

Vulnerable Witnesses and Pre-Trial Cross-Examination

His Honour Judge Martin Picton

Advisory Committee on Video Evidence ("The Pigot Report") 1988

Proposed the whole of a young child's evidence, including the cross-examination, should take place out of court and in advance of the trial

“Speaking Up for Justice” 1998

- Report of the Home Office Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System
- Recommended that there should be special measures to enable vulnerable or intimidated witnesses in a criminal trial to give their best evidence

Youth Justice and Criminal Evidence Act 1999

- Introduced with a view to facilitating the ability of vulnerable and/or intimidated witnesses to give evidence efficiently and safely in criminal court proceedings
- Provides for a range of “Special Measures” which are designed to enable witnesses to give their best evidence but at the same time to take them away from the stress and pressure of open court process

Special Measures

- S.23 – Screens
- S.24- Live Link
- S.25- Evidence in Private
- S.26- Removal of wigs and Gowns

Special Measures

- S.27- Video recorded Evidence in Chief
- S.28- Pre-recorded cross-examination
- S.29- Intermediaries
- S.30 - Aids to communication

- Under 18 years of age, and/or
- With a mental disorder or learning disability, and/or
- With a physical disorder or disability, and/or
- Who are likely to suffer fear or distress in giving evidence because of their own circumstances or those relating to the case
- The court must always take account of the views expressed by a witness

Eligibility

- Complainants in respect of a sexual offences, offences under section 1 or 2 of the Modern Slavery Act 2015 and alleged victims of domestic abuse are **automatically** eligible for assistance unless the witness has informed the court of a wish not to be so eligible
- Witnesses in respect of offences listed in Sch 1A also qualify **automatically** – includes close relatives bereaved by criminal conduct, victims of domestic violence, hate crime, terrorism, sexual offences, human trafficking, attempted murder, kidnap and false imprisonment, arson with intent to endanger life and wounding or causing grievous bodily harm with intent

Eligibility

Special Measures

- S.17 YJCE 1999 – **fear or distress**
- Court must be satisfied that the quality of evidence given by the witness is likely to be diminished by reason of fear or distress on the part of the witness in connection with testifying in the proceedings.
- Court must take into account, in particular—
- the nature and alleged circumstances of the offence to which the proceedings relate;
- the age of the witness;
- such of the following matters as appear to the court to be relevant, namely—

Special Measures

- The social and cultural background and ethnic origins of the witness,
- The domestic and employment circumstances of the witness, and
- Any religious beliefs or political opinions of the witness;
- Any behaviour towards the witness on the part of—
 - (i) the accused,
 - (ii) members of the family or associates of the accused, or
 - (iii) any other person who is likely to be an accused or a witness in the proceedings.

Special Measures

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- The age of the witness;
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 - (i) the social and cultural background and ethnic origins of the witness,
 - (ii) the domestic and employment circumstances of the witness, and
 - (iii) any religious beliefs or political opinions of the witness;

Special Measures

- (d) any behaviour towards the witness on the part of—
 - (i) the accused,
 - (ii) members of the family or associates of the accused, or
 - (iii) any other person who is likely to be an accused or a witness in the proceedings.

S16 and 17
applied in
context of s19,
20 & 21

- **(2)** Where the court determines that the witness is eligible the court must then—
- **(a)** determine whether any of the special measures available in relation to the witness (or any combination of them) would, in its opinion, be likely to improve the quality of evidence given by the witness; and

S16 and 17
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- **(b)** if so—
- **(i)** determine which of those measures (or combination of them) would, in its opinion, be likely to maximise so far as practicable the quality of such evidence; and
- **(ii)** give a direction under this section providing for the measure or measures so determined to apply to evidence given by the witness.

S16 and 17 applied in context of s19, 20 & 21

- **(3)** In determining ... whether any special measure or measures would or would not be likely to improve, or to maximise so far as practicable, the quality of evidence given by the witness, the court must consider all the circumstances of the case, including in particular—
 - **(a)** any views expressed by the witness; and
 - **(b)** whether the measure or measures might tend to inhibit such evidence being effectively tested by a party to the proceedings.

- **(3)** The primary rule in the case of a child witness is that the court must give a special measures direction in relation to the witness which complies with the following requirements—
- **(a)** it must provide for any relevant recording to be admitted under section 27 (video recorded evidence in chief); and
- **(b)** it must provide for any evidence given by the witness in the proceedings which is not given by means of a video recording (whether in chief or otherwise) to be given by means of a live link in accordance with section 24.

S.21 — Special provisions relating to child witnesses

S.28 Pre-Recorded Cross-Examination

- Has taken a long time to reach the stage of implementation
- Not until 2013 – pilot courts
- National roll-out for young and vulnerable witness (s.16) now complete
- Phased roll-out for intimidated witnesses (s.17) now underway
- Includes complainants in cases of alleged sexual offences, domestic abuse and human trafficking
- S.28 the right option **IF** it will improve and maximise the quality of the evidence
- Potential for Ground Rules Hearing (GRH) should be considered

S.28 Pre-Recorded Cross-Examination

- Necessary precondition that police have video recorded the account from the witness
- Need to identify eligibility at an early stage
- Court must be informed
- Process of serving evidence and making necessary pre-trial disclosure accelerated
- Consider need for GRH
- List case for s.28 hearing and set date for subsequent trial at same time
- S.28 hearing is the **start** of the trial

S.28 Pre-Recorded Cross-Examination

- Require advocates to look at Advocate's Gateway toolkits - [Advocates Gateway](#)
- GRH form – advocate may be required to write out questions in advance
- Judge should make a note of answers to agreed questions at s.28 hearing
- Pre-Recorded cross-examination – stored and held by Vodaphone
- Consistency of Judge and advocate – not compulsory but may be desirable
- Does the recording need to be edited?
- What if advocate wants to ask further questions post s.28?

GRH

- In any case where there is a vulnerable witness or accused consideration must be given to holding a 'ground rules hearing'
- The greater the level of vulnerability the more important it will be to hold such a hearing

Adjusting for vulnerability

- When should the witness be called?
- What should the advocates and judge wear?
- Meet witness in advance?
- Take breaks where needed
- How to manage intermediary
- Require advocate to submit questions in advance
 - *Dinc* [2017] EWCA Crim 1206 – not just relevant to s.28
- Duty to control the questioning of a witness, to set reasonable time limits and to interrupt inappropriate questioning *Lubemba* [2014] EWCA Crim 2064

Adjusting for vulnerability

- Exercise editorial control
- Questions not comment
- Time limit cross-examination? In advance and not half way through!
- If more than one accused stop both advocates covering the same ground?
- With young or otherwise vulnerable witness does the case need to be “put”?
- If style and content of questions limited then take account of what questions would have been asked
- No need to put inconsistencies – demonstrate in other ways

Vulnerable Defendants

- YJCEA 1999 does not apply to Defendants
- *R. (D) v Camberwell Green Youth Court*; [2005] UKHL 4 - the court has wide and flexible inherent powers to ensure that the defendant received a fair trial, including a fair opportunity of giving the best evidence possible.
- *“A judge has an inherent power to take measures to ensure the participation of a defendant in the trial process. There is no limit on a court’s power when it comes to securing the accused’s participation in his trial.”*

Vulnerable Defendants

- *SH* [2003] EWCA Crim 1208 the Court of Appeal expressed the obiter opinion that a trial judge has a discretion as to the measures to be taken to assist a defendant with learning difficulties; this would extend to—
 - permitting him to have the assistance of an intermediary whilst giving evidence;
 - reading a detailed defence statement to the jury; and
 - allowing leading questions based on that statement in examination-in-chief where it was apparent that D was having difficulty recalling facts.

Vulnerable Defendants

- *Thomas* [2020] EWCA Crim 117
- Intermediaries should not be appointed as a matter of routine trial management, but instead because there were compelling reasons for taking that step. It should be clear that all other adaptations to the trial process would not sufficiently meet the defendant's needs to ensure they could effectively participate in the trial. There should be an assessment not only of the relevant circumstances of the defendant, but also of the circumstances of the particular trial: any difficulty experienced by the defendant had to be considered in the context of the actual proceedings which they faced.

Vulnerable Defendants

- *Tl v Bromley Youth Court* [2020] EWHC 1204 (Admin)
- While there was no statutory basis on which an intermediary could be appointed to assist a defendant, Criminal Practice Direction 3F.13 provided that a court could exercise its inherent powers to appoint an intermediary to assist a defendant giving evidence or for the entire trial. CPD 3F.25 stated that there was no presumption that a defendant under the age of 18 would be assisted by an intermediary at court, but that the decision had to be made on an individual basis having regard to the circumstances of the case. The essential point was that any defendant in criminal proceedings had to have a fair trial. In cases involving vulnerable young defendants, a court had to consider how issues of concentration and understanding might affect their ability to participate in the trial.
- HMCTS Intermediary Scheme – since 1st of April

Vulnerable Defendants

- The principles set out in *Lubemba* as to steps necessary to facilitate the participation of vulnerable witnesses apply equally to child defendants as witnesses as to any other vulnerable witness: *Grant-Murray (Janhelle)*; *McGill (Joseph)* [2017] EWCA Crim 1228; [2018] Crim. L.R. 71 (difficult to conceive of an advocate being competent to act in a case involving young witnesses or defendants unless the advocate had undertaken specific training)

Vulnerable Defendants

- Right to try vulnerable and non-vulnerable Ds together?
- Court familiarisation visit for vulnerable D (with or without intermediary)?
- Where will D sit and who with?
- Are there publicity issues from which D should be protected?
- Reporting restrictions generally?
- GRH required?

Vulnerable Defendants

- Prosecution advocate to write out questions?
- Wigs and gowns?
- Restrict members of the public?
- Age appropriate language?
- Make reasonable adjustments to enable effective participation



THE END

