



For better
mental health

Achieving justice for victims and witnesses with mental distress

A quick guide to firefighting on the day in court



About Mind

Mind has been speaking out for better mental health for over 60 years and is now the leading mental health charity in England and Wales. We work in partnership with around 200 local Mind associations to improve the lives of people with experience of mental distress.

Mind is an independent organisation supported by donations. We campaign to influence Government policy and legislation, work closely with the media and are the first source of unbiased, independent mental health information via our publications, website www.mind.org.uk and phone service MindinfoLine 0845 766 0163.

Introduction

Research by Mind in 2007 found that while people with experience of mental distress are disproportionately the victims of crime, they are also too often denied access to justice.¹ The High Court case known as *FB v DPP*² confirmed that one reason for this was insufficient understanding amongst prosecutors of how to handle cases involving victims or witnesses with mental distress appropriately. This has led to various barriers to justice such as:

- cases not being pursued because of misconceptions about how mental health impacts on credibility and reliability,
- insufficient support being put in place to help witnesses withstand trial and give their best evidence, and
- inappropriate or aggressive questioning by the defence going unchallenged by prosecution advocates.

Mind's mental health toolkit *Achieving justice for victims and witnesses with mental distress* acts as a complement to the CPS public policy statement *Supporting victims and witnesses with mental health issues*³ and associated relevant prosecution guidance.⁴ Alongside these legal documents, the toolkit offers thorough information and advice about mental distress and its implications, including practical tools to mitigate these and grant victims and witnesses equal access to justice.

However, since early preparation for a trial involving a witness with mental distress will not always be possible, this short guide to firefighting on the day in court aims to support

1. Mind (2007) *Another assault: Mind's campaign for equal access to justice for people with mental health problems*. http://www.mind.org.uk/campaigns_and_issues/report_and_resources/894_another_assault
2. R (on the application of B) v DPP (2009) EWHC
3. CPS (2009) *Supporting victims and witnesses with mental health*

prosecutors and advocates to deal with the cases that can not be predicted or planned for. It recaps the main points covered in the full version of the toolkit, which can be downloaded from www.mind.org.uk

Firefighting on the day in court

Early preparation for a trial involving a witness with mental distress will not always be possible and the prosecution may have been unable to explore thoroughly a witness's mental distress, their credibility and reliability, and any support needs before a trial begins. Advocates may meet witnesses for the first time at the door of the court, especially in magistrates' hearings, or mental distress may only come to light on the day of the trial (via information from the witness or their supporters, or indications of distress noted by advocates or other court staff). Mental health may also be raised as a factor for the first time by the defence, raising possible issues around inappropriate or aggressive cross-examination, irrelevant (and potentially unlawful) disclosure of sensitive confidential information, or unwarranted attacks on character where psychiatric evidence is used to discredit a witness.

In such circumstances, advocates must be armed to firefight on the day to protect the witness. With the duties in the CPS Core Quality Standards in mind, be alert, confident and robust in seeking last-minute reasonable adjustments or challenging inappropriate and discriminatory practice by the defence.

Core Quality Standards – relevance for mental distress

The Standards place duties on advocates to:

- treat witnesses and defendants in court respectfully and ask the court to intervene to stop inappropriate questioning of prosecution witnesses (6.4c)
- challenge any defence mitigation that is derogatory to a victim's character (9.5b)
- promote equality of access to justice (7.1)
- in very exceptional cases ask the court for permission to withhold the identity of a witness where this can be justified (7.7).

issues. http://www.cps.gov.uk/publications/docs/supporting_victims_and_witnesses_with_mental_health_issues.pdf
4. CPS (2010) *Victims and witnesses who have mental health issues and/or learning disabilities: Prosecution Guidance*

Key points

- Advocates play a key role in protecting the witness, ensuring that the trial process is fair and there is equal access to justice.
- Ultimately, this also helps to present the prosecution case in its best light, as witnesses will be able to give their best evidence.
- Always be robust in seeking the judge's or magistrate's intervention to:
 - permit further explanation or short breaks where the witness is distressed
 - discount irrelevant information
 - challenge aggressive or oppressive cross-examination
 - challenge unwarranted personal attacks on a witness's character or credibility
 - clear the courtroom where necessary.

Indicators of mental distress


- Does the witness appear distressed, disturbed or distracted?
 - Are they talking incoherently or laughing incongruously?
 - Do they appear to be having illogical thought processes?
 - Do they seem over-excited, euphoric, irritable or aggressive?
 - Do they appear dazed, withdrawn or shutdown?
 - Are they fidgety, restless or jumpy?
 - Do they keep repeating themselves or obsessing?
 - Do they appear to be taking information in?
 - Do they seem to be responding to experiences, sensations or people not observable by others?
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Trouble-shooting checklist

When meeting the witness...

- ✓ Are there any indicators of mental distress?
- ✓ Ask the witness (or if needed, their supporter) about any support needs.
- ✓ Ask the witness if they have reason to believe the defence may use their mental health condition as evidence in the trial.

During cross-examination...

- ✓ Observe and respond to any indicators of mental distress.

- ✓ Request intervention by the judge or magistrate in the interests of best evidence and proper treatment of a witness:
 - request a short adjournment
 - consider reasonable adjustments
 - ask for modification in defence style of questioning.
- ✓ Challenge immediately if mental health is brought up by the defence or other witnesses and seek intervention by the judge or magistrate.



Did you have prior knowledge of the witness's mental distress?

If no:

- request a break to speak to the witness
- ask the judge to clear the courtroom to determine admissibility and relevance in private.

If yes,

- challenge use of mental health information to discredit the witness
- use expert report as rebuttal evidence or call expert witness to prove reliability or credibility, where possible.

Communicating with the witness

Where rapid decision-making during the trial is necessary to minimise distress and achieve best evidence, communication, awareness and responsiveness are crucial.

To enable good communication with the witness and ensure you get the evidence the court needs to hear, the prosecution, defence and judiciary should adopt the following best practice:

- Establish and maintain eye contact in a natural way (bearing in mind cultural differences where necessary).
- Allow plenty of time for response, repeat questions if necessary, and explain further if the witness is confused or distressed.
- Use plain language and avoid jargons and legal terminology.
- Ask straightforward questions in a logical time sequence such as “what happened first?”, “what did you do next?”, “what was the last thing you remember?” rather than compound questions like “before the man ran away, did you notice anything?”.
- Make no assumptions that because someone needs a support worker with them, they are unable to comprehend questions or participate in discussions.
- Where a witness is accompanied by a carer, mental health advocate or intermediary, address remarks to the witness rather than to the person accompanying them.

Mental health – experiences and implications

Key points

- Everyone is different – avoid assumptions and always ask the victim or witness first about their own experiences
- Avoid thinking in terms of diagnoses – people may have one or more of a range of experiences and symptoms, whether or not they have a diagnosed condition
- Remember mental distress is fluctuating – people may have periods where they experience no symptoms at all and the difficult days or times of day can be avoided
- Never generalise about the impact of mental distress – for each case consider when these experiences are present; any aggravating or alleviating factors; the specific impact on thought, concentration, recall, expression and interaction at given times.

- Always bear in mind potential triggers – be honest, open and sensitive in asking questions about what might help reduce distress

Asking about mental distress

- “You appear to be experiencing some discomfort, is anything in particular causing you to feel like this?”
- “You appear to be distressed by this situation, is there anything that might help reduce your anxiety?”
- “You seem to be behaving a little oddly, is anything troubling you at the moment? Is there any way I can help?”
- “Do you have anything you would like to tell us about how you are feeling at the moment?”
- “I need to ask if you are experiencing any kind of mental distress or have a mental health condition. If you want to tell me, say yes. If you either haven’t or you don’t want me to know, say no comment.”

Making decisions about credibility and reliability

Key points

- Make no assumptions that mental distress will undermine credibility and reliability.
- Follow existing legal models and adopt a case by case and functional approach – reassessing credibility and reliability at all material times where necessary.
- Take care not to conflate credibility, reliability, competence and capacity – all have different implications on ability to give evidence.
- Consult the witness – people are often experts in their own strengths, support needs, when they may appear to lack credibility or reliability and how to work around this.
- Pursue a merits-based approach to the evidential test – assess if the evidence is sufficient to merit a conviction, rather than the likelihood of conviction by the jury.

Credibility and reliability – first principles

- A witness must be assumed to be credible and reliable unless it is established that they are not.
 - A witness is not to be treated as unable to give credible or reliable evidence unless all practicable steps to help them to do so have been taken without success.
 - A witness is not to be treated as unable to give credible or reliable evidence merely because they have difficulty giving evidence.
 - A witness is not to be treated as unable to give credible or reliable evidence merely because they act in a way you feel is unwise.
 - A witness should not be treated as never able to give credible or reliable evidence merely because at one time they have been unable to.
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Relevance and duty of disclosure

Key points

Aim for a commonsense, sensitive approach, within the disclosure regime framework:

- Do not make assumptions about the relevance of mental health to the case and the need to seek medical evidence.
 - Seek informed consent at all times and explain the implications to the witness of medical evidence used by either prosecution or defence.
 - Resist disclosure unless strictly necessary under CPIA rules, particularly where evidence is neutral and there is no duty to disclose to the defence.
 - Avoid a risk-averse approach – do not disclose information automatically to err on the side of caution, in the anticipation of a possible appeal on grounds of non-disclosure.
 - Make early decisions about admissibility, where possible before the trial or in a closed session.
 - Always challenge disclosure of psychiatric evidence by the defence during the trial, where it is irrelevant, sensitive and/or used inappropriately to discredit the witness.
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Using expert evidence and medical records

Key points

- Gathering expert evidence can be intrusive – do not assume it is always necessary where a witness has mental distress.
 - Consult the witness – about who the expert should be and the implications of any evidence provided, as appropriate.
 - Avoid generalisations – ask specific questions of experts and analyse medical records robustly in relation to the context of the case.
 - Be aware of limitations – medical records can be disputed: one expert's opinion is not definitive; stigma or difficult relationships can cloud professional judgement.
 - Use expert evidence in various ways – to satisfy concerns about credibility and reliability, as rebuttal evidence, or to bolster applications for support or adjustments.
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Supporting people to give their best evidence

Key points

- Avoid assumptions – just as mental distress may fluctuate, so too will any support needs so make assessments on a case by case basis.
 - Identify any potential needs early and always explore them with the witness – take care not to force unwanted support on people.
 - Think beyond special measures – always consider them but also bear in mind reasonable adjustments and informal support measures.
 - Finding the right support is key to ensuring best evidence – in relation to the witness's credibility or reliability and their ability to withstand trial.
 - The four key aims of support are: achieving best evidence; preparation and reassurance; managing expectations; minimising further distress.
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Asking the witness – key principles

- Just as people’s experiences of mental distress vary and fluctuate, so too will any associated support needs
- People are often experts in their own strengths and when, if ever, they may require additional support to give their best evidence
- Take care not to pressurise witnesses with mental distress into accepting special measures or reasonable adjustments they feel are unnecessary or inappropriate
- Some people with mental distress may be very robust some or all of the time and may not wish to be afforded special treatment and therefore labelled as ‘vulnerable’ or ‘different’

Special measures to minimise mental distress

Formal special measures are available for witnesses who have a mental disorder as defined under the Mental Health Act 1983 – “any disorder or disability of the mind”.

- Video-recorded evidence
- Evidence via live link
- Screens
- Giving evidence in private
- Removal of wigs and gowns
- Use of intermediaries
- Aids to communication

Reasonable adjustments to minimise mental distress

- Interviews and hearings taking place in rooms with natural light
- Shorter sittings and/or the opportunity to take regular comfort breaks
- Staying seated while giving evidence and during cross-examination
- Permission to get up and walk around if this reduces discomfort, as some medication can cause restlessness
- Allowing a supporter or carer to accompany the person at all times – including to stand alongside the witness box, where possible
- Ensuring witnesses are comfortable with court procedures and environment, such as explaining why there are CCTV cameras present or switching them off
- Asking police officers to remove hats and helmets to reduce distress caused by unfamiliarity or authority figures (as with wigs and gowns)
- Requesting the judiciary, clerks and defence address the witness directly and display patience and sensitivity where explanation is necessary or distress becomes acute
- Requests to clear the courtroom where sensitive medical information is raised for the first time and relevance needs to be determined

For more information please see the full version of Mind’s toolkit for prosecutors and advocates: *Achieving justice for victims and witnesses with mental distress*, which is available online at www.mind.org.uk

For details of your nearest local Mind association and of local services, contact Mind’s helpline, *MindinfoLine* on 0845 7660 163, Monday to Friday 9.00am to 5.00pm. Speech impaired or deaf enquirers can contact us on the same number (if you are using BT Text direct, add the prefix 18001). For interpretation, *MindinfoLine* has access to 100 languages via Language Line.

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