

CHAPTER 4: The course of the trial

1. *What is the difference between a ‘hostile witness’ and an ‘unfavourable witness’? What steps may counsel take if his or her witness is declared hostile?*

This distinction is explained at para. 4.10. As much as anything, it rests upon the attitude, even the demeanour, of the witness. As Hallett LJ VP recently observed, “The issue of whether a witness is hostile does not depend solely on whether the witness has given a previous inconsistent written witness statement or evidence on oath”: *Hengari-Ajufo and Antuguya* [2016] EWCA Crim 1913, [59].

The steps counsel may take if s/he considers that his/her witness is turning out hostile are outlined in paras. 4.11-4.18. Although counsel may be allowed to put leading questions to the witness and, most importantly, confront the witness with his/her previous inconsistent statement(s) (provided that the procedure laid down in the Criminal Procedure Act 1865 has been complied with), it is not permissible to ‘cross-examine’ your own witness on bad character in order to undermine credit.

2. *Although the point was not decided by the Court of Appeal in R v. Llewellyn and Gray [2001] EWCA Crim 1555 (not discussed in this book), the judge in this trial, which involved the supply of Class A drugs, ruled that the defence could ask a police officer, who testified for the Crown, whether at the time of the trial he himself was being investigated for having allegedly supplied drugs to an undercover reporter from the News of the World. The judge also ruled, however, that the defence could not call evidence in rebuttal to contradict any answers that the officer might give. Would the trial judge’s rulings be correct today, taking into account the provisions of the Criminal Justice Act 2003?*

This question requires you to consider the provisions of the Criminal Justice Act 2003, s. 100 restricting the cross-examination of non-defendants on their bad character, as defined in ss. 98 and 112 of that Act, without the leave of the court (paras. 4.27 ff.). You will also need to consider the collateral-finality principle and the tricky distinction of matters going to issue and matters going to credit (paras. 4.48 ff.)

3. *What principal protections have been extended to the vulnerable, or the intimidated, or the young witness by the Youth Justice and Criminal Evidence Act 1999, as amended? What further reforms, if any, do you believe would be desirable?*

The wide variety of devices available to assist vulnerable, intimidated, or young witnesses giving evidence under the Youth Justice and Criminal Evidence Act 1999 are detailed, principally at paras. 4.99-4.121. You are invited to consider whether these various means are adequate or whether they require to be developed further, bearing in mind the rights of the defence and Article 6 of the ECHR in particular.

4. *In R v. A (No 2) [2001] 2 WLR 1546, the House of Lords availed itself of s 3 of the Human Rights Act 1998 in order to ‘reinterpret’ the rape-shield provisions in the Youth Justice and Criminal Evidence Act 1999. Do you consider that, had this decision not been taken and had s 41 been interpreted using traditional canons of statutory construction, s 41 would have made an excessive inroad into the guarantee of fair trial under Art 6 of the European Convention on Human Rights?*

This question requires you to think critically about the House of Lords' reasoning in *R v. A (No 2) [2001] 2 WLR 1546*.