, in *Crawford v. Washington*, the United States Supreme Court found that the Confrontation Clause prohibited the admission of “testimonial” hearsay evidence, unless the declarant is unavailable and the defendant had a prior opportunity for cross examination.⁵⁹ This judgment has undermined legislative and judicial measures to protect vulnerable witnesses in the United States because it has resulted in prosecutors dropping domestic violence and sexual abuse cases at a much higher rate than before *Crawford* and forcing fragile victims to testify in court.⁶⁰

IV - The Art of Cross-Examination

Vulnerable witnesses are faced with three main problems arising from the current manner in which cross-examination is conducted. They are: (i) the use of developmentally inappropriate language, (ii) suggestive questioning, and (iii) its intimidatory tactics. The “revolutionary” reforms, particularly when viewed from an Irish context, articulated by the Court of Appeal of England and Wales to remedy these problems will be analysed.⁶¹ Although these reforms do not entirely resolve the problems facing vulnerable witnesses, they provide a useful starting point from which the Irish courts could work so as to render cross-examination suitable for vulnerable witnesses.

A. Developmentally Inappropriate Language

Language has been identified as the “primary manipulative tool” at the disposal of lawyers and, in the context of cross-examination, is used to gain an advantage over

⁵⁸ P. Bowden, T. Henning & D. Plater, “Balancing Fairness to Victims, Society and Defendants in the Cross-Examination of Vulnerable Witnesses: An Impossible Triangulation?” (2014) 37(3) M.U.L.R. 539 at 559.

⁵⁹ 541 U.S. 36 (2004) at 59 (Scalia J.) [hereinafter *Crawford*]; J. Clow, “Throwing a Toy Wrench in the ‘Greatest Legal Engine’: Child Witnesses and the Confrontation Clause” (2015) 92 Wash. U.L. Rev. 793 at 804.

⁶⁰ J. Brooks, “Two-Way Video Testimony and the Confrontation Clause: Protecting Vulnerable Witnesses After *Crawford*” (2012) 8 Stan. J.C.R. & C.L. 183 at 194-195; L. Harmon, “Throwing the Testimony Out with the Bathwater: Washington’s Application of Crawford Hearsay in Child Abuse Cases” (2013-2014) 12 Seattle J. Soc. Just. 1085; M. Fan, “Adversarial Justice’s Casualties: Defending Victim-Witness Protection” (2014) 55 B.C.L. Rev. 775 at 808.

⁶¹ Lord Judge, “The Evidence of Child Victims: The Next Stage” <http://www.barcouncil.org.uk/media/241783/annual_law_reform_lecture_rt_hon_the_lord_judge_speech_2013.pdf> (date accessed: 12 January 2017).

comparably unsophisticated language users.⁶² The concern surrounding the use of developmentally inappropriate language is that it leads to significantly more inaccurate responses and a greater number of errors because witnesses may respond without understanding the questions' true meaning. Research suggests that even ordinary adult witnesses give more accurate responses and make less errors when asked the same questions, but using less advanced language.⁶³ Advanced language has a particular detrimental impact on child witnesses, and those with learning disabilities.⁶⁴ For example, fifteen and seventeen year olds' understanding of formal or high register words like "assume" or "concede" may be incomplete and children up to fifteen years may not fully comprehend common structures, like clauses beginning with "although".⁶⁵ Not only may children have difficulty understanding adult language, adults may also have difficulty understanding children's language. This may result in inaccurate inferences being drawn from the responses of child witnesses and their testimony may be further tainted by follow-up questions which incorporate these inaccurate inferences.⁶⁶

Unfortunately, studies indicate that the use of developmentally inappropriate language remains widespread. In their survey of child witnesses in England, Wales and Northern Ireland, Plotnikoff and Woolfson found that 49% did not understand some questions asked of them and 34% said that the questions were too complicated.⁶⁷ These findings were mirrored in a New Zealand study which found that the cross-examination of child witnesses was characterised by a high proportion of utterances containing complex vocabulary, double negatives, multiple forms of complexity and multiple subordinate clauses.⁶⁸ This is despite Brennan and Brennan identifying such linguistic devices as likely

⁶² L. Ellison, "The Mosaic Art: Cross-examination and the Vulnerable Witness" (2001) 21 L.S. 353 at 354 [hereinafter Ellison]; L. Ellison, "Cross-examination and the Intermediary: Bridging the Language Divide" [2002] Crim. L.R. 114 at 119.

⁶³ L. Ellison & J.M. Wheatcroft, "Could you ask me that in a different way please?" [2010] Crim. L.R. 823 at 828.

⁶⁴ M. Kebbell & C. Hatton, "People with Retardation as Witnesses in Court: A Review" (1999) 37(3) Mental Retardation 179.

⁶⁵ K. Hanna, E. Davies, E. Henderson, C. Crothers & C. Rotherham, *Child Witnesses in New Zealand Criminal Courts: A Review of Practice and Implications for Policy* (Auckland: Institute of Public Policy AUT University, 2010) at 77 [hereinafter Hanna *et al*, *Child Witnesses*].

⁶⁶ J.Z. Klemfuss & S.J. Ceci, "Legal and Psychological Perspectives on Children's Competence to Testify in Court" (2012) 32 Dev. Rev. 268 at 272.

⁶⁷ Plotnikoff & Woolfson, *supra* note 5 at para. 9.2.

⁶⁸ K. Hanna, E. Davies, C. Crothers & E. Henderson, "Questioning Child Witnesses in New Zealand's Criminal Justice System: Is Cross-Examination Fair?" (2012) 19(4) *Psychiatry, Psychology and Law* 530 at 535-537 [hereinafter Hanna *et al*, "Questioning"].

to confuse child witnesses.⁶⁹ These difficulties are compounded by the fact that child witnesses do not ask for clarification when they fail to understand the question and even may not recognise that they have misunderstood the question. Even when they do ask for clarification, evidence suggests that the restatements are just as complex as the originals.⁷⁰ Can cross-examination continue to be considered the “greatest legal engine ever invented for the discovery of truth” if child witnesses do not understand, at a minimum, almost half of all questions put to them?

The Court of Appeal of England and Wales began their reform of cross-examination in *R. v. Barker*, where Lord Judge C.J. recognised that “children are not miniature adults, but children, and to be treated and judged for what they are”.⁷¹ Lord Judge C.J. endorsed the need to adopt developmentally suitable language and stated that “it should not be over-problematic for the advocate to formulate short, simple questions which put the essential elements of the defendant's case to the witness”.⁷² However, with the greatest of respect to Lord Judge C.J., it is questionable as to whether it is indeed not “over-problematic” for defence counsel to conduct cross-examination using only developmentally appropriate language. It may be the case that the Court of Appeal is underestimating the complexity of the task facing advocates in adapting their language and that advocates may need the assistance of experts to do so.⁷³ In a recent survey of judges and criminal advocates in England and Wales, widespread support for *Barker* was found, with three-quarters of judges and over half of advocates firmly in favour. There was also growing recognition of the problem surrounding the use of developmentally inappropriate language, with three quarters of judges raising concerns about the cross-examiners’ language and syntax.⁷⁴

In contrast, there has only been limited recognition in Ireland of the need to alter the language in which cross-examination is conducted.⁷⁵ The Law Reform Commission noted that “the use of legal jargon and traditional style of questioning during cross-

⁶⁹ M.N. Woodward, I.J. Hepner & J. Stewart, “Out of the Mouth of Babes: Enabling children to give evidence in the justice system” (2014) 39 *Alternative L.J.* 27.

⁷⁰ E. Henderson, “Bigger Fish to Fry: Should the Reform of Cross-examination be Expanded Beyond Vulnerable Witnesses?” (2015) 19(2) *E. & P.* 83 at 85 [hereinafter Henderson, “Bigger Fish”].

⁷¹ [2010] *E.W.C.A. Crim.* 4 at para. 40 [hereinafter *Barker*].

⁷² *Ibid.* at para. 42.

⁷³ E. Henderson, “Root or Branch? Reforming the Cross-examination of Children” (2010) 69 *C.L.J.* 460 at 462.

⁷⁴ E. Henderson, “Communicative Competence? Judges, Advocates and Intermediaries Communication Issues in the Cross-Examination of Vulnerable Witnesses” [2015] *Crim. L.R.* 659 at 664-667 [hereinafter Henderson, “Communicative Competence?”].

⁷⁵ For example, K. O’Brien, “Just How Child-Friendly Should Justice Be?” (2013) 107 *Law Society Gazette* 14.

examination can operate to further alienate people who require support and accommodation to give evidence”.⁷⁶ However, it would appear that the Irish courts have yet to consider whether developmentally inappropriate language is permissible when cross-examining a vulnerable witness. It is hoped that, when the opportunity arises, the Irish courts will adopt the approach of the Court of Appeal of England and Wales and engage with this important issue in light of the detrimental impact that it may have on the evidence of vulnerable witnesses.

B. Suggestive Questioning

Cross-examination is characterised by its use of controlling questioning techniques, such as coercive, close-ended and leading questions.⁷⁷ Leading questions may be defined as questions which directly or indirectly suggest to the witness the answer he or she is to give.⁷⁸ Leading questions generally take two forms, they may assume the existence of a disputed fact, such as the question “with what sort of knife did the accused stab?”⁷⁹ Alternatively, it may be a closed leading question, which indicates the expected answer, such as “so you went home after that?” It may also include a tag question, a positive or negative statement followed by a question inviting an acceptance that the statement is true, for example “so you went home after that, is that right?”. The substitute for the use of these question types are open-ended questions which ask the witness to supply missing information, such as “where did you go?”.⁸⁰ Leading questions are preferred in cross-examination because advocates seek to ensure that witnesses only give answers that are useful to their cause and so attempt to prevent witnesses giving unfavourable information.⁸¹ While the use of leading questions is prohibited in examination-in-chief, their use is not only permitted in cross-examination but expected. Plotnikoff and Woolfson found that 58% of the child witnesses surveyed stated that “the other side’s lawyer tried to make them say something they did not mean or put words in their mouths”.⁸² This is supported by the New Zealand study, which found that, on average, 84% of questions posed during the cross-

⁷⁶ Law Reform Commission, LRC 32-1990, *Report on Child Sexual Abuse* (Dublin: Law Reform Commission, 1990) at para. 5.115 [hereinafter *Report on Child Sexual Abuse*].

⁷⁷ Ellison, *supra* note 62 at 358.

⁷⁸ *Maeves v. Grand Trunk Pacific Railway Co* (1913) 14 D.L.R. 70 at 73 (Beck J.).

⁷⁹ D.T. Zeffertt, A.P. Paizes & A. St. Q. Skeen, *The South African Law of Evidence* (Durban: LexisNexis, 2003) at 737.

⁸⁰ Hanna *et al*, *Child Witnesses*, *supra* note 65 at 61.

⁸¹ E. Henderson, “Reforming The Cross-Examination of Children: The Need for a New Commission on the Testimony of Vulnerable Witnesses” (2013) 10 Arch. Rev. 6 at 8.

⁸² Plotnikoff & Woolfson, *supra* note 5 para. 9.3.

examination of child witnesses analysed were either closed or leading.⁸³ The use of suggestive questioning is based on the rationale that the purpose of effective cross-examination is to catch the witness unaware, to commit him or her to some proposition which, when developed, will be inconsistent with his or her evidence-in-chief.⁸⁴ The underlying assumption is thus that the primary characteristic of accurate and honest witnesses is resolute resistance to suggestion, together with consistent recall of the facts.⁸⁵

However, psychological research would appear to have now rejected this assumption as false and identified the danger that these question types may distort the testimony of even ordinary witnesses. The main danger in the use of these question types is that by suggesting answers within their questions cross-examiners may be leading witnesses to give answers that more closely accord with the hypothesis they advance rather than the actual truth.⁸⁶ The more a questioner suggests a particular answer, the less reliable the answer is likely to be and that this problem is exacerbated when the person making the suggestion is an authority figure, such as a defence lawyer.⁸⁷ Although everyone may be potentially influenced by the structure and type of questions, children and witnesses with learning disabilities are particularly susceptible to leading questions.⁸⁸ Even very subtle suggestions are effective and the fundamental danger in the use of these question types is thus that it may lead to simple acquiescence to what is suggested.⁸⁹ As Wheatcroft noted, “[p]ermitting the use of forms of questions that facilitate the exploitation of witnesses’ inexperience and reduces the accuracy of their responses is repugnant to the aims of the adversarial trial process”.⁹⁰

Unfortunately, there would appear to be no recognition of the problems that leading questions pose for witnesses, particularly vulnerable witnesses, by the Irish courts and there

⁸³ Hanna *et al*, “Questioning”, *supra* note 68 at 535.

⁸⁴ Wells & Stone, *supra* note 20 at 645.

⁸⁵ Henderson, “Bigger Fish”, *supra* note 70 at 90.

⁸⁶ L. Ellison, “The Protection of Vulnerable Witnesses in Court: An Anglo-Dutch Comparison” [1998] 3(1) E. & P. 29 at 36.

⁸⁷ N. Perlman, K. Ericson, V. Esses & B. Isaacs “The Developmentally Handicapped Witness: Competence as a Function of Question Format” (1994) 18(2) L. & Human Behaviour 186 in Ellison, *supra* note 62 at 358-359.

⁸⁸ L.A. Henry & G.H. Gudjonsson “Eyewitness memory and suggestibility in children with mental retardation” (1999) 104(6) A.J.M.R. 491; S. Krähenbühl and M. Blades, “The effect of interviewing techniques on young children’s responses to questions” (2006) 32(3) Child Care Health Dev. 321.

⁸⁹ A. Keane & R. Fortson, “Leading Questions: A Critical Analysis” [2011] Crim. L.R. 280 at 282-283 [hereinafter Keane & Fortson].

⁹⁰ J.M. Wheatcroft, D. Caruso & J. Krumrey-Quinn, “Rethinking Leading: The Directive Non-Directive Divide” [2015] Crim. L.R. 340 at 342.

is no evidence to suggest that their use is not considered a legitimate cross-examination technique.⁹¹ In contrast, the Court of Appeal of England and Wales has extended their reform of cross-examination beyond the issue of comprehensibility to also address the problem of suggestive questioning. In *R. v. W. and M.*, Hughes L.J. acknowledged “[t]here is undoubtedly a danger of a child witness wishing simply to please. There is undoubtedly a danger of a child witness seeing that to assent to what is put may bring the questioning process to a speedier conclusion than to disagree”.⁹² In order to counteract this danger, Hughes L.J. recommended the use of “short and untagged questions” when questioning child witnesses.⁹³ The most persuasive justification for the use of leading questions is that they are necessary if the rule of putting one’s case to the witness in cross-examination is to be satisfied.⁹⁴ However, in *Barker* Lord Judge C.J. held that “[a]spects of evidence which undermine or are believed to undermine the child’s credibility must, of course, be revealed to the jury, but it is not necessarily appropriate for them to form the subject matter of detailed cross-examination of the child”.⁹⁵ It has therefore now been accepted in England and Wales that it is no longer appropriate to “put your case” to a vulnerable witness in the traditional way and so undermined the rationale for the continued use of leading questions.⁹⁶

While the Court of Appeal’s reform of suggestive questioning is to be commended, it is arguable that it is too limited in nature to fully remedy the danger they pose to vulnerable witnesses. The Court criticised certain types of suggestive questions, such as tag questions, where the risk to witnesses is particularly acute without addressing the underlying assumptions about cross-examination which mandate their use.⁹⁷ The dangers surrounding the use of leading or suggestive questions was recognised by around three-quarters of judges and half of advocates surveyed in England and Wales.⁹⁸ Nevertheless, a quarter of judges and advocates could see no option but closed leading questions if witnesses are to be

⁹¹ M. Delahunt, “Issues in respect of Support Measures for Witnesses with an Intellectual Disabilities in the Irish Criminal Justice System” (2015) 5(1) I.J.L.S. 51 at 62.

⁹² [2010] E.W.C.A. Crim. 1926 at para. 30.

⁹³ *Ibid.*

⁹⁴ Keane & Fortson, *supra* note 89 at 292.

⁹⁵ *Barker*, *supra* note 71 at para. 42.

⁹⁶ *E.*, *supra* note 51 at para. 28; *Willis*, *supra* note 51 at para. 39; E. Henderson, “All the Proper Protections – the Court of Appeal Rewrites the Rules of Cross-Examination for Vulnerable Witnesses” [2014] Crim. L.R. 93 at 101-102.

⁹⁷ *Ibid.* at 99.

⁹⁸ Henderson, “Communicative Competence?”, *supra* note 74 at 664.

properly tested.⁹⁹ However, there is no empirical evidence to support the view that leading questions are effective means of discovering the truth and it has been recommended that leading questions be avoided altogether. Instead, open-ended questions should be used and where they fail to draw out all the details required, specific questions should be used before resorting to closed questions, which limits the answer to either yes or no, to elicit these details.¹⁰⁰ This would ensure that all relevant information is obtained from a vulnerable witness without compromising the reliability of their evidence by using leading questions.

C. Tactics of Cross-Examination

Cross-examination tends to be naturally aggressive and confrontational, with cross-examiners deploying a vast range of tactics to unsettle witnesses.¹⁰¹ These tactics employed in cross-examination include the focusing on peripheral details and accusing the witness of lying. The tactics are also combined with other devices, such as tone of voice, physical proximity, eye contact, physical gesture and facial expression, in order to intimidate, and thereby undermine, opposing witnesses.¹⁰² The belief that cross-examination should be conducted with “restraint and appropriate courtesy and consideration for the witness”,¹⁰³ appears not to be adhered to in practice. Only 28% of the child witnesses surveyed by Plotnikoff and Woolfson described the defence lawyer as polite and 49%, almost half, had less positive views of them. Their descriptions of defence lawyers included: “sarcastic”, “rude”, “aggressive”, “cross”, “bullying”, “badgering”, “intimidating”, “degrading”, “disrespectful”, “snappy”, “pushy”, “loud”, “relentless”, “abrupt” and “snotty”.¹⁰⁴ These descriptions by children of the manner in which cross-examination is conducted by respected members of the Bar raises grave concerns. The truism that civilised society is measured according to how it treats its weaker and less advantaged members comes to mind in light of these descriptions.¹⁰⁵

⁹⁹ *Ibid.* at 674.

¹⁰⁰ Ministry of Justice, *Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures* (London: Ministry of Justice, 2011) at paras. 3.35–3.80.

¹⁰¹ J. Doak and C. McGourlay, *Evidence in Context*, 3rd ed. (Abingdon: Routledge, 2012) at 124.

¹⁰² Ellison, *supra* note 62 at 360.

¹⁰³ D. McGrath, *Evidence*, 2nd ed. (Dublin: Thomson Round Hall, 2014) at para. 3.97.

¹⁰⁴ Plotnikoff & Woolfson, *supra* note 5 at para. 9.1.

¹⁰⁵ Northern Ireland Law Commission, N.I.L.C. 10-2011, *Report: Vulnerable Witness in Civil Proceedings* (Belfast: Northern Ireland Law Commission, 2010) at ix.

Wigmore himself recognised that such a style of questioning “may so coerce or disconcert the witness that his answers do not represent his actual knowledge on the subject”.¹⁰⁶ The tactic of focusing on peripheral details, and relying on an inability to recall such details to demonstrate unreliability and untruthfulness, is not a forensically safe tactic for testing the evidence of even an ordinary adult witness. Memory research now establishes that it is to be expected that information central to events is remembered better than peripheral information. This tactic is particularly unfair to children and persons with learning disabilities because they have even greater difficulty remembering peripheral details. Children who report on multiple events, such as sexual abuse, have an increased rate of error for less distinctive events because of confusing detail among similar experiences, rather than reporting details that were never experienced.¹⁰⁷ In New Zealand, it was found that this tactic was used in the cross-examinations of one in three children under thirteen and 61% of those involving older children.¹⁰⁸ This is mirrored by the findings of Plotnikoff and Woolfson’s survey, where 22% of the child witnesses described questions focusing on details unrelated to the substance of the case or placing unrealistic demands on their memory.¹⁰⁹ Another potentially distortive tactic for vulnerable witnesses is to accuse witnesses of lying and this can be particularly upsetting for child witnesses. It generally reduces children to tears and the stress induced makes it difficult for them to remember accurately and to think clearly.¹¹⁰ In Plotnikoff and Woolfson’s survey, fifty-seven percent said that the defence lawyer had accused them of lying and, of those, seventy percent said that this happened more than once.¹¹¹ Similarly in New Zealand, the child witnesses were accused of lying, having faulty memories, being confused or uncertain in eleven of the sixteen cross-examinations analysed.¹¹² Therefore, these tactics serve no beneficial purpose in the cross-examination of vulnerable witnesses and do not aid in the discovery of the truth, rather they only serve to unfairly discredit them and to distort their evidence.

¹⁰⁶ Wigmore, *supra* note 1 at paras. 1367-1368.

¹⁰⁷ R. Fivush, C. Peterson & A. Schwarzmueller, “Questions and answers: The credibility of child witnesses in the context of specific questioning techniques” in M. L. Eisen, J.A. Quas & G.S. Goodman, eds., *Memory and suggestibility in the forensic interview* (Mahwah: Laurence Erlbaum, 2000) 331, cited by Hanna *et al*, “Questioning”, *supra* note 68 at 541.

¹⁰⁸ Hanna *et al*, “Questioning”, *ibid.* at 541.

¹⁰⁹ Plotnikoff & Woolfson, *supra* note 5 at para. 9.3.

¹¹⁰ J.R. Spencer & D. Glaser, “Sentencing, Children's Evidence and Children's Trauma” [1990] *Crim. L.R.* 371 at 378.

¹¹¹ Plotnikoff & Woolfson, *supra* note 5 at para. 9.4.2.

¹¹² Hanna *et al*, “Questioning”, *supra* note 68 at 541.

The final aspect of the Court of Appeal of England and Wales's reform of the manner in which cross-examination is conducted relates to the use of these tactics. In *R. v. E.*, Rafferty L.J. noted that when cross-examining a child witness a "direct challenge that he or she is wrong or lying could lead to confusion and, worse, to capitulation. Capitulation is not a consequence of unreliability but a function of the youngster's age and the circumstances in which she finds herself".¹¹³ The extent to which the Court of Appeal of England and Wales has sought to reform cross-examination, and in particular the tactics used in it, is evident in *R. v. Farooqi*, where the Court of Appeal went against long-standing convention and criticised an advocate's conduct, going so far as to encourage disciplinary action to be taken.¹¹⁴ Lord Judge C.J. also stated that the "trial process is not a game".¹¹⁵ It is heartening that the Court of Appeal has sought to restrict the unfair tactics that may be deployed during cross-examination and expressly recognised the particular needs of vulnerable witnesses.

The problems that the tactic of cross-examination may pose to vulnerable witnesses has received some recognition in Ireland. The Joint Committee on Child Protection noted that cross-examination should "not become a mechanism for oppressing the [child] witness".¹¹⁶ Similarly, the Rape Crisis Network Ireland identified fear of the criminal justice process as a prominent reason why 34% of victims did not report to the Gardaí and the most common reason for withdrawal of reports already made related to concerns surrounding the trial and appearance in court.¹¹⁷ It would be correct to argue that there may be multiple reasons why rape complainants fear the criminal justice system and appearing in court in Ireland, but it cannot be doubted that the manner in which cross-examination is conducted is a major factor.¹¹⁸ The Irish courts have grappled with the question of what tactics may be used in cross-examination when considering the standards governing cross-examination

¹¹³ *E.*, *supra* note 51 at para. 28.

¹¹⁴ [2013] E.W.C.A. Crim. 1649 at para. 115 [hereinafter *Farooqi*]; E. Henderson, "Taking control of cross-examination: judges, advocates and intermediaries discuss judicial management of the cross-examination of vulnerable people" [2016] Crim. L.R. 181 at 204.

¹¹⁵ *Ibid.* at paras. 113-114.

¹¹⁶ Joint Committee on Child Protection, Prn A6/2024, *Report on Child Protection* (Dublin: Joint Committee on Child Protection, 2006) at para. 11.9.9 [hereinafter *Report on Child Protection*]; *Report on Child Sexual Abuse.*, *supra* note 76 at para. 7.24.

¹¹⁷ C. Hanly, D. Healy & S. Scriver, *Rape and Justice in Ireland* (Dublin: Liffey Press, 2009) at 140-144, 356-357; C. Counihan, "Rape Crisis Network Ireland Perspectives on Sexual Violence and the Criminal Justice System" (2013) 23(4) I.C.L.J. 115 at 115.

¹¹⁸ Edwards *et al.*, *supra* note 14 at 79; *Report on Child Protection*, *supra* note 116 at para. 11.3.5; Special Rapporteur on Child Protection, *Report of the Special Rapporteur on Child Protection: A Report Submitted to the Oireachtas* (Dublin: *Special Rapporteur on Child Protection*, 2007) at para. 5.3.1.

more generally. It is clear that the Irish courts have adopted a traditional limited approach to what is considered impermissible in cross-examination. In *People (D.P.P.) v. D.O.*, which concerned the cross-examination of an accused person, Hardiman J. noted that cross-examination is expected to be “hard, detailed, challenging and bruising”.¹¹⁹ While Murray C.J. stated that prosecuting counsel must “act fairly and objectively” and observe “appropriate standards”.¹²⁰ Although this recognition that cross-examination must be governed by “appropriate standards” is welcome, it is only by the Irish courts formulating, and enforcing, such standards that vulnerable persons will be able to act as witnesses without being subject to inappropriate tactics. In contrast to the Court of Appeal of England and Wales’s striking approach in *Farooqi*, Murray C.J. emphasised that the lapse by counsel from these standards in this case was “rare”.¹²¹ It is possible that Article 18 of the *Victims’ Rights Directive* may have a beneficial impact on the tactics that may be used during cross-examination in Ireland, if utilised by the Irish courts. It requires that measures be adopted to protect victims from secondary and repeat victimisation, the risk of emotional or psychological harm, and their dignity during questioning and when testifying. This may include limiting intrusive questions, ensuring that only questions that are of interest and importance to the case are asked during cross-examination and limits the manner in which questions are asked.¹²²

V - Conclusion

Cross-examination was heralded by Wigmore because of its central role in the discovery of the truth and so if its ability to ascertain accurate facts is to be maximised, greater attention needs to be paid to the lessons that can be learned from other disciplines, such as psychology. Although the accused’s right to cross-examine is an integral aspect of the accused’s right to a fair trial, an analysis of the jurisprudence of the Irish courts and the European Court of Human Rights showed that this right does not prohibit the reform of the harmful aspects of cross-examination to accommodate vulnerable witnesses. A number of limited reforms of aspects of cross-examination were also advocated for, with the recent case

¹¹⁹ [2006] I.E.S.C. 12, [2006] 2 I.R. 57 at 69.

¹²⁰ *Ibid.* at 60–61.

¹²¹ *Ibid.* 62 at 75 (Hardiman J.); M. Holmes, “Courtus Interruptus – New Case Law on Interruptions by Judges” (2015) 20 (6) Bar Rev. 130.

¹²² European Commission, *Guidance Document related to the transposition and implementation of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JH* (Brussels: European Commission, 2013) at 50.

law of the Court of Appeal of England and Wales used as a model of judicial reform to be emulated in Ireland. It is hoped that this article will encourage a conversation as to how the most vulnerable in our society should be treated by our trial process and the reforms that need to be adopted in light of the knowledge we now have about human behaviour.