TESTING THE EVIDENCE OF WITNESSES

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THE OUTCOME OF MOST COURT CASES, be they civil or criminal, depends on resolving conflicts of fact. The facts are traditionally established by witnesses giving oral evidence in court describing past events, conditions, feelings, knowledge, beliefs, or any other states of affairs relevant to the factual issues. The job of the tribunal is to judge what facts to accept, what to reject. In recent years the rigidity of the old rule requiring all evidence to be called 'live' has been relaxed. Nowadays written statements prepared for use in the criminal court may be read if the witness's evidence is uncontentious and if the parties agree, or in certain other exceptional circumstances where the witness is unavailable or unwilling to testify through fear. But where evidence is challenged or otherwise not accepted, the traditional tool developed by the Common law for testing the integrity or reliability of contested evidence remains cross-examination, once memorably described as the 'greatest engine for detecting perjury yet devised.' Whilst this is perhaps to overstate its efficacy, as the list of notorious miscarriages of justice can attest, there is little doubt that the classic techniques of cross-examination, which advocates have honed up over the centuries, do furnish a powerful weapon for exposing inaccuracy, whether through mendacity, muddle or a combination of both.

Perhaps the most important weapon in the armoury of the cross-examiner is the test as to consistency. It is traditionally believed that after making all due allowance for the frailty of memory a comparison between the testimony of an eyewitness in court and a statement about the events in question uttered on a previous occasion may provide a compelling indication of the witness's veracity, accuracy and reliability. Indeed, it was asserted by the Court of Appeal in the case of *Rashid* in 1994 that previous statements are 'one of the classic examples of material tending to undermine the credibility of a witness.' For many centuries now professional investigators have customarily taken written statements from witnesses close in time to the events in question. Later, at trial, the witnesses are allowed to

'refresh their memories' from those statements. To that end, in some cases, they are handed their statements to use in front of them, in the witness box. More commonly however, they will be given the statement to inspect before coming in to court, but not permitted to have it with them when they are actually in court; significant differences can then be explored in cross-examination. Quite clearly, testing for consistency is dependent on restricting memory refreshment to out-of-court use of a statement made to the police, since there can hardly be any valid test of consistency if witnesses in the box have their statements in front of them in the first instance. Statements to the police will usually have been signed months before the trial and, not surprisingly, differences often emerge at trial even though witnesses may be given their original statements to read outside the courtroom before they give evidence. Since private witnesses will usually be describing an incident completely out of their normal experience it is assumed that their content will be graphically embossed on the memory; whilst details may become fuzzy with the passage of time the essentials will tend to remain constant. Changes in the memory of such central matters are therefore supposed to furnish a useful litmus test of reliability and if conducted well, cross-examination on inconsistency will prove illuminating, not to say decisive.

The value of testing for inconsistency obviously depends on the accuracy of the written statement as a record of what the witness said to the police and is likely to be undermined by flaws in the system of recording. In this country the statements of private eye-witnesses are still almost invariably taken down by officers involved to a greater or lesser extent in the investigation, and the content is likely to be influenced by the way in which the investigator perceives the case and receives and transcribes the narrative. Interviews in which the police take statements from witnesses are conducted in private without the keeping of any verbatim record. Hardly ever are they tape-recorded, and in the absence of any independent means by which a court can determine exactly how a statement came to be made, the police are relatively free to engage in manipulation, deliberate or inadvertent.

With the best will in the world, the way in which the story is committed to paper cannot help but reflect the officer's subjective view of the facts. A statement often owes as much to the officer's controlling hand as to the witness's actual memory. It invariably excludes the questions, which may be leading and suggestive, what purports to be written up can be highly selective and even quite inaccurate, and the

statement may turn out to be a seriously distorted version of what the witness actually said. At the time of telling the police their story, witnesses may be exhausted, depressed, disorientated, unwell or preoccupied. Many witnesses are insensitive to the nuances of language. So, after the officer has taken down the statement and has handed it to the witness to check and sign, crucial omissions, errors or distortions can easily be overlooked. On the other hand, the witness may simply be too tired or too timid to give voice to objections or reservations.

By contrast with the stringent rules governing the obtaining of statements from *suspects* the process of taking statements from *witnesses* is subject to few, if any, formal safeguards or regulatory constraints. Until only as recently as 1992, when the Home Office Central Planning and Training Unit issued *A Guide to Interviewing*, a manual based on the 'ethical' method of the 'cognitive interview' with its stress on the neutral search for facts, it was enhanced by little or no training. Even now it seems that there continues to be relatively little systematic training given to officers on conducting interviews, although it must be acknowledged that there has been an increasing tendency to inculcate awareness of the pitfalls of inadequate interviewing.

Most officers are coy when asked how they took a witness statement. Few care to admit that the written narrative was obtained by questioning and the fiction is still perpetuated that a statement was produced by straight dictation, possibly preceded by some amount of general 'discussion' of the issues to be covered and punctuated only by bland questions aimed at clearing up ambiguities or providing descriptive detail. Broadly innocent reasons may explain why during the taking of a statement a factual assertion by a witness is omitted from the narrative text, misrecorded or misrepresented by the writer. For example, the statement-maker may speak in a rambling or disconnected fashion or may suffer from poor diction or may speak in an obscure dialect or with an unfamiliar accent. This may lead to misunderstandings or omissions from the body of the statement if the statement-taker is inexperienced or insufficiently vigilant to avert them, but it is liable to occur even with old hands. Again, the witness may lay insufficient emphasis on a particular point despite its potential significance, with the result that the statement-taker fails to notice it amongst a mass of other more prominently voiced assertions. However, a more insidious factor than simple miscommunication is the influence of unjustified supposition. Whilst officers delegated to take a witness statement often have little or no

involvement in the investigation this is usually where the witness is of marginal importance. But statements by major witnesses are usually taken by officers at the heart of an inquiry and this can lead to unconscious slanting of the narrative content. In spite of the unquestioned desirability of preserving detachment an investigator may understandably form an impassioned view of the case not warranted by the actual evidence available. From this there may stem an emotion-led tendency to assume the existence of facts conforming with the preconceived belief. The assumption by an officer of the existence of facts not actually established by available evidence may lead to their inclusion in a statement in two possible ways, one by direct impact on the witness's spoken narrative, the other affecting the recording process. By the influence of suggestion an officer with a forceful and persuasive personality may impose on an uncertain witness a belief in the existence of a particular fact. As to distortion through the recording process, ambiguities may tend to be read in favour of a particular supposition (*i.e.* the suspected culprit's guilt) although, objectively considered, they could equally be read to the contrary. Again, averments which, on the face of it may seem perfectly clear in their meaning, may be misinterpreted in conformity with the suspect's supposed guilt. The attachment to a given belief may even cause what is said to be misheard. The consequence may be that statement-takers will unconsciously rewrite what was actually said in accordance with what they believe was implied.

In contrast with innocent misquotation, distortion or corruption of the witness's original account may be the result of deliberate manipulation. Thus the process of implanting in the witness's mind a belief in a particular fact may occur quite deliberately. In adopting the belief the witness then 'dictates' it back to the officer. Another approach is to misquote the witness in writing out the statement and then to procure a signature without giving the witness an adequate chance to inspect the record. (This could be achieved by a bogus 'reading' back of the statement.) Somewhat recklessly, it may be hoped that months later at trial, when the witness reads the statement before giving evidence, its content will be adopted uncritically on the basis of the assumption that if it was in the statement it must have been believed to be true, even though there is now no actual memory of the particular fact but only a wish on the part of the witness not to be obstructive or unhelpful, or not to be seen to be incompetent. Deliberate manipulation of witness or record may be motivated by zeal where the officer firmly believes a particular person to be guilty and perceives the existing evidence to be inadequate to guarantee a conviction.

This is an example of what has been called 'noble cause corruption.' But less 'nobly' the motivation of the police may reflect an anxiety to cover their backs against a legitimate complaint of unlawful arrest or some other illegality or impropriety. Either way, it is instructive to quote the account by Dr Roderick Munday of having

'... regularly heard stories to make the flesh creep concerning the way in which policemen have sometimes adjusted or attempted to adjust witnesses' versions of events-verging from an unsuccessful and puzzling attempt to get a member of the Bar to agree that his wife was with him in a boat on the Thames when he witnessed a rape on the towpath ("because it looks better sir") to a student who, to his evident distress, had been politely cajoled into giving descriptions of two men who mugged him by a bank cash machine which he did not recognise but which happened to fit those of two persons apprehended that same night by the constabulary.'

('The drafting smokescreen', *New Law Journal*, 30 May and 6 June 1997)

An important factor in rendering some witnesses vulnerable to deliberate manipulation is that involvement in a case frequently begins for an individual as a suspect. The transition to witness is often made in the belief that an escape from prosecution is being offered and that there is little choice but to co-operate. Acquiescence in these circumstances hardly conduces to willing testimony. On the other hand, the witness may be perfectly innocent and eager to help the police but suggestible, not very observant or possessed of only a mediocre memory. It is easy to see how in either sort of case people are open to manipulation by a zealous investigator or one anxious to avoid criticism for impropriety or incompetence. There will be an obvious and clearly justifiable interest for the defence in learning how the witness's statement was taken, under what blandishments, and exactly what was said. It sometimes turns out with a witness who started out being questioned as a suspect that no official record was evidently kept of the interview which led on to that person eventually signing a witness statement. Since it is inconceivable that such a statement will have been prompted without some amount of questioning, it follows that the officers who were secluded with the witness during that session wrongly failed to tape-record it. The breach can be used not only to attack the officer's credit on other aspects of police evidence in the case, eg, admissions attributed to a defendant, but there may be an argument for seeking exclusion of the witness's evidence from the outset on the basis that the foundation on which the witness gives evidence – the statement – was obtained through the commission of a breach of the rules.

This problem was one of the main reasons behind the widely reported acquittal of Paul Humphreys and others at Maidstone Crown Court in February 2000.

Many investigating officers will be unaware, or, at least, only dimly aware, of the possible effect of unconscious influences emanating from a statement-taker in distorting the content of a witness's statement. But few will fail to appreciate the implications where deliberate manipulation is suspected. Hence officers are invariably concerned to cultivate the impression that witness statements are the product of dictation to an indifferent amanuensis. Thus, they will usually concede that there was some generalised initial discussion on the broad outline of the subject-matter and will sometimes admit the occasional interjection intended to keep the witness within the bounds of relevance, or a neutral question designed to elicit details of a description, for example. But the suggestion of any greater involvement in controlling the content of the statement will always be vehemently denied.

The result, then, of these inherent defects in the recording process may be a document which substantially, if not fundamentally, diverges from what the witness stated or intended to state. On rare occasions distortion of what the witness actually said may lead to the conviction of the innocent. But awful as it is to contemplate the prospect of wrongful convictions, however remote, the lack of an unchallengeable record of interviews in which witnesses give their statements to the police poses the courts with what in practice amounts to a much more serious problem. For it is *frequently* a direct cause of the *acquittal of the guilty*. We need to see how this happens in practice. Because the content of statements is controlled by what investigators, who record them, choose to include, attempts to use a statement to test consistency often degenerates into a farce, with unresolved conflicts over just exactly what it was that the witness did say to the police. Of course, discrepancies may be genuine ones, truly showing up the witness as unreliable or even dishonest. But defending barristers have long perfected the art of exploiting inadequacies in the system of taking down statements in order to cast 'blame' on a witness for ostensible inconsistencies which may be no more than the spurious product of inherent failings in the traditional recording process. When a witness answering the prosecuting barrister's questions departs in some significant respect from an earlier statement to the police, the defending barrister in cross-examination will embark on a series of standardised entrapping questions designed to seal up escape routes. Questions tend to proceed along the following lines. Before making the statement did the witness read the

printed declaration at the top of the first page indicating the importance of telling the truth? Did the witness appreciate the importance of honesty, care and accuracy? Was everything of importance included? At the conclusion of making the statement did the witness read it through before signing it or was it read back by the officer? Was the witness shown the statement before coming into court? Was it read through carefully? Did it revive memory of the facts as clearly as when the statement was made? Has the evidence in the witness box corresponded exactly with the contents of the statement?

These preliminary, ensnaring, questions are designed to prevent attempts to evade the embarrassment of apparent self-contradiction by, for example, blaming the lapse of time since the events occurred. Finally the trap is sprung and the witness is confronted with the inconsistency, omission, addition, elaboration, or embellishment, as the case may be. The result is often an excruciating attempt to claim either that the officer put down something that was not said or otherwise left out something that was. If called to resolve the conflict the attesting officer will be torn between selling the witness short or admitting to inattention or error. Since such officers will usually be moved to protect their own *amour propre* witnesses may well end up being made to look unreliable or dishonest – not the officer whose mode of interviewing and transcription may have been seriously at fault. At the very least the conflict will remain unresolved and the doubt will often be applied in favour of the undeserving accused. Using these expurgated or inaccurate versions of what the witness actually told the police in private in order to pick holes in their evidence in court hardly conduces to getting at the truth.

The obvious and simple answer is tape-recording. Better still, if statements were video-recorded it is possible to envisage a time in the future when the video tape might be played in court as the original narrative of the witness recorded at a time when the memory was fresh. Arguably, this would be the best evidence, much better indeed, than the painful and laboured process of trying to recall details from many months earlier. It is axiomatic in our courts that evidence is not a memory test and the witness whose video-taped narrative was played to the jury would still be liable to be cross-examined.