

**This article is one of three articles that form part of NICCY's 'December 2014 Legal Ezine' (electronic newsletter). You can view the other articles on the NICCY web site [www.niccy.org](http://www.niccy.org)**

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Conor was called to the bar of Northern Ireland in 1994. His practice has mainly been as a prosecution and defence criminal trial advocate and he has completed the Registered Intermediary Training course with the PPS. Conor has gained extensive experience in public inquiry law in Northern Ireland having appeared in the Robert Hamill Inquiry.

Throughout his career Conor has tutored at the institute of Professional Legal Studies, Queen's University Belfast. He has presented courses on all aspects of criminal trials to include pre-trial applications and the technique of advocacy.

Resulting from his Criminal Law experience, Conor has developed an interest in victims and witnesses law, particularly the technique of advocacy of cross examination.

Conor has further developed this area of specialism having been part of the Department of Justice team that delivered training of the last cohort of Registered Intermediaries in October 2014, along with the joint authors and founders of The Advocates Gateway and Witness Intermediary Scheme (England) Professor Penny Cooper and David Wurtzel.

Conor is currently chairing the working group within Northern Ireland to develop and establish toolkits and ground rules hearings for vulnerable witnesses and Registered Intermediaries to sit alongside The Advocates Gateway with the aim to develop a Northern Ireland Version of The Advocates Gateway.

At present Conor is further developing research with Queens University Belfast in relation to an evaluation of the benefits of the adversarial system dealing with victims of sex crimes.

## Vulnerable Witnesses in the Adversarial Court System

Does the adversarial system work for children as vulnerable witnesses in accordance with Article 3 of United Nations Convention on the Rights of Children?

### Introduction

When dealing with children the adversarial system must have the child's best interests as its motivation. [1] The difficulty with this is that the child is thrust into a world with rules designed to resolve conflict played out by adult lawyers which can create a significant power differential between the child and adults.

This article examines how the adversarial system needs to;

1. Change to fully incorporate the best interests of the child.
2. Identify the challenges that are to be faced in implementing change and in hearing their voice.
3. Embrace new methods to improve this,

so that the child's best interests are at the centre of the legal conflict they find themselves involved in.

### Recognition of need to have safeguards for vulnerable witnesses

As recently as 1990 the Criminal Court of Appeal confirmed that 'the jury could not attach any value to the evidence of a child of five; it is ridiculous to suppose they could'. [2] Criminal lawyers used many different tactics to show that young and vulnerable witnesses shouldn't be believed. When questioning a witness, they maligned the complainant's behaviour, attempting to discredit and even harass the witness in an overbearing manner. [3] It is no controversy therefore those criminal trials frequently led to psychological stress among children and vulnerable witnesses as crime victims. [4]

However, the protection for the witness from psychological harm has found voice with The International Criminal Court by virtue of The Rome Statute 1998 Article 68; 'the Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.' [5]

For criminal trials the European Directive 2012/29 set 'Minimum Standards or rights, support and protection of victims of Crime' thus adding to the already established human rights enshrined with the United Nations Convention of Human Rights 1989.

Lawyers do recognise that it's not always about winning a case and have acknowledged the harm the adversarial system may cause. [6] Baroness Hale in *Re W (children)* [2010] – UKSC 12, succinctly expressed this sentiment when she stated:

*“When the court is considering whether a particular child should be called as a witness, the court will have to weigh two considerations; the advantages that that will bring to the determination of the truth and the damage it may do to the welfare of this or any other child”.*

However despite these sentiments a joint study between Queens University Belfast and NSPCC in 2011 found that 51.4 % of young witnesses found there was **NOTHING** positive about the experience of being a witness. There was recognition of the need to improve the system and evidence highlighted exactly how and where the system was failing these witnesses. [7]

The sentiments of these young witnesses is also being backed up by an emerging view that traditional methods of questioning may not be the most effective method as a truth-discovering device, especially for children, other vulnerable witnesses and individuals with for example, Intellectual Disability, [8] who are significantly over represented at all levels of the criminal justice system.

The courts have begun to recognise these issues. They have begun to set down guidance, for example, with a series of restrictions on questioning methods traditionally employed by the Bar and changed their attitudes towards the veracity of the evidence of young children; The Lord Chief Justice in the English Court of Appeal in *R v Barker* [2010] EWCA Crim 4 [9] emphatically stated that children are as believable as adults. The Appeal court has recently again reaffirmed this position in *R v Lubemba* [2014] EWCA 2064 and the legal systems attitude to and practice of working with vulnerable witnesses, particularly through cross examination. The current position has been eruditely presented by Dr Emily Henderson [2014] *Criminal Law Review* in an article titled 'All the Proper Protections-The Court of Appeal Rewrites the Rules for the Cross-Examination of Vulnerable Witnesses.

This attempt to shift practitioners perceptions to what is acceptable advocacy comes some time after the inception of an advisory group to consider the use of video recordings as a means of taking evidence of children and vulnerable witnesses at criminal trials. Their recommendations, which followed a comprehensive examination of the criminal justice system, were delivered within the Pigott Report 1989. [10]

These recommendations resulted in the implementation of special measures legislation aimed at protecting the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. The aim is to achieve best evidence, improving its quality in terms of completeness, coherence, accuracy and allow examination of the witness through an intermediary. Whilst pre-recorded cross examination is being piloted in England and Wales in three Crown Court locations, S.28 of the legislation has not been fully enacted. In Northern Ireland the comparative legislation exists under article 16 though it also has not been enacted. [11]

## How are the courts measuring up?

### Criminal

#### England:

In 1999 the English Bar recognised the need for training of its members on matters such as tone, manner and demeanour of cross examination. [12]

In 2011 The Advocacy Training Council (ATC; England) in a report cited the urgent need to address significant problems associated with vulnerable witnesses, accepting that such advocacy was a specialist skill. The advocacy required needs to be recognised by the whole profession as such, [13] being based upon specialist expert training which should lead to those advocates being certified or 'ticketed' to conduct trials involving vulnerable witnesses.

Whilst the English Bar has not set forth any regulatory requirements the Government has pledged to introduce such a requirement by March 2015 for those advocates who wish to receive public funds to conduct such cases. [14] Whereas the Crown Prosecution Service (CPS) have already established an advocates rape and serious sexual offences panel for such cases with mandatory training for those wanting to join the approved list. This initiative is fully supported by the Bar.

In 2012 The English Judicial College issued the Judicial College Bench Checklist; Young Witness Cases, [15] providing guidelines in relation to the early identification of vulnerabilities and thereafter the methods used to ensure that the trial process did not cause any further psychological harm either by the questioning methods or procedural rules of the trial. These should be discussed with all parties in a ground rules hearing prior to the case which all parties would agree to adopt for the course of the trial.

Perhaps one of the most important initiatives in England is the Witness Intermediary Scheme and The Advocates Gateway (TAG; England). In 2012 The ATC (E) launched a free website providing training resources and toolkits to help advocates identify vulnerable witnesses and defendants and to plan how to adjust their questioning. The Advocates Gateway (TAG; E) also identifies those ground rules that should be adopted for questioning within a trial relating to the particular vulnerabilities identified. These ground rules were based upon a written report on the witnesses communication difficulties derived from an assessment by a communication specialist, the Registered Intermediary (R.I.).

The Witness Intermediary Scheme (W.I.S) came into effect with the first training in England in 2003 and helped witnesses early in 2004. The R.I. became a facilitator, transparently advising the police and courts on the witnesses communication difficulties, whilst intervening in the event of miscommunication usually to advise the questioner how better to communicate with the witness. Those R.I.'s trained were already communication specialists within their own profession e.g. speech and language therapists, who then underwent a masters equivalent training course in the law, practice and procedure thus assisting in the administration of justice.

### **Northern Ireland:**

The Lord Chief Justice in Northern Ireland set down practice directions on 12<sup>th</sup> May 2009 for the treatment of young and vulnerable victims and witnesses, he has also expressed strong support for the R.I. Scheme pilot[16]and the necessity of implementing appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.' The Northern Ireland Bar, Judiciary, Public Prosecution Service (PPS) and Police further utilise the established resources from TAG (E).

There have also been a number of training initiatives designed to raise awareness and shift practitioners' perceptions to what is acceptable advocacy with children and vulnerable

witnesses. [17] However, there have been no moves as yet by either the PPS or the Bar to introduce rape and serious sexual offences panels or ticketing as in England.

The Registered Intermediary scheme pilot (N.I.) was launched in May 2013 for indictable offences in Belfast Crown Court, with 12 requests being made after 3 months. In November 2013 it was extended to all Crown Courts province wide and as of March 2014 there had been 106 requests for assistance with only 4 having been deemed as not eligible under the qualifying criteria (figures supplied by Department Of Justice). This pilot scheme is due to end in March 2015. What is unique about the Northern Ireland scheme is that vulnerable defendants when giving evidence will be able to take advantage of the scheme; whilst the legislation for defendants in England exists it has not yet been brought into force [18]. Further development and initiatives are underway to develop Northern Ireland toolkits and ground rules to sit within TAG (E) for the use of R.I.'s in Crown Court trials.

The Northern Ireland Court of Appeal has also addressed a number of issues relevant to vulnerable witnesses in sex crime cases, though not specifically upon issues directly relating to ground rules, toolkits or R.I.'s, for example on issues of delay, good & bad character directions. To date there have been no cases giving guidance on R.I.'s, vulnerability, the advocates role and protection from psychological harm.

Within many jurisdictions there is emerging recognition that it is common for individual's communication skills to be overestimated [19]. Traditional cross examination tactics of trying to weaken, discredit, harass and cast doubt upon the accuracy of the evidence impeaching a witness's credibility by seeking to attach great weight and significance to the demeanour of the witness as a reliable gauge of honesty during will have to change. Questions will need to be non leading in manner, using open or free recall questions so that people with mental health issues, children and vulnerable witnesses can make reliable witnesses and have their voices heard. Questions should also be short and succinct, in plain everyday language without double negatives or delivered in an overbearing demeanour [20].

In R v B [2010] EWCA Crim 4 the English Court of Appeal stated that the trial process must cater or the needs of child witnesses whose evidence in former years would not have been heard. The Lord Chief Justice stated '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, and fully ventilate before the jury the areas of evidence which bear on the child's credibility'.

The Lord Chief Justice (England) firmly placed the onus on the bar to raise its standards and to properly adhere to the codes concerning cross-examination in his last judgement in R v Farooqi & others [2013] EWCA, giving significant guidance to the bar on how to conduct a criminal trial. [21]

It would seem that if the Bar cannot change its traditional tactics of cross examination the Court of Appeal in England have signalled to judges the need to manage how cross examinations shall be conducted in accordance with guidance from TAG and associated toolkits. In R v E [2011] EWCA Crim 3028 the judge imposed his own rules on the manner of cross-examination of a young child and R v Wills [2011] EWCA Crim 1938 the judge placed limitations upon the cross-examination, both rulings were endorsed by the Appellate Court.

There is a clear impetus now to avoid the worst tactics of cross examination experienced by young victims. The Operation Chalice Stafford Crown Case 20011 (as reported in Counsel Magazine January 2014 by Debi Gould, Principal Crown Advocate) involved the sexual exploitation of young girls, allowed the following cross examination for example 'looking back are you proud of the bad things you have done in your life' or another having to read out aloud every detail of the allegation of sexual abuse made against her stepfather she later retracted, with her anguish being plain for all to see.

## **Family**

In England the presumption against children giving evidence in care proceedings can be traced back to R v B County Council, Ex P [1991]1 FLR 470 when the court refused to order a 17 year old to give evidence about sexual abuse.

However, the decision in Re W [2010] UKSC 12 has now stated that this presumption against the child giving evidence is not the starting point and the court will have to weigh two considerations on the child giving evidence: the advantages that will bring to the determination of the truth and the damage it may do to the welfare of this or any other child.

The Northern Ireland experience to date is that the family law system has not implemented any statutory special measures scheme nor not utilised the newly developing special measures initiatives encompassed within the Department of Justice Registered Intermediary scheme.

A similar position exists in England particularly with absence of a statutory scheme for family law cases and the non use of intermediaries has led one court to state ‘that this has caused real obstacles’ *Re X (a child)* [2011] EWHC 3401 (FAM).

This is despite *Baroness Hale Re W* [2010] at [28] signalling the pathway to their use by reference to *The Youth Justice and Criminal Evidence Order 1999* providing one suggestion ‘examining the witness through an approved intermediary,’ as one of a number special measures. Two recent cases have shown that she is being listened to with use of the registered intermediary scheme in *Re M (oral evidence; vulnerable witness)* [2012] EWCA 1905 & *Re A (a child) (Vulnerable witness fact finding)* [2013] EWHC 2124 (FAM) .

However, a chasm still exists between the criminal and family courts approaches. In *Re M (a child)* [2010] EWCA CIV 1043, the appeal was on the basis that the key evidence was hearsay. *Hughes LJ* stated ‘ I have no doubt at all that there would never have been and should not even now any question of any of these children being expected to give oral evidence, at least in a family court’.

The family law courts have operated a presumption against the child giving evidence and thus relied upon the inherent jurisdiction to implement a number of special measures to the child’s voice being heard ensuring that the best interests of the child is at its heart. These include the *Guardian ad Litem* for specified proceedings, social worker, court welfare officer who all play an active role in representing the best interest of the child and present them to the court. In non court forums the *VOYPIC*, for looked after children acts in this role. Further to this the Family courts allow hearsay evidence to be presented by these representatives on behalf of the child and the court determines the issues by hearing submissions on that hearsay evidence by each sides lawyers.

The *Advocacy Training Board Family (Northern Ireland)* has specialised training for dealing with vulnerable witnesses to achieve best practice in the best interests of the child. While the starting point is no longer a presumption that the child does not give evidence, the lack of a statutory scheme of special measure surely works against the Judge determining that the child should be called.

It also works against the best interests of the child in not allowing the child's voice to be heard as in *Re W* [2010] the child expressed a wish to give evidence.

Notwithstanding, there are Family Justice Council Guidelines in Relation to Children Giving Evidence in Family Proceedings encouraging practitioners to consider the use of intermediaries at the earliest opportunity [ Family Justice Council 2011].

### **Civil**

In 2011 Northern Ireland Law Commission Report [ NILC 10] Vulnerable Witnesses in Civil Proceedings recommended the use of special measures for children , people living with mental illness, learning disability, personality disorder or disability and for witnesses who suffer fear and distress in connection with giving evidence. They also recommended the use of intermediaries subject to their successful implementation in criminal proceedings [pg62, para3.52].

### **Challenges to fully implementing Article 3 of the United Nations Convention on the Rights of Children.**

The difference within the courts appears to be accommodation approaches. The time has come for a joined up and flexible approach of each system.

The different approaches are perplexing given that the very same circumstances which give rise to care proceedings (removal of a child from parental care) may also demand prosecution of the perpetrator of abuse in criminal courts. The child being subject to physical abuse being prima facie evidence of significant harm under article 50 of the Children (NI) Order 1995 and also s.47 OAPA 1861 when the child would be required to give evidence within the criminal system but may not be in the family system.

A further perplexing dilemma is that in the criminal system culpability begins at 10 whereas in the civil system responsibility begins at 16.

There must be a holistic approach to the best interests of the child balancing the competing interests of the child with those of society, the family and children as a constituency. [22] The voice of the child will only be heard through conversation, hearing the child's needs and wishes about proceedings or particular special measures that may ultimately cause the re-triggering of stress, PTSD or psychological trauma.

A further challenge is a shortage of funding for registered intermediaries to be involved in all cases with young witnesses as highlighted by NSPCC's Order in Court Campaign. It would also seem the emergence of self litigants in the family legal system is another major challenge who 'without the benefit of having any advice whatsoever don't understand the process or what the effective issues are. This puts the judge in the position of being an adviser which is not the essence of the adversarial system and again creates a significant power differential within the process'. [23]

In Northern Ireland, whilst it is encouraging that the Department of Justice is committed to reducing psychological harm in trials, there needs to be clearer expressions of its existence and commitment to its reduction. The Victims Charter 2014 Consultation Document for N. Ireland at point 82 only once mentions the sentiments expressed within the Rome Statute art 68 'due to your vulnerability to secondary and repeat victimisation, intimidation or retaliation'.

More importantly there needs to be adequate funding for the implementation of such measures. Both the Criminal Law and Family Law systems appear to be undergoing draconian budget cuts which would seem to negate the sentiments and commitment expressed by the Justice Minister at the IPLS vulnerable Witnesses Conference November 2014 to implement the European Directive 2012/29, to establish special measures as minimum standards for vulnerable witnesses in the Courts in Northern Ireland.

Just as the government are seeking the bar to re-professionalise and learn new skills there needs to be the same commitment on behalf of the Government or those in opposition to learn from other jurisdictions and legal systems. There is cogent evidence of the benefits of Inquisitorial legal Systems accomplishing what Article 68 Rome Statute and ECD 29/2012 seeks to accomplish. [24]

## Conclusions

Practitioners will need to re-professionalise in order to fulfil the objectives of European Directives designed to protect those who are vulnerable whom they seek to challenge the veracity of their allegations which have undoubtedly already caused psychological harm and trauma.

The Bar must see this as an opportunity to demonstrate they have the requisite skills and thus the competitive edge to define their own quality mark for these specialist skills.

The government must commit sufficient funding and encourage the Bar to develop this specialism otherwise these initiatives will flounder and ‘the ground rules will become perfunctory and box ticking exercises with the loser being the vulnerable person’. [25]

The adversarial system must adapt and become flexible as Lord Judge in his Bar Council Annual Law Lecture on 21 November 2013 stated, ‘The evidence of children, and the next stage’ “the objective of the criminal trial is that justice should be done...it depends upon the proposition that the adversarial system will produce justice. But we have to face the reality that if the adversarial system does not produce justice, justice is to everyone involved in the process, it will have to be examined and it should be re-examined. If it fails to do so the system requires to be changed”

Those organisations and practitioners that have flouted the rules, instructed or accepted instructions when inexperienced without the requisite training or certification may well find the civil justice system turning to them seeking compensation from vulnerable witnesses whose best interests were not seen as paramount in the proceedings and who have suffered further psychological trauma, thus being denied justice.

**Conor Gillespie BL**

## References

1. Article 3 UNCRC stipulates that ‘ In All actions concerning children, whether undertaken by public or private, social welfare institutions, courts of law, administrative authorities or legislative bodies the best interests of the child shall be a primary consideration’.
2. The English Court of Appeal in R v Wright & Ormerod [1990]90 CAR 9 cited as good authority the case of R v Wallwork [1958]42 CAR 153 which stated ‘the jury could not attach any value to the evidence of a child of five; it is ridiculous to suppose they could’.
3. Tempkin 2000;229-36, with one QC noting it is a very unfair contest as a complainant already unnerved by the courtroom were often no match for skilled and experienced counsel [Krahe and Tempkin – Sexual assault and the justice gap pg 129– The professionals role ].
4. As exemplified by Operation Chalice Stafford Crown Court Case 2011. Inappropriate questions were put to young witnesses ‘looking back are you proud of the bad things you have done in your life’ or another having to read out aloud every detail of the allegation of sexual abuse made against her stepfather she later retracted, with her anguish being plain for all to see.
5. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.
6. Lord Justice Hughes delivering the Hershman-Levy Memorial Lecture 2001 stated that ‘it behoved us to be astute not to risk adding more abuse to any there may already have been, by requiring detailed questioning in semi public’.
7. The Experiences of Young Witnesses in Criminal Proceedings in Northern Ireland . D.Hayes, L.Bunting, A.Lazenbatt, N.Carr, J.Duffy, QUB/NSPCC ;2011 .
8. Giving the Vulnerable a Voice for Individuals with Intellectual Disability. - Hepner. - wooward - stewart, 2014 psychiatry,psychology and law.

9. The complainant in this case was four years of age giving evidence of sexual abuse when less than three years of age when there was no intermediary or ground rules as to the nature and type of questions. On Appeal it was submitted that the defendants' counsels' attempt to question the witness were futile because of her age and that her account could not be properly challenged nor the defendant's case properly put to her. The Lord Chief Justice further emphatically stated that children are as believable as adults. 'none of the characteristics of childhood, and none of the special measures which apply to the evidence of children carry with them the implicit stigma that children should be deemed in advance to be somehow less reliable than adults'
10. Judge Thomas Pigott QC ' Report of the Advisory Group on Video Evidence Home Office ; making a number of recommendations, for example, the video recorded interviews for children under 14 years of age for violent crimes or 17 if a sexual crime and that a person who is likely to suffer an unusual and unreasonable degree of mental stress by giving evidence in open court should be treated as a vulnerable witness and for pre-recorded which has yet to come into force though there is a pilot scheme running in 3 English Crown Court locations, Liverpool. Leeds, Kingston Upon-Thames dated 13 June 2013.
11. Criminal Justice Act 1991 (England & Wales). Criminal Evidence (Northern Ireland) Order 1999, article 17 provides for 'the examination of a witness through an intermediary'. A child witness by virtue of their age, under 18 is now eligible as of right by Article 4 (1) C.E. (N.I.) O 1999.
12. Childline Conference - K.McEwan In Defence of Vulnerable Witnesses; Youth Justice and Criminal Evidence Act 1999(2000) 4 (1) International Journal of Evidence and Proof 1-30,20.
13. Raising the Bar Report -The Handling of Vulnerable Witnesses, Victims and Defendants In Court 2011.
14. Our Commitment to Victims' document 15th September 2014 Secretary of State for Justice.
15. [www.judiciary.gov.uk](http://www.judiciary.gov.uk)
16. IPLS, Institute of Professional Legal Studies , Queens University Belfast, Vulnerable Witnesses Conference November 2014.

17. Criminal Bar Association annual conference May 2012 Victims and Vulnerable Witnesses in the Criminal Process at Queens University Belfast ; Judges and Intermediaries Seminar December 2012 , Judicial Studies Board; Intermediary seminar for police and prosecutors April 2013 and June 2014. Institute of Professional Legal Studies November 2014 Vulnerable Witnesses Conference.
18. An erudite comparison of both schemes and the issues of vulnerability within the justice system have been recently addressed in the Northern Ireland Law Quarterly 65: 39-61 Cooper & Wurtzel.
19. Baldry et al 2011 NSW LRC 2012 quoted in Hepner. - wooward - stewart, [2014] psychiatry, psychology and law pg 3.
20. Kebbell, Hatton, Johnson & O'Kelly, 2001. 'People with learning disabilities as witnesses in court; what questions should lawyers ask? British Journal of Learning Disabilities , 29,1-5 as cited in Hepner et al pg 3 ibid.
21. Paras 111 to 115 ; reflecting also upon the duty of counsel within the trial process and that adherence to these principles is a requisite, rather than the kind of advocacy seen in this case, in order for independent minded advocates responsibly fulfilling complex professional obligations .This case demonstrates the antithesis of allowing a witnesses voice to be heard an being protected to safety, physical and psychological well-being, dignity and privacy of victims and witnesses as expressed in the Rome statute.
22. Gerison Lansdown Lecture NICCY conference November 20th Belfast.
23. The LASPO; Legal Aid Sentencing and Punishment of Offenders Act 2012; Justice Select Committees Report 2012 is any indicator of the plight of litigants in person in the family justice system. The form is almost 30 pages long to get legal aid in exceptional circumstances and has led the Family Law Bar Association Chair Susan Jacklin QC to remark that 'without the benefit of having any advice whatsoever... they don't understand the process or what the effective issues are'. This puts the judge in the position of being an adviser which is not the essence of the adversarial system and again creates an unfair power differential within the process.

24. Orth and Maercker. [do trials of perpetrators retraumatise crime victims  
journal of interpersonal violence vol 19 no 2 feb 2004 212-227 defined  
retraumatisation as 'a significant increase of ptsd to the original trauma, thus  
an exacerbation of ptsd' and examined a number of potential causes of  
retraumatisation by trials within the German Inquisitorial Legal System. Their  
empirical results found that trials of perpetrators do not cause  
retraumatisation among crime victims as defined as a significant increase in  
the frequency of pts reactions.
25. Highs and Lows : The 4th Intermediary Survey. Professor Penny Cooper.