

*Non-verbal Witnesses in the Adversarial  
Process  
Communication, Voice and Agency*

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# Outline

- Who are non-verbal witnesses?
- What are the challenges they face?
- The right to participation
- Communication, Voice and Agency
- Facilitating Agency
- Forms of AAC (Augmentative & Alternative Communication)
- Challenges ahead

# Who are non-verbal victims (or witnesses)?

A **verbal witness** is one who can draw extensively upon the resources of a language to make fluent and original meaning by independently combining words of their choice to make meaning. This is not necessarily achieved orally (e.g. a fluent user of British Sign Language, a fully literate user of communication technology such as Professor Stephen Hawking).

A **non-verbal witness** is one who does not have enough command of any language (oral spoken, signed or technology-mediated) to fluently deliver verbal evidence and would require significant communication support (e.g. provision of limited selection of symbols to indicate meaning, support of communication partner).

# What are the challenges they face?

- Higher levels of vulnerability; higher rates of both criminalisation and victimisation
- Orality and the Adversarial Criminal Process:
  - ‘those who might be presumed to be key players – the witnesses, victims and defendants – are in fact side-lined and tend to play only minor roles’ (Jacobsen et al, 2015).
- Specific difficulties relating to memory recall, communication, and response to perceived aggression (Edwards et al, 2012; Home Office, 1996)
- Consequences:
  - Panic, fear, distress and disempowerment
  - Confusion and disorientation
  - Risks of compliance or acquiescence before authority figures

# The right to participation: an emergent international norm

- For victims generally: eg UN Victims' Declaration, Prin 6(b); Rome Statute of the ICC, Art 68; EU Victims' Directive, Art 3, 10-17.
- *T and V v United Kingdom* (1999); *Edwards v UK* (1999): victims must be 'involved in the procedure to the extent necessary to safeguard their interests'.
- For disabled persons: UNCRPD, Arts 3, 9 and 13;
- For children: UNCRC, Art 12; *Pupino* (ECJ), 16 June 2005, Case C-105/0.

# Communication, Voice and Agency

Agency:  
Having the possibility of acting in  
a way that shapes events,  
relationships and one's world.

Voice:  
Having one's communication attended to  
and taken seriously

Communication:  
Having the possibility of conveying one's intended  
meaning (enabled with appropriate supports).

# Facilitating Agency in E&W

'... to make sure that the victim's voice is heard at the centre of government and throughout the criminal justice system.'  
(Home Office, 2005: 8)

- Victims' Code of Practice (2006)
- Equality Act 2010, s20
- Special Measures (esp. ss 29-30)
- Advocates' Gateway / Ground Rules Hearings (see *Lubemba* [2014] EWCA Crim 2064)
- Criminal Practice Direction (2013) 3E; Crim PR 2015.
- Case Law: *Re C (A Child)* [2014] EWCA (Civ) 128; *Barker* (2014) EWCA Crim 2064

# The Competency Test

- Presumption of competence – s54(2) YJCEA 1999
- ‘understand questions put to him... and give answers to them which can be understood’ – s53(3) YJCEA 1999
- See *R v F* [2013] EWCA Crim 424:
  - “the trial process must cater for the needs of witnesses... The competency test is not failed because the forensic techniques of the advocate or the processes of the court have to be adapted to enable the witness to give the best evidence of which he or she is capable. It is our clear conclusion that the hearing did not effectively explore H’s ability to communicate’



# Enabling Communication using Augmentative & Alternative Communication (AAC)

## What is AAC?

'An area of educational and clinical practice that aims to supplement or replace an individual's natural speech and/or handwriting through unaided approaches such as manual signing and gestures, as well as aided approaches such as graphic symbols, communication boards, and speech-generating devices' (Schlosser, 2009)

# Enabling Communication using Augmentative & Alternative Communication (AAC)

## Forms of AAC ...

2. Speech-generating devices allowing selection of symbols, producing speech output when pressed



AAC-specific devices



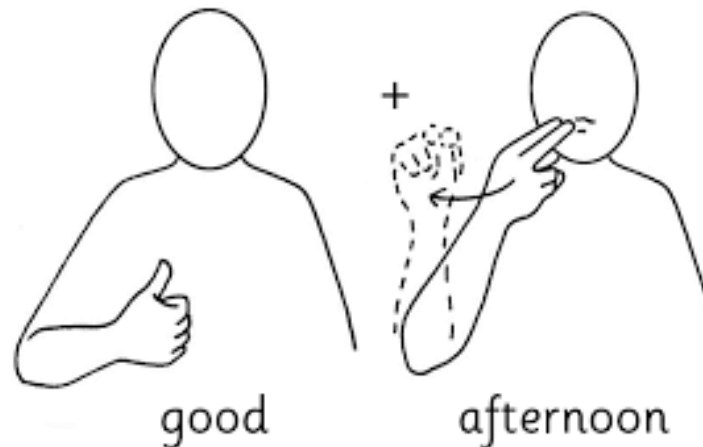
AAC apps for iPad



# Enabling Communication using Augmentative & Alternative Communication (AAC)

## Forms of AAC ...

3. Simplified manual signing systems for people with learning disabilities such as Makaton



# Enabling Communication using Augmentative & Alternative Communication (AAC)

## Forms of AAC ...

4. Eye gaze AAC (low-tech or high-tech, for highly literate users or users with basic symbol sets)



E-tran board



Hi-tech eye gaze

# Enabling Communication using Augmentative & Alternative Communication (AAC)

## Forms of AAC ...

5. Facilitated Communication (FC). Assistant uses hold/touch of AAC user's arm/hand, verbal prompts, moral support.

Very controversial: FC has produced many apparent allegations of sexual abuse but authorship contested in courts.



# Enabling Communication using Augmentative & Alternative Communication (AAC)

One issue with AAC in the courtroom is locating authorship in light of:

- The degree of physical support
- The degree of verbal support
- The degree of moral support
- The degree of interpretation required
- The extent to which user has selected own vocabulary range
- Idiosyncratic meanings

# Enabling Communication using Augmentative & Alternative Communication (AAC)

And yet ....

- People with learning disabilities known to be statistically more at risk of sexual and other abuse than non-disabled peers - so AAC could be powerful mechanism for enabling reporting / testifying.
- Increased recognition of the need to teach AAC vocabularies around safeguarding and abuse.





# Alternatives forms of voice: challenges ahead

- The quest for conceptual clarity: What is 'voice' and how do we facilitate it?
- Questions of authorship: 'who's really speaking?'. Admissibility issues: expert evidence often required / may be contested.
- Further evidential arise issues re. fair trial rights and the competency test?
- Shifting procedural paradigms: the challenges of the 'accommodation' approach (Ellison, 2001); moves towards a more inquisitorial / participatory / managerial paradigm (Jackson, 2005; McEwan, 2011)?

Thank you

Any questions?