



What is the court's approach to capacity evidence and the particular difficulties of:

- (1) distorted memories,
- (2) false beliefs and
- (3) personality change

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**Julian Shaw**

**Barrister**

**Recorder Crown Court, County Court and Family Court**

**& Financial Remedies Judge**

**St John's Buildings**

**INTRODUCTION:**

- ❖ The issues and problems of interpretation and evaluation of oral evidence from witnesses and parties especially the vulnerable.
- ❖ How to facilitate its presentation to enable '*the authentic voice to be heard*'
- ❖ The direction of travel across the three primary jurisdictions.
- ❖ The appropriate weight to attach to oral evidence.
- ❖ Historic recollection or recall of events.

**THE SIGNIFICANCE OF GESTMIN:**

*Gestmin SGPS SA v. Credit Suisse (UK) Limited* [2013] EWHC 3560 (Comm)

- ❖ Leggatt J's analysis and commentary upon the unreliability of human memory paras: 16 - 20
  - The fallibility of memory;
  - The lessons learned from psychological research;
  - The unreliability of eyewitness testimony.
  - Common myths of '*vivid recall*' and '*confident recollection*' of past events.
  - The '*flashbulb*' memory misconception.
  - Transference of memory leading to false recollections.
  - The overlay and impact of present beliefs re-writing past beliefs.
  - The litigation factor.
  - The unconscious desire to please and to be seen in a favourable light.

- ❖ Leggatt J's conclusions:
  - In a commercial case, place little if any reliance upon witnesses' recollection.
  - Base factual findings upon inferences to be drawn from documentary and contemporaneous records and known or probable facts.
  
- ❖ The effect and adoption of the Gestmin judgment
  - *AB v Catholic Child Welfare Society* [2016] EWHC 3334 (QB)
  - *'The fallibility of memory in judicial processes: Lessons from the past and their modern consequences'*

(2015) Memory, 23, 633 at 651-3.

### **THE COURT'S DILEMMA AND CHALLENGE:**

- ❖ *'How should we approach and evaluate the evidence of those people engaged in the judicial processes either as witnesses or defendants'*
- ❖ *'How have the Court's and Tribunals evolved both in treating and evaluating oral evidence and especially the evidence of the vulnerable over the past few decades'.*

### **SUNDAY 2<sup>ND</sup> NOVEMBER 1952:**

- ❖ Tamworth Road, Croydon.
- ❖ One of the most notorious miscarriages of justice in English Legal history.
  - The first development – the Homicide Act and diminished responsibility.

- 'Let him have it, Chris' – the four notorious words.
- Speedy justice.
- Bentley's capacity.
- Alfred Peirrepoint.

### **THE DEVELOPMENT OF A MORE ENLIGHTENED APPROACH:**

- ❖ Across all the three main divisions of our justice system.

### **THE ADVOCATES GATEWAY:**

- ❖ <https://www.theadvocatesgateway.org/toolkits>

- ❖ Links to:

Ground Rules Hearings and the fair treatment of vulnerable people in Court » [Download PDF \(0.3mb\)](#)

And the Ground Rules Hearing checklist  
» [Download PDF \(0.3mb\)](#)

### **THE TOOLKITS:**

The 19 current Toolkits are:

- 1. Ground rules hearings and the fair treatment of vulnerable people in court
- Ground rules hearing checklist
- 1a. Case management in criminal cases when a witness or defendant is vulnerable
- Essential questions checklist
- 2. General principles from research, policy and guidance: planning to question a vulnerable person or someone with communication needs
- 3. Planning to question someone with an autism spectrum disorder including Asperger syndrome
- 4. Planning to question someone with a learning disability

- 5. Planning to question someone with 'hidden' disabilities: specific language impairment, dyslexia, dyspraxia, dyscalculia and AD(H)
  - 6. Planning to question a child or young person
  - 7. Additional factors concerning children under 7 (or functioning at a very young age)
  - 8. Effective participation of young defendants
  - 9. Planning to question someone using a remote link
  - 10. Identifying vulnerability in witnesses and parties and making adjustments
  - 11. Planning to question someone who is deaf
  - 12. General principles when questioning witnesses and defendants with mental disorder – [NB: This toolkit is currently under review, a revised version will be published in due course]
  - 13. Vulnerable witnesses and parties in the family courts
  - 14. Using communication aids in the criminal justice system
  - 15. Witnesses and defendants with autism: memory and sensory issues
  - 16. Intermediaries: step by step
  - 17. Vulnerable witnesses and parties in the civil courts
  - 18. Working with traumatised witnesses, defendants and parties – [NB: This toolkit is currently under review, a revised version will be published in due course]
  - 19. Supporting participation in courts and tribunals
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- ❖ Enabling the voice of the vulnerable to be heard and their participation in the justice system to be facilitated and fair.

### ADAPTATIONS:

- ❖ Lady Justice Hallett in *R v Lubemba*; & *R v JP* [2014] EWCA Crim 2064. observed that:

*'Advocates must adapt to the witness, not the other way round.'*
- ❖ An echo of Judicial Studies Board Equal Treatments Bench Book from 2013 commenting upon litigants in person and their treatment within the Court system.

**PROPER TRAINING:**

❖ Lord Thomas of Cymgiedd in:

*R v GrantMurray & Anor* [2017] EWCA Crim 1228, para 226.

*‘The handling and questioning of vulnerable witnesses and defendants is a specialist skill. Advocates must ensure that they are suitably trained and that they adhere to their professional conduct rules.*

*We would like to emphasise that it is, of course, generally misconduct to take on a case where an advocate is not competent. It would be difficult to conceive of an advocate being competent to act in a case involving young witnesses or defendants unless the advocate had undertaken specific training.’*

**MENTAL CAPACITY ACT 2005:**

❖ s.1 and the 5 principles of approach.

1. A presumption of capacity
  - Start by thinking I *can* make a decision
2. Do not treat me as unable to make a decision unless you have taken all practicable steps to help me do so without success.
  - Do all you can to *help* me make a decision
3. Permit me to make my own decisions for myself
  - You should not say I lack capacity because you think my decision is unwise
4. Any decision taken for me must be a best interests decision
  - If I do lack capacity use the best interest checklist for any decision you take
5. Make sure that any decision taken is the least restrictive way of achieving the desired result
  - Check that the decision made does not stop my freedom/autonomy any more than is required.

**COURT OF PROTECTION:**

- ❖ 1<sup>st</sup> October 2007.
- ❖ Jurisdiction over the property, financial affairs and personal welfare of people who lack mental capacity to make decisions for themselves.

**HOW NOW DO THE COURT'S DEAL WITH AND EVALUATE THE EVIDENCE OF THE VULNERABLE AND THOSE WHO LACK CAPACITY?****Overview:**

- ❖ Caution and the need for a broad assessment of all the evidence.
- ❖ (a) distorted memories and
- (b) false beliefs
- ❖ Evidence is just that: evidence.

**The Role of Experts:**

- ❖ Expert's do not decide cases. Judges do.
- ❖ The holistic approach

**The Lady who had lost her 'sparkle':**

- ❖ *Kings College Hospital Trust v. C and V* [2015] EWCOP 80
  - The case of the woman who had lost her 'sparkle' and wanted to refuse life-saving treatment for kidney failure that had been precipitated by her unsuccessful suicide attempt.
  - The right to refuse the treatment however unwise the decision might be.

- Lord Donaldson in *In Re T (Adult: Refusal of Treatment)* [1993] Fam 95 at 102 Lord Donaldson observed that:

*‘An adult patient who...suffers from no mental incapacity has an absolute right to choose whether to consent to medical treatment, to refuse it or to choose one rather than another of the treatments being offered... This right of choice is not limited to decisions which others might regard as sensible. It exists notwithstanding that the reasons for making the choice are rational, irrational, unknown or even non-existent.’*

### UNWISE DECISIONS OR BARGAINS AND THE CIVIL COURT:

- ❖ *Arnold v. Britton* [2015] UKSC 36
  - Re-stated the general principle that the Court’s will not step in to re-write a bad bargain entered into by the parties.
  - It is not the function of the court interpreting a contract to relieve a party from the consequences of imprudence or poor advice.

### AUTONOMY OF TESTAMENTARY DECISIONS:

- ❖ *Ilot v. Blue Cross* [2017] UKSC 17
  - Unlike some other systems, English law recognises the freedom of individuals to dispose of their assets by will after death in whatever manner they wish.
  - The testator’s right to be capricious and contrary with their testamentary dispositions.

### ‘HONEST BUT MISTAKEN BELIEFS’ IN THE FAMILY COURT:

- ❖ *Stack v. Dowden* [2007] UKHL 17

- Oral evidence and testimony of the parties can be skewed when viewed through the prism of hind-sight or the bitterness of a relationship breakdown
- Baroness Hale: *'In family disputes, strong feelings are aroused when couples split up. These often lead the parties, honestly but mistakenly, to reinterpret the past in self-exculpatory or vengeful terms'*.

### EYE WITNESS RECOGNITION EVIDENCE IN THE CROWN COURT:

#### ❖ *R v. Turnbull [1977] QB224*

- The warning to the Jury:
  - (i) caution is required to avoid the risk of injustice;
  - (ii) a witness who is honest may be wrong even if they are convinced they are right;
  - (iii) a witness who is convincing may still be wrong;
  - (iv) more than one witness may be wrong;
  - (v) a witness who recognises the defendant, even when the witness knows the defendant very well, may be wrong.

### THE LUCAS DIRECTION:

#### ❖ *R v Lucas [1981] QB 720*

- If a court concludes that a witness has lied about a matter, it does not follow that he has lied about everything. *"A witness may lie for many reasons, for example out of shame, humiliation, misplaced loyalty, panic, fear, distress, confusion and emotional pressure"*.

**SERIOUS SYSTEMIC FAILINGS:**

- ❖ Public Inquiries (Cleveland (HMSO 1988) and Orkney (HMSO 1992)  
*Re E (A Minor) (Child Abuse: Evidence)* [1990] 1 FLR 420 FCR 793 at 798
  - Permeating the case was an underlying theme of “*the child must be believed*”.
  - “*The distinction between believing the child and taking seriously what the child has said was recognised by some of the witnesses but not consistently by all...[This] gave the impression of minds already made up. The distinction is a real and fundamental one. To take the allegation seriously does not mean that it is necessarily to be believed. The allegation is not to be put lightly aside. That the person making the allegation is a child is not to be taken to detract from the attention to be paid to it. It is to be taken as seriously as an allegation made by an adult. But it still requires to be scrutinised, assessed and evaluated. It has to be approached with an open mind, to be taken and to be seen to be taken seriously, but not to be assumed at once to be true.*”
  
- ❖ Operation Midland 2014-2016:
  - The police are pursuing a number of allegations that ‘*are credible and true*’.
  - Another 4-words.

**THE RTA VICTIM TORN BETWEEN TWO COMPETING NARRATIVES:**

- ❖ The whole constellation of:
  - (a) Distorted memories;
  - (b) False beliefs; and
  - (c) Personality change.

**LUDOVIC KENNEDY (1919-2009):**

- ❖ The taxi ride in Oxford Street London
  - *'I could have sworn'* – another four words.
  - Derek Bentley
  - Royal Pardon 1993
  - LCJ Lord Bingham 1998 and, finally, justice.
  - Postscript: Christopher Craig

**Julian Shaw**

**Barrister**

**Recorder Crown Court, County Court and Civil Court**

**Financial Remedies Judge**

