SWEET & MAXWELL

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Cases in Brief

Evidence—hearsay—Criminal Justice Act 2003 s.116—application—Criminal Justice Act 2003 s.114—approach

C [2019] EWCA Crim 623; 9 April 2019

C was convicted of a number of counts of sexual activity with a child contrary to the Sexual Offences Act 2003 s.9(1). After giving an ABE interview, one complainant committed suicide. On appeal, C argued that the interview and her suicide note should not have been admitted in evidence.

(1) C argued that the interview and note were not admissible by virtue of the Criminal Justice Act 2003, s.116(5). Although her statements in the interview and suicide note satisfied the condition in s.116(2)(a), "that the relevant person was dead", they nonetheless fell within s.116(5), which provided that a necessary condition in s.116(2) – in this case death – was to be deemed to be not satisfied if "caused by the person in support of whose case it is sought to give the statement … in order to prevent the relevant person giving oral evidence". The complaint, C submitted, had caused her own death and she was the person in support of whose case it was sought to adduce the evidence. The argument failed as a matter of statutory interpretation. Section 116(2)(a) identified the person whose evidence was relied on as "the relevant person". Section 116(5)(a) referred to the "person in support of whose case" it was sought to give the statement in evidence. Such a person was not described as "the relevant person" – in its context, the subsection applied to a party in the trial. Although the position might be different under s.116(2)(c) ("relevant person" outside the UK, not reasonably practicable to secure attendance), so far as s.116(2)(a) was concerned, the person referred to in s.116(5) would be the defendant or someone acting on his or her behalf. The court added that the defence interpretation would create significant practical difficulties. It invited a determination of why a prosecution witness killed him or herself. That was a matter with which the coronial process was designed to deal, but which the Crown Court was not. It might involve a detailed investigation and analysis of a deceased's mental health and state of mind over a significant period of time, and the calling of evidence. It may be that in some cases it would be clear that a witness killed him or herself in order to avoid giving evidence. If that were so it would be a relevant factor when the court came to consider the test for admissibility under s.114(2). In the present case, the recorder at first instance was entitled to find on the facts available to him that G did not kill herself in order to avoid giving evidence, and that her decision was "brought about by all the events surrounding and flowing from disclosure".

(2) C argued that the contents of the suicide note ("the stress from the current situation is too much to handle and 24/7 I feel so guilty because of what happened … Make sure that bastard rots in hell for what he has done to me and [her sister, the other complainant]") were accusatory, highly emotional, non-specific and prejudicial, and should have been excluded as a matter of fairness. The recorder applied the approach to the admission of hearsay evidence under the 2003 Act in accordance with the steps set out in *Riat (Jaspal)* [2012] EWCA Crim 1509, [2013] 1 Cr.App.R 2. He properly considered both the risk of the unreliability of the evidence and the extent to which it could be tested and assessed. He concluded that the admission of both the interview and the note would not have such an adverse effect on the fairness of the proceedings that they should be excluded. The Court of Appeal would only interfere with such an exercise of judgment if it concluded that it was outside the band of legitimate decisions available to the judge (see e.g *Finch* [2007] EWCA Crim 36, [2007] 1 W.L.R 1645, [23]). The Recorder was aware of the charged nature of the note and its likely effect on the jury, and gave the jury a warning to keep "cool heads".

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Some judges might have admitted the interview but excluded the suicide note; but that was not a reason for interfering with the Recorder's decision following a careful and measured ruling.
[*Comment: the argument based on s.116(5) ("realistically acknowledged as 'unattractive'" by counsel, the court reports) was misplaced for another reason. A complainant is a witness, not a party. It is a party who has a case. The complainant may have caused her own death, but it was the Crown's case, not hers, in support of which her statements were sought to be adduced. RP*]

Fraud—failure to disclose—Fraud Act 2006 ss.1 and 3—disclosure of residence for council tax purposes—absence of legal duty as to
D [2019] EWCA Crim 209; 5 February 2019
D was charged with fraud by failure to disclose contrary to the Fraud Act 2006 ss.1(2)(b) and 3, where, on the prosecution case, she had failed to disclose that she lived at a particular address, for council tax purposes (and as a result of which she received a lower council tax bill than would have otherwise been the case). Section 3(a) required that to be guilty, the defendant must be under a legal duty to disclose the relevant information. The court dismissed the prosecution's appeal against a terminating ruling, permission to appeal having been given by the judge at first instance. Section 3 of the 2006 Act was designed to create a new offence, extending beyond dishonest positive representations (express or implied), but limited the criminalisation of non-disclosure to that required by way of a legal duty (the court considered the Law Commission report *Fraud* (Law Com 276, 2002), upon which the 2006 Act was largely based, for a discussion of the scope of "legal duty" at paras 7.28 to 7.30). It was plainly designed both to supersede and to supplement the previous legal position prevailing and consequently it should be treated as an entirely new provision. The prosecution were unable to identify any express obligation to disclose residence in the Local Government Finance Act 1992 or any statutory instrument made thereunder. There was a legal obligation to pay the tax, but no obligation to notify the council of continued occupation. There was no common law relationship between the local authority and the defendant which could give rise to a duty of notification; nor were there any relevant fiduciary duty or other equitable obligation. The local authority was itself a creature of statute; and if it were to be able to recover council tax from those resident within its area then it must look to statutory authority for so doing. Contrary to the Crown's submissions, it was not possible to imply a statutory obligation.

Inflicting grievous bodily harm—Offences Against the Person Act 1861 s.20—apparent consent to a procedure—injection of Botox—whether medical qualification going to identity—whether consent vitiated by misrepresentation as to this
MELIN [2019] EWCA Crim 557; 2 April 2019
M injected what purported to be Botox into two complainants on two occasions. Following the second, they both suffered really serious harm. The prosecution case was that, in both cases, they only consented to the treatment because M had said that he was medically qualified, which he was not. On appeal, M relied on *Richardson* [1998] 2 Cr.App. R 200 to argue that a deception as to identity, which was capable of vitiating consent, did not include a deception as to "qualifications or attributes", which was not. M also relied on the fact that there was no legal requirement for Botox to be administered by a medical professional. The appeal against conviction for an offence against Offences Against the Person Act s.20 was dismissed.
(1) At common law, it was well established that for offences against the person a defendant's fraud as to conduct would not negative the victim's consent unless it deceived the victim either as to the defendant's identity or as to the nature of the act. *Richardson* was no doubt correct on its facts (dentistry practiced by a qualified, but suspended, dentist: the concept of identity of a person did not extend to cover qualifications). But there may be cases where a person's identity was inextricably linked to his or her professional status. The court quoted with approval a passage in *Smith, Hogan and Ormerod's Criminal Law*, 15th ed, p.672, suggesting that an attribute could be *more* important than identity, using the example of a GP. The word "identity" was an ordinary English word, defined as "the fact of being who or what a person is". Depending on the facts, a deception as to a person's identity as a doctor where that was integral to his or her identity, could as a matter of law vitiate consent.
(2) The court rejected an argument that the principle set out above could not apply where there was no requirement for a qualification for the administration of the treatment. This consideration did not raise an argument of law, but rather as to its application to these facts. Unlike in *Richardson*, where the fraud was not as to whether the defendant was a qualified dentist but as to whether she remained licensed by her regulatory body, in M's case, the treatment was said to have been given by a person impersonating a medically qualified practitioner. Whether the fact of being medically qualified was operative in the minds of the complainants in giving consent could not be determined solely by reference to the regulatory requirements for the administration of Botox injections, though that might play a part in the factual matrix depending on what was known and understood by them. If as a matter of fact, administration of the injection by a medically qualified practitioner was for each complainant a condition of giving her consent and without it, consent would not have been given or would have been withdrawn, this would go to the question of the appellant's identity and the legal validity of their consent. Accordingly, there was at least potentially a deception as to identity rather than merely qualifications or attributes. That (on the prosecution case) there were positive misrepresentations, rather than, as in *Richardson*, a failure to inform, was also relevant. It was not necessary to consider arguments advanced by reference to *Tabassum* [2000] 2 Cr.App.R 328 and the question whether true consent was vitiated in consequence of false representations about the nature, quality or purpose of the procedure administered (upholding M's conviction on one count; on the other there was insufficient evidence of a representation and reliance thereon, and the conviction on that count was quashed).

Procedure—magistrates' court—time limit for summary only offences—Magistrates' Courts Act 1980 s.127—written charge procedure—Criminal Justice Act 2003, s.29—when a written charge "issued"

BROWN v DPP [2019] EWHC 798 (Admin); 2 April 2019

The issue between the parties was as to when a "written charge" was "issued", for the purposes of the rule that summary proceedings must be commenced within six months of the offence alleged (Magistrates' Courts Act 1980 s.127), given the replacement of the old two-stage process of the laying of a complaint or information before the magistrates, who then issued the proceedings, by the new procedure introduced by Criminal Justice Act 2003, s.29 under which the written charge (and at the same time a single justice procedure notice) was issued directly to the defendant. It was agreed that a written charge could properly be served by post (Crim PR 4.4(1)). It was clear, both as a matter of first principle and because of the terms of the Crim PR, that issue and service were two distinct processes. There was no plausible intervening stage between the completion of the written charge as a document in its final form and the process of service. Thus, the written charge was to be regarded as issued when the document comprising the written charge was completed, with all relevant details and in the form needed for service. Provided that was done within six months of the relevant offence, the written charge would have been "issued" in time. The magistrates had been wrong to conclude that issue took place "when the relevant prosecutor determines to issue it", and nor was it sufficient that there should be "some tangible signification by the prosecutor" of the contents of the written charge, as the respondent contended on appeal. Nonetheless, the effect in the instant case was that the written charge was issued on 21 April 2018, when the document was complete, and within time, not 23 May 2018, when it was posted, or on some intermediate date, and accordingly the appeal was dismissed.

Offensive weapons—Crime Prevention Act 1953 s.1(1)—reasonable excuse—use for work—proper approach of court

GARRY v CPS [2019] EWHC 636 (Admin); 3 March 2019

G sought to show that he had a reasonable excuse for having an offensive weapon *per se* (a butterfly knife) with him in a public place (the glovebox of his car), in that he used it for his work in the building trade (Crime Prevention Act 1953 s.1(1)). A tribunal of fact had a wide discretion in determining whether a reasonable excuse was made out. An innocent purpose for having an offensive weapon in a public place did not equate to a reasonable excuse. Rather, the court was entitled to consider necessity or immediate temporal connection between possession and the purpose for which it is carried. That he had the knife for use at work was simply evidence of reasonableness – the fact of use at work did not, of itself, require the conclusion that having it was reasonable. The tribunal of fact would review the balance of evidence capable of affecting its ultimate conclusion, which would include the type of weapon, where it was found, and any temporal connection. There was a high hurdle for discharging the defendant's burden of proof in relation to a butterfly knife: *DPP v Patterson* [2004] EWHC 2744 (Admin). The knife was found not in a tool bag or box or overalls pocket but in the glovebox of his personal vehicle, and on a Saturday, when G led no evidence that he worked on Saturdays.

Sexual offences—engaging in sexual activity in the presence of a child—Sexual Offences Act 2003 s.11—relationship between sexual gratification and the presence of the child

B AND L [2018] EWCA Crim 1439; 27 June 2018

(1) The ordinary and natural meaning of the words of Sexual Offences Act 2003 s.11(1) provided that a person A committed the offence of engaging in sexual activity in the presence of a child if:
(a) he or she intentionally engaged in an activity that was sexual;
(b) in the presence or under the observation of a child (B);
(c) A did so for the purpose of A's obtaining (some) sexual gratification from B's presence or observation;
(d) A knew or believed that B was aware of the activity or intended that B should be aware of the activity; and
(e) B was under 16 and A did not reasonably believe that B was 16 or over, or B was under 13.
(2) If there had been any ambiguity (which there was not) in the wording of the subsection, the court could have had recourse to the explanation of the Minister during the Committee stage in the House of Commons during the Parliamentary passage of the Bill (*Pepper v Hart* [1992] 3 W.L.R 1032), which made it clear that this interpretation was the correct one (the court quoted the speech). In doing so, the court rejected the prosecution's argument that a purposive interpretation did not require that there should be a link between the defendant's sexual gratification and the presence of the child. Crown counsel may have been right to suggest that the protection of children required that there be an offence of engaging in sexual activity in the presence of a conscious child; but if that were so, it was for Parliament and not the court (reporting restrictions lifted following re-trial).

Trial—juror—objective bias

EDGAR [2018] EWCA Crim 621; 12 April 2019

Where a juror was the girlfriend of the son of, and personally close to, a police officer acting as family liaison officer supporting members of the family of the deceased in E's trial for murder, the juror also knew by sight a member of the deceased's family, the officer and the juror maintained contact with each other by text and phone during the trial, failed to disclose their connection and showed they were prepared to connive in giving misleading or incomplete information to the court in order to suit their own personal convenience, E's conviction was unsafe. That the officer initially lied during the police investigation of the connection indicated that she knew her conduct was improper. Any fair-minded and informed observer would conclude from the facts that there was a real possibility or danger that the juror was biased (*In Re Medicaments and Related Classes of Goods (No 2)* [2001] 1 W.L.R 700; *Porter and Weeks v Magill* [2001] UKHL 67, [2002] 2 AC 357) (reporting restrictions lifted following re-trial).

SENTENCING CASE

Mental disorder; fresh evidence

RENDELL [2019] EWCA Crim 621; 12 April 2019

Following his conviction for wounding with intent (OAPA 1861 s.18), in March 2012 the appellant was sentenced to an indeterminate term of imprisonment, pursuant to s.225 of the Criminal Justice Act 2003, with a minimum term of three years. He completed this term in 2015.

Following sentence, a consensus emerged amongst those involved in his treatment that he suffered from a personality disorder. In September 2015 he was removed to a hospital under s.47 of the Mental Health Act 1983 (MHA 1983) and a restriction direction made under s.49. In 2017 Dr Lally, his responsible clinician, a consultant forensic psychiatrist, reported that he suffered from a personality disorder, that his mental disorder made it appropriate for him to be detained in hospital for medical treatment and that medical treatment was available for him. In 2018 the report of another forensic psychiatrist was to similar effect. The appellant appealed against sentence, relying on these reports. He was given permission to rely upon this fresh evidence and Dr Lally was permitted to give oral evidence.

The Court adopted the approach set out in *Vowles* [2015] EWCA Crim 45, at [54], as to whether a hospital order (with or without a restriction order) pursuant to s.37 and 41 of the MHA 1983 would be appropriate. The first matter to which the court had regard was the extent to which the appellant needed treatment for his mental disorder. There was no dispute as to this.

The Court then considered the extent to which the appellant's offending was attributable to his illness, stating that this encompassed consideration of whether the offending was attributable to his mental disorder within the meaning of the MHA 1983. This was central to the assessment of the appellant's culpability. After considering the relevance of the appellant's use of drink and drugs to his offending behaviour, the court concluded that his culpability was moderate.

The third matter the court considered was the regime for deciding release. The regime for release on life licence is different from that for release on a hospital order/restriction order. The Parole Board considers the likelihood of reoffending and risk to the public. Under the section 37/41 regime, the focus is on the appellant's mental health, although the risk to the public and the risk of deterioration of the appellant's mental health are closely linked.

The Court then considered the regime that would apply following release. The question of which regime best protects the public is a matter of fact in each case. In [52]–[56] the court concluded that in this case orders under s.37 and 41 of the MHA 1983 would most effectively protect the public. Having regard to *Vowles*, the Court then considered whether there were sound reasons for departing from the usual course of imposing a penal sentence, and concluded that there were (at [57] and [58]). The indeterminate sentence of imprisonment was quashed and substituted with orders under ss.37 and 41 of the MHA 1983.

Features

Section 28 YJCEA 1999 and pre-trial cross-examination: where we've got to now, and how we got there

By J.R. Spencer[1]

The beginnings: the Marie Payne case, and the proposals of the Pigot Committee

The story begins over 30 years ago, back in the 1980s, when three things came together: studies by social scientists suggested that the sexual abuse of children was far more common than previously imagined, work by experimental psychologists began to suggest that the evidence of children was more reliable than previously thought, and some disastrous cases showed the world how ill-adapted the traditional rules of criminal evidence were to the evidence of children.

Prominent among these cases was that of Colin James Evans, who in 1984 was convicted of murdering Marie Payne, a little girl of four, whom he had abducted and sexually assaulted. Not long before the murder he had been twice prosecuted and acquitted for sexual assaults on other little children, the prosecutions failing for want of evidence. Of his guilt of these earlier offences there is little doubt, because photographs were later found that he had taken of himself committing them. Had the victims of these offences been able to give evidence he might have been convicted – and so not have been at liberty to murder Marie Payne.[2]

All this showed up the need to reform the law of criminal evidence to remove some of the obstacles that it then put in the way of the courts hearing the evidence of children. Prominent among the obstacles was the need for young children to testify at trial, under the same conditions as apply to adults, and the obvious practical difficulties this gave rise to; and the solution to this, it was widely said, was the use of video technology.

The Criminal Justice Act 1988 made various changes in relation to evidence of children, in particular by making it possible for child witnesses to give evidence from out-

1 I am grateful to Joyce Plotnikoff, Richard Woolfson and HH Judge David Aubrey for their help with this article; any resulting errors are, of course, my own.

2 For further details of this case, see Spencer, "Child witnesses, video-technology and the law of evidence: Part I", [1987] Crim. L.R 76.

side the court-room via what the Act called a live television link.[3] Then shortly afterwards the Home Secretary, Douglas Hurd, set up an enquiry, chaired by Tom Pigot, a well-respected Old Bailey judge,[4] to consider the possibility of further reform. Informed by practice in other countries,[5] the recommendations of the Pigot Committee (as it was known) were radical.[6] They included abolishing the existing rules concerning competency and corroboration, and making possible the use of intermediaries to relay the child's evidence. But the most radical proposal was, by the use of video-technology, to remove the need for child witnesses to give live evidence at trials altogether. In place of the child's live evidence in-chief – assuming he or she could be persuaded to utter – the court would in future see and hear a video recording of an interview with the child conducted by a trained investigator. Having seen this the defence would then be permitted, if it wished, to conduct a cross-examination ahead of trial, the video-recording of which would then replace the child's live cross-examination.

Though widely welcomed, some of the Pigot Committee's proposals were too advanced to be acceptable to most legal opinion at the time. The proposal for pre-trial cross-examination, in particular, was seen as much too radical. And the result, in the Criminal Justice Act 1991, enacted the proposal about video-recorded evidence in chief – so originating what is now known as the "ABE interview"[7] – but not the complementary proposal about video-recorded pre-trial cross-examination. Under the "half-Pigot" scheme, as it was often called, a child witness was relieved of the need to give live evidence in-chief, but as before would have to come to court to undergo a live cross-examination. This enabled courts to hear evidence from some young children that it would have been impossible to hear before, and in consequence, secured the conviction of some people who had injured or abused them who would have fallen outside the reach of the criminal justice system before. But it had two very obvious disadvantages compared with the scheme the Pigot Committee had originally proposed. First, the child was unable to drop out of the proceedings at an early stage because he or she still had to come to court for a live cross-examination at the defendant's trial. And secondly, from the perspective of the justice system – and of the defendant who was innocent – a live cross-examination of a child a long time after the ABE interview might result in little meaningful communication, especially when conducted along traditional lines.[8] In consequence, pressure continued for the introduction of all the parts of the integrated scheme the Pigot Committee had proposed.

In 1999, in the early days of New Labour, Parliament enacted the Youth Justice and Criminal Evidence Act, Part II of which legislated for a range of "special measures" intended to make it easier for vulnerable or intimidated witnesses to give evidence in criminal proceedings. Some of these procedures were already available for children but some of them were new. One of these, in s.29, was the Pigot proposal of intermediaries to facilitate communication.[9] Another was the possibility, created by s.28, of holding pre-trial cross-examinations. This provision reached the statute-book against the wishes of the Home Office, in consequence of which neither the government then in power, nor initially its successors, brought it into force. And so for over 10 years it languished on the statute-book unimplemented, looking more and more as if it never would be.

The Barker case – and renewed pressure for implementation

This[10] is the well-known case in which the Court of Appeal, upholding a rape conviction based mainly on the evidence of a little girl who was still under five at the time of trial, made a number of important pronouncements about the evidence of children. These included, in particular, a clear statement that the traditional methods of cross-examination must be modified when examining little children.

> [42] The trial process must, of course, and increasingly has, catered for the needs of child witnesses … At the same time the right of the defendant to a fair trial must be undiminished. When the issue is whether the child is lying or mistaken in claiming that the defendant behaved indecently towards him or her, 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 to ventilate before the jury the areas of evidence which bear on the child's credibility. Aspects of evidence which undermine or are believed to undermine the child's credibility must, of course, be revealed to the jury, but it is not necessarily appropriate for them to form the subject matter of detailed cross-examination of the child and the advocate may have to forego much of the kind of contemporary cross-examination which consists of no more than comment on matters which will be before the jury in any event from different sources …

These comments have been repeated, with amplification, by the Court of Appeal in a series of later cases.[11] And they were later reinforced by amendments to the Criminal Procedure Rules[12] and (at length and in detail) in the accompanying Criminal Practice Direction,[13] which now require "ground rules hearings" at which the shape and limits of a future cross-examination are fixed in advance of trial. (Though regrettably, it seems that counsel are not always as familiar with these requirements as they should be.)[14]

To get the child witness in *Barker* to the Old Bailey in time for her live cross-examination meant rousing and dressing her at 6 a.m. for a long drive: a process that had to be repeated the next day when the first day's proceedings overran, causing her and her supporters to waste the whole day in court waiting. It was in the afternoon of the second day

3 Section 32.

4 The Common Serjeant, he presided over a number of high-profile trials. For his obituary, see the *Daily Telegraph*, 24 September 1998.

5 In June 1989, the members attended an interntional conference in Cambridge the papers of which were later published as (ed Spencer, Nicholson, Flin and Bull) *Children's Evidence in Legal Proceedings: an International Perspective* (Cambridge Law Faculty, 1990).

6 *Report of the Advisory Committee on Video-Evidence*, Home Office, 1989. The Report is not available online, but the text was reprinted in the book mentioned in fn.15 below.

7 ABE stands for "Achieving Best Evidence" and refers to the title of the official guide to good practice in interviewing, published by the Ministry of Justice.

8 A striking example of the difficulties that could arise is *Powell* [2006] EWCA Crim 3, [2006] 1 Cr.App.R 31.

9 Although the Home Office implemented a more restricted model in which Pigot's "interlocutor" was replaced by someone who could flag up communication problems but rarely relayed the advocate's questions.

10 [2010] EWCA Crim 4; [2011] Crim. L.R. 233. Though available online, the full text of the judgment has, surprisingly, never appeared in any printed series of reports.

11 *Wills* [2011] EWCA Crim 1938, [2012] 1 Cr.App.R 2; *E* [2011] EWCA Crim 3028, [2012] Crim. L.R 563; *Lubemba* [2014] EWCA Crim 1064, [2015] 1 W.L.R 1579.

12 CPR 3A.21: "… The directions to be given at the Plea and Trial Preparation Hearing may therefore include a direction for a further case management hearing, but will usually do so in one of the following cases: … (d) cases involving a vulnerable witness; (e) cases in which the defendant is a child or otherwise under a disability, or otherwise requires special assistance."

13 CPD 1 General Matters 3D: *Vulnerable people in the courts*, and 3E: *Ground rules hearings to plan the questioning of a vulnerable witness or defendant*.

14 *YGM* [2018] EWCA Crim 2458, [2019] 3 Crim. L.R. 333. In his comment at [2019] 3 CLW 3 David Wurtzel writes: "Lady Justice Hallett … must be getting used to appellate (or at least trial) counsel not having read her leading judgments on the subject in hand."

before the court was ready to hear her, by which time she was at the end of her tether. That she had to undergo this experience shocked and exasperated the police officers in the case, at whose initiative a conference was later held in Cambridge in order to raise once again the possibility of introducing pre-trial cross-examination for vulnerable witnesses.[15]

This conference heard speakers from a number of jurisdictions where this is done: most tellingly, from a retired judge from Western Australia, where the "full Pigot" had been implemented many years before and was thought to be working well. Discussions at the conference, and afterwards, indicated that legal opinion had now shifted and that there was now strong support for the implementation of s.28, at least on an experimental basis. But still nothing happened.

What finally persuaded the government to bring s.28 into force appears to have been the Telford sex ring case, in which the first trial of the defendants collapsed, leading to a further trial at which the young witnesses had to undergo a second series of prolonged in-court cross-examinations: an unhappy situation given extensive coverage, and adverse comment, in the media.[16] Not long after this the Minister of Justice issued a Commencement Order bringing the section into force, for the purpose of a 10-month long experiment in the Crown Courts at Kingston-upon-Thames, Liverpool and Leeds, and using only cases where the witness was under 16, or suffering from a disability.[17]

The experiment, and after

The Ministry of Justice carried out an evaluation of the experiment which was published on 15 September 2016[18] and this was followed by a fuller study by the researchers Henderson and Lamb,[19] who made a detailed comparison of the waiting times for witnesses in "normal" cases and those in the experiment using pre-trial cross-examination. Both studies indicated that the experiment with s.28 was a success. The MOJ evaluation reported that both cross-examination and the resulting trials were shorter, and that practitioners thought that it was "probably the case" that the use of pre-trial cross-examination improved the ability of witnesses to recall. More precisely, Henderson and Lamb concluded that where s.28 was used, witnesses completed their evidence over four months earlier, spent an hour less in the court-house (indicating that the cross-examinations were conducted more quickly) and that the witnesses gave evidence significantly earlier in the day[20] – an important change when witnesses (like the girl in *Barker*) are little children. Shortly before the MOJ evaluation was published, an article by Joyce Plotnikoff and Richard Woolfson appeared which was based in part on discussions with the judges involved in the experiment, whose comments also indicated that the experiment was a success – and that they were continuing to use the s.28 procedure in their courts even after the experimental period was over.[21]

In the past, the main argument that had been used against the implementation of s.28 had been potential difficulties with disclosure. If disclosure is delayed until after the pre-trial cross-examination, fairness to the defendant will require the witness to be recalled for a further cross-examination, so defeating one of the main objects of pre-trial cross-examination. With the prospect of the section's wider use this worry has been expressed again.[22] But if potentially a problem it is only so in those cases where unused material exists and the Crown are late disclosing it, and it appears to have caused few difficulties during the experiment.[23]

Pleased with the results of the experiment, in July 2016 the government announced its intention to roll out the use of pre-trial cross-examination nationally.[24] Technical difficulties with equipment delayed this longer than the government had hoped,[25] but the latest plan is for a phased national roll-out to commence on 3 June 2019 with six further courts having the facilities to conduct s.28 cases, the others following as the necessary equipment and facilities are made available.

Meanwhile, the first group of appeals against convictions in trials where s.28 was used have reached the Court of Appeal; and it to these the last section of this article will be devoted.

The section 28 appeals

To date, reports are available in three such cases: *RL*,[26] *Dinc*[27] and *PMH*.[28]

In the first two of these, no issue arose about the use of the s.28 procedure and the central issue was whether the restrictions the judge had imposed on the defendant's cross-examination had overstepped the mark and undermined his right to fair trial – which in both cases the Court of Appeal decided it had not. The decision in *Dinc*, however, does contains a point of further interest. In the slightly earlier case of *SG*[29] a different constitution of the Court of Appeal had criticised the trial judge for requiring defence counsel to give him in advance a list of the questions he proposed to put to the complainant in a sex case, aged 18 by the time of trial, who had become distressed when giving evidence. If advance notice of questions was required in s.28 cases, the Court said, it was not generally appropriate. In *Dinc* the Court of Appeal sought to read the comments in *SG* in a restrictive sense.

> The court [in *SG*] did not hold, as some commentators have suggested, that a judge should only require a list of questions in advance for the court's approval in exceptional cases. In paragraph 62 of the judgment, the court simply reminded trial judges of the potential for prejudice if a

15 The papers at the conference were later published in (ed Spencer and Lamb) *Children and Cross-examination – Time to Change the Rules?* (Hart Publishing, 2012).
16 In particular, by the journalist Andrew Norfolk in *The Times*, 23 May 2013. A few days later, on 27 May, *The Times* published a letter making the point that, if s.28 had been in force, the witnesses might have been spared much of this ordeal.
17 Youth Justice and Criminal Evidence Act 1999 (Commencement No. 13) Order SI 2013 No. 3236.
18 Baverstock, *Process evaluation of pre-recorded cross-examination pilot (Section 28)* (MOJ 2016); online at: https://www.gov.uk/government/publications/process-evaluation-of-pre-recorded-cross-examination-pilot-section-28.
19 Hayden M Henderson and Michael E Lamb, "The Section 28 Pilot Study: Effects on Case Progression", [2017] 2 *Archbold Review* 7-9. Longer version in [2017] Crim. L.R. 343.
20 On average, an hour and 13 minutes earlier.
21 Joyce Plotnikoff and Richard Woolfson, "Worth waiting for: The benefits of section 28 pre-trial cross-examination", [2016] 8 *Archbold Review* 6.
22 Annabel Timan, writing in the Doughty Chambers' Crime Team Bulletin, Issue 4, March 2018.
23 See Plotnikoff and Woolfson, fn.21 above, at p.7.
24 Mike Penning, Minister for Policing, Fire, Criminal Justice and Victims, Hansard 6 July 2016, col 1016.
25 Although in 2016 a further Commencement Order was issued, extending the use of s.28 in the three experimental courts to a slightly wider range of witnesses: Youth Justice and Criminal Evidence Act 1999 (Commencement No. 15) Order 2016/1201.
26 [2015] EWCA Crim 1215.
27 [2017] EWCA Crim 1206.
28 [2018] EWCA Crim 2452, [2019] 1 Cr.App.R. 27.
29 [2017] EWCA 617, [2017] 2 Cr. App.R. 20.

> defence advocate is wrongly prevented from pursuing a legitimate line of questioning. In paragraph 63, the court declared that where a witness *had no difficulty in understanding the questions*, requiring an advocate *during cross examination* to prepare a list of questions should be regarded as an exceptional course.

In *PMH* the s.28 procedure had been followed but some problems had arisen in the process. On both sides there had been a change of counsel between the cross-examination and the trial and "for reasons not entirely clear" neither of the counsel who appeared at trial had been able to watch the recording of the cross-examination properly in advance. And for good measure, the video recording of the cross-examination had been incompetently done, with the lower part of the complainant's face accidentally amputated. The Court said that these problems should not have happened, though it decided that, on balance, the conviction was still safe. And for the avoidance of difficulties in future it gave some detailed guidance.

> [21] Bearing those provisions in mind, we have identified the following areas of best practice which we hope will assist trial judges and advocates. We accept that this best practice may evolve with experience:
>
> (i) at the ground rules hearing the judge should discuss with the advocates how and when any limitations on questioning will be explained to the jury;
>
> (ii) if this has not happened, or there have been any changes, the judge should discuss with the advocates how any limitations on questioning will be explained to the jury *before* the recording of the cross-examination is played;
>
> (iii) the judge can then give the jury the standard direction on special measures with a direction on the limitations that the judge has imposed on cross-examination and the reasons for them *before* the cross-examination is played;
>
> (iv) the judge should consider if it is necessary to have a further discussion with the advocates before their closing submissions and the summing-up on the limitations imposed and any areas where those limitations have had a material effect. In this way the advocates will know the areas upon which they can address the jury;
>
> (v) in the summing-up the judge should remind the jury of the limitations imposed and any areas identified where they have had a material effect upon the questions asked; and
>
> (vi) if any written directions are provided to the jury the judge should include with the standard special measures direction a general direction that limitations have been imposed on the cross-examination.
>
> [22] We hope that best practice of this kind will avoid the kind of arguments we have considered this morning. However, if such best practice is not followed, it does not follow that any convictions are unsafe.

In an earlier paragraph in the judgment the Court of Appeal made it plain that, whether counsel like the s.28 procedure of not, they will have to come to grips with it.

> [16] Much of the argument advanced by [defence counsel] in his written submissions appeared to be a thinly disguised attack on the use of pre-recorded cross-examination. Whatever his views or the views of others, Parliament has provided for this procedure in s.28 of the YJCEA and those who are accustomed to it report that, if operated properly, it can work well. It does not undermine the defendant's right to a fair trial. However, all parties should follow the steps as set out in [18E] of the Criminal Practice Directions 2015 (as amended).

A final case to examine is one in which s.28 and pre-trial cross-examination did not arise at all, but which is indirectly relevant to this issue nonetheless. In *RK*[30] the defence, with the encouragement of the judge, elected not to cross-examine the three-year-old complainant (although an intermediary was available) but instead to point out the flaws in her evidence – her ABE interview – when addressing the jury. Though upholding the conviction as safe on the facts, the Court of Appeal criticised the course taken, making it clear that its previous decisions should not be taken as suggesting that cross-examination should be waived where the only questions to be asked are whether the incident took place.
The Court's words on the subject are worth quoting in full.

> [27] In relation to ground 2, we first question what we are told is becoming an increasing practice for defence advocates to decide they will not cross-examine a vulnerable, particularly a child, witness. We understand the concern to protect a child witness and the desire of a defence advocate to avoid any suggestion of confronting a child witness. However, if a child is assessed as competent and the judge agrees the child is competent, we would generally expect the child to be called and cross-examined, with the benefit of the range of special measures we now deploy. There is no reason to distress her or cause her any anxiety and therefore no reason to avoid putting the defence case by simple, short and direct questions. Although this court has in the past doubted the *right* to put every aspect of the defence case to a vulnerable witness, whatever the circumstances, it has not questioned the general *duty* to ensure the defence case is put fully and fairly and witnesses challenged, where that is possible.
>
> [28] Furthermore, if the judge approves a decision not to cross examine, it raises the problem of what directions should be given to the jury. The directions should not indicate the child is incompetent when she is competent and should not inadvertently leave the jury with the impression that the child is not worthy of belief. We see some force in [counsel's] submission that the judge's directions in this case as to S's lack of maturity and understanding risked giving the jury such an impression, without giving them the best opportunity to assess her.
>
> [29] For these reasons, and accepting the statutory power exists for the parties to agree that a witness who gives evidence in chief by means of a video recording should not be cross- examined, we suggest the prosecutor should think very carefully before agreeing to that course and a trial judge should think very carefully before s/he expresses judicial approval of any agreement.

If and when s.28 has been brought fully into force and pre-trial cross-examination is generally available there will be even less excuse for defence's use of this tactic than there is now.

30 [2018] EWCA Crim 603.

Archbold Review

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Managing young witness cases: the views of judges, advocates and intermediaries

By Joyce Plotnikoff and Richard Woolfson, Lexicon Limited

Introduction

The NSPCC study *Falling short? A snapshot of young witness policy and practice* (February 2019) brings together over 40 policies on questioning, delay, support and safeguarding and compares them with views about practice expressed by 272 criminal justice personnel. This article focuses on responses about questioning from 40 circuit judges, 24 barristers, 21 Crown Advocates, three higher court advocates and 48 intermediaries from the Ministry of Justice register.

Advocacy and training

Cross-examination tailored to the understanding of individual young witnesses had improved in the last year in the view of 31 of 40 judges (78%), 27 of 36 of advocates (75%) and 28 of 47 intermediaries (60%). Many judges linked improvements to innovative "Advocacy and the vulnerable" training led by the Inns of Court College of Advocacy (ICCA).[1] Advocates who completed the course were positive, e.g.

> … complete about-face change, abandoning a lifetime's approach for a whole new world

> It has focussed my attention radically so that I can limit considerably the number of questions I need to ask.

However, ICCA lead facilitators felt follow-through was hindered by inconsistent judicial approaches:

> Our training was a really healthy discussion to mark the sea change in advocacy. We said "There are new rules and you've got to get to grips with them" … Judicial College training does not convey the same message – it should be saying "You're not doing your job if you don't take control of this". There's a real danger this will wither away, with the edges rubbed off our new approach. I want this to have the clarity it needs from the judges.

"Ticketed" serious sex offence circuit judges and recorders must attend the relevant Judicial College course; High Court judges are not required to do so. Twenty-eight of 39 circuit judges (72%) had received training on developmentally appropriate questioning of children; 32 of 40 (80%) said more training on identifying their communication problems would be helpful. One judge trainer acknowledged that "the judiciary are not getting on board" but another forecast that inconsistencies would diminish as pre-trial cross-examination (s.28 of theYouth Justice and Criminal Evidence Act 1999) is rolled out. Successful integration of s.28 will require consolidated best practice across the judiciary and advocates. Without further training, there is a danger that best practice messages from the s.28 pilot courts will be diluted.

1 Launched in 2016: https://www.icca.ac.uk/advocacy-the-vulnerable.

Ground rules hearings (GRHs) and draft questions

Registered intermediaries (independent communication specialists)[2] have helped influence the change of approach. While 36 of 39 judges (92%) almost always held a GRH for planning purposes, as required in intermediary trials[3], this fell to 21 of 38 judges (55%) in cases with no intermediary, even though GRHs are good practice in all young witness trials.[4] Judicial guidance recommends discussing ground rules before the day of the witness's evidence.[5] Two-thirds of judges reported that this was more likely to happen in intermediary cases. Judges should seek child-specific information if not provided.[6] While intermediaries routinely provide assessment reports and recommend communication aids,[7] where no intermediary was involved most judges seldom received information about children's development/ communication or applications for aids.

Courts may

> impose restrictions … where there is a risk of a young or otherwise vulnerable witness failing to understand, becoming distressed or acquiescing to leading questions.[8]

Young witness evidence should be timetabled, with limits imposed on the duration of cross-examination.[9] A minority of judges placed restrictions on questioning young witnesses or limited the length of cross-examination, but they said these steps were more likely in intermediary cases. Where restrictions were imposed and explained to the jury, 85 per cent of both judges and lawyers were satisfied that an appropriate balance could be struck in furtherance of a fair trial. Submitting draft questions for review is required for pre-trial cross-examination[10], is recommended in all young witness cases[11] and is the main plank of ICCA training.[12] The study found that, beyond s.28, draft questions were more likely in intermediary trials: 32 of 39 judges (82%) almost always made this direction, compared to 22 of 38 (58%) who did so in cases without an intermediary. ICCA lead facilitators expressed frustration

> I tell barristers to draft every single word, and judges are saying to them in court that "a list of topics is fine."

2 A special measure for vulnerable prosecution and defence witnesses rolled out in 2008 under s.29 of the Youth Justice and Criminal Evidence Act 1999. Their role is to help obtain "complete, coherent and accurate" evidence (s 16(5)).
3 Criminal Procedure Rules 3.9(6) and (7); Criminal Practice Direction 3E.2.
4 Criminal Practice Direction 3E.3.
5 Criminal Practice Direction 3E.3; Judicial *College Equal Treatment Bench Book* 2018, ch.2, paras 48, 56. In s.28 cases, GRHs should be scheduled "about one week" earlier than pre-trial cross-examination: Criminal Practice Direction 18E.21(vii).
6 Judicial College *Equal Treatment Bench Book* 2018, ch.2, para 48; see also Ministry of Justice *Code of Practice for Victims of Crime* 2015, "Duties on service providers for children and young people" para 2.2, p.74.
7 Section 30 of the Youth Justice and Criminal Evidence Act 1999; Criminal Procedure Rule 3.9(7)(b)(vi).
8 Criminal Practice Direction para 3E.4.
9 Judicial College *Equal Treatment Bench Book* 2018, para 56. See also Criminal Procedure Rules 3.9(7)(b)(iii)) and 3.11(d)(i).
10 Criminal Practice Direction 18 E, para 4.
11 Judicial College "Crown Court Compendium" 2018 para 6, pages 10-19; Judicial College *Equal Treatment Bench Book* 2018 ch.2, para 123; *Lubemba* [2014] EWCA Crim 2064, para 35; *Dinc* [2017] EWCA Crim 1206.
12 https://www.icca.ac.uk/advocacy-the-vulnerable-training-delegate-online-preparation-stage-1.

Dispensing with the intermediary for cross-examination

Thirty-nine of 47 advocates (83%) said they had adapted their advocacy with young witnesses as a result of working with intermediaries. We were not permitted to ask judges this question, but in their freeform comments, only nine of 26 (35%) were unequivocally positive. This differed from our 2015 survey of 77 judges, in which almost all feedback was positive and two-thirds had changed their practice.[13] In this study, some judges felt that intermediaries may overstate the need for their presence at trial. Intermediaries say this is almost impossible to forecast: responses, even to carefully crafted draft questions, are unpredictable; much depends on the "communicative competence" of advocates and control exercised by the trial judge.[14] The intermediary's presence may contribute to "best evidence" in ways not apparent to those in court, for example, making children feel more confident and satisfying the court's obligation to "take every reasonable step" to facilitate witness participation.[15]

In a worrying trend,[16] in the previous year, eight of 39 judges (21%) had dispensed with the intermediary for cross-examination, even though the Equal Treatment Bench Book argues for retention for trial of those who have already assessed a witness.[17] Rulings to dispense with the intermediary must take account of the child's viewpoint, as required by s.19(3)(a) of the 1999 Act:

> In determining … whether any special measure … would or would not be likely to improve … the quality of evidence given by the witness, the court must consider all the circumstances of the case, including in particular any views expressed by the witness.[18]

Judges concerned about making better use of intermediaries as a scarce resource could free up weeks of their time by fixing their trials and the date(s) on which they are needed.[19] The study highlighted inefficiencies when their availability was not requested or taken into account; when their trials were placed in warned lists, requiring them to hold several weeks in their diaries; and the lack of responsibility for notifying them of listing decisions.

Inappropriate cross-examination

Judges are responsible for controlling inappropriate questioning or breaches of ground rules.[20] Most said they would intervene to stop inappropriate questioning, sometimes asking for remaining questions to be written. Jurors should be given directions about a breach of ground rules "when that occurs".[21] Not all judges dealt with the matter in front of the jury:

> Send the jury out. Speak to counsel. Have a break. Smile sweetly at counsel.

> Before questioning, I often tell the jury about restrictions and explain why. If counsel then breach them – given that jurors know that there are restrictions in place – I see no reason to send the jury out, but simply stop counsel and tell them that the question is inappropriate and to move on, or to remind them of a particular ground rule … If inappropriate questioning persists, I tell the witness and jury that we will be taking a break and remind counsel – if necessary in strong terms – of the directions given. When the jury comes back, I will again direct the jury that I have placed restrictions on the questioning, the reasons why, and that it must not be held against the defendant.

Perceptions of effective participation: young prosecution witnesses and young defendants

The Court of Appeal confirms that *Lubemba* principles apply not only to vulnerable witnesses but to young defendants.[22] However, judges and lawyers had differing perspectives on whether they thought both groups were enabled to participate equally effectively. While 18 of 20 Crown Advocates (90%) were satisfied this was the case, only 23 of 40 judges (58%) and eight of 27 barristers and solicitor advocates (30%) agreed.

Judges and advocates concerned about the treatment of young defendants highlighted the absence of a regulated defendants' intermediary scheme, as recommended by the Law Commission,[23] and the impression of "unfair bias" caused by Criminal Practice Direction 3F.13.[24] Further disadvantages included the failure to apply restrictions to ensure fair questioning; not asking prosecutors to submit draft cross-examination questions; a lack of automatic access to special measures;[25] poor or no support; facilities that were not child friendly, including routine use of the dock in adult courts; and limited breaks, "treated as if we are just 'indulging' the defendant".

Conclusion

In most aspects of young witnesses' interaction with the justice system, the study found gaps between policies and children's experiences as described by practitioners. There was a lack of ownership and accountability: one senior civil servant commented: "Traditional forms for driving forward commitments have fallen by the wayside". Government departments could not explain, for example, an apparent dramatic fall in young witness numbers.[26] In another such example, the National Police Chiefs' Council could not provide a national profile of force approaches to child protection, though some forces were closing specialist police child protection teams and moving to merged public protection units or even "omnicompetent" policing (where detectives respond to a range of investigations). The Criminal Justice Board is tasked with ensuring "each part of the criminal justice system is held accountable".[27] Despite the plethora of policies, young witnesses have not featured on its agenda in recent years. The study found improvements, but not one that emanated from systematic monitoring.

The full report, recommendations and foreword by Lord Thomas, former Lord Chief Justice, can be found at: *https://learning.nspcc.org.uk/media/1672/falling-short-snapshot-young-witness-policy-practice-full-report.pdf.*

13 J. Plotnikoff and R. Woolfson (2015) *Intermediaries in the Criminal Justice System,* Policy Press, p.283.
14 J. Plotnikoff and R. Woolfson (2017) "Dispensing with the 'safety net': is the intermediary really needed during cross-examination?" *Archbold Review*, Issue 6, pages 6-9.
15 Criminal Procedure Rule 3.9(3)(b).
16 Some judges confused registered intermediaries for witnesses regulated by the Ministry of Justice and unregulated intermediaries for defendants.
17 Judicial College *Equal Treatment Bench Book* 2018, ch.2, para 101.
18 See also Standard 4 of the Ministry of Justice Witness Charter (2013).
19 Judicial College *Equal Treatment Bench Book* 2018, ch.2, paras 47, 88: "Court listings that book their time more precisely, and with greater certainty, would result in more registered intermediaries being available for work. This in turn would improve waiting times for victims and witnesses to be matched to appropriate intermediaries".
20 Criminal Practice Direction 3E.1, 4.
21 Criminal Practice Direction 3E.4.
22 Lord Chief Justice, *Grant-Murray* [2017] EWCA Crim 1228 at [227].
23 Law Commission (2016) "Unfitness to Plead" vol. 1, Law Com No. 364, para 2.72.
24 This acknowledges courts' inherent powers to appoint intermediaries but warns that such appointments confined to the defendant's evidence will be rare and "for the entire trial extremely rare".
25 Section 47, Police and Justice Act 2006 (creating s.33A-C of the Youth Justice and Criminal Evidence Act 1999) provides for defendants under 18 to give evidence by live link in certain conditions: much narrower than for witnesses and the provision is seldom invoked.
26 There are no official statistics but a range of unofficial sources all indicate a decline e.g. in 2012 a Criminal Justice Joint Inspection reported around 33,000 young witnesses whereas in 2018 the Witness Service recorded 7,618 young witnesses attending court.
27 *https://www.gov.uk/government/groups/criminal-justice-board*, undated; HM Government *Our Commitment to Victims* (2014) p.9.

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