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Video recorded Cross-Examination or Re-Examination: A Discussion on Practice and Research

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Abstract

The Youth Justice and Criminal Evidence Act (YJCEA, 1999) was designed as a support mechanism to alleviate fear, and enable vulnerable and intimidated witnesses (VIW) within criminal trials Special Measures (SM), such as screens and video recorded evidence (Hoyle & Zedner, 2007). The introduction of video recorded cross-examination, or re-examination, under s.28 of the YJCEA is one of the most recent SM to be used within criminal trials. This procedure reduces the time between initial examination of some witnesses and the subsequent cross-examination in not guilty cases. This discussion paper emphasises a number of key research areas that could yield future improvements within s.28. The development of linguistic psychology, best evidence, and disclosure rules would be future avenues for research, providing emphasis and direction. It is a well-recognised fact that there are inherent issues around the identification of witnesses who may benefit from measures under the YJCEA (Ellison, 1999; Burton et al., 2006; Charles, 2012). There is still a significant gap within research around the development of the Intermediary service amongst other areas of the CJS, and in relation to VIWs; however, this is seen to have strong links with the ability to conduct through interviews with witnesses and defendants alike (Plotnikoff & Woolfson, 2007; Oxburgh et al., 2016). There may be much to be gained from a process of analysis where s.28 cross-examinations take place, and subsequent recordings, are subjected to interdisciplinary research scrutiny.

Keywords: Vulnerable and Intimidated Witnesses, Special Measures, Cross-Examination.

Section 28 and cross-examination; a brief reflection

One of the key areas in the future of the Youth Justice and Criminal Evidence Act (YJCEA, 1999) is s.28: pre-recorded cross-examination and re-examination. However, this remains largely unimplemented despite being discussed for several years (Bowden et al., 2014; McDonald & Tinsley, 2012). Video recorded cross-examination, or re-examination, is a fundamental change to cross-examination and case preparation; it may have wider impacts for vulnerable or intimidated witnesses (VIW). However, the research evidence is limited and progress slow due to concerns around disclosure (Criminal Procedure and Investigations Act [CPIA], 1996) and the handling of this type of evidence within criminal trials (Hall, 2012). There are also concerns around this measure giving additional evidential weight to a witness' account, despite there being no research evidence that such measures under the YJCEA have an impact upon juror's decisions, providing correct safeguards are in place (Ellison & Munro, 2014). The s.28 measure still relies on the initial identification by investigators that a witness is vulnerable or intimidated and requiring their evidence to be video recorded, or measures put in place to assist witnesses at court. This process of identification is highly subjective and underdeveloped (Cooper & Roberts, 2005; Roberts et al., 2005; Burton et al., 2006; Charles, 2012; Criminal Justice Joint Inspectorate, 2009). The research evidence around the questioning approach of lawyers has received little attention in comparison to the way in which evidence is first gathered by the investigator. Henderson (2015a) draws attention to the significant empirical research and cases (e.g. R v Barker [2010] EWCA Crim 4; R v Haji (Ismail) [2017] EWCA Crim 1556) that specifically relate to court room questioning styles, it is unknown how s.28 will impact upon this, or which 'type' of witness will be best served by the measure (e.g. Henderson et al., 2012). However, there is room for development around cross-examination styles which s.28 may seek to address and emerging research upon the impact of such evidence on juries (Wheatcroft & Keogan, 2017).

In a study around courtroom questioning approaches participants viewed a film and were then individually questioned, it was noted: "Half the participants were asked questions using six categories of confusing questions often asked by lawyers in court (negatives, double negatives, leading, multiple questions, complex syntax, and complex vocabulary) whilst the remaining half were asked for the same information using simply phrased equivalents. Confusing questions reduced participant-witnesses' accuracy and suppressed confidence—accuracy relationships compared with the condition where simplified alternatives were asked" (Kebbell., et al., 2010. p.262; Kebbell & Johnson, 2000). This is significant because

the participants were not classed as being vulnerable or intimidated, and notably they were not under the same pressure as a live trial. Examples of such questions can be found within Kebbell and Johnson (2000), and Kebbell et al. (2010) where double negative complex question: ‘Is it not true that the woman did not go into the house?’ simplified to: ‘Is it true that the woman went into the house?’; or leading complex: ‘It is correct to say that the woman ran across the baseball ground, isn’t it?’ simplified to: ‘Did the woman run across a baseball ground?’ (p.263). Where s.28 research may seek to address this, for example, within how recordings are analysed, and feedback produced around questioning styles and approaches. The procedure of questioning, under cross-examination, may seek to utilise some of this research within future s.28 development. Variable styles of questioning present some vulnerability to all witnesses, and Henderson (2015b) emphasises that the “rules around cross-examination are long established while some are based on models of interrogation, and legal discourse, that simply do not cater for the desire to produce a reliable response to questions” (p.929). Comparatively, Police interrogation often receives more sensitive attention in case law as found in *R v Mushtaq* [2005] 1 WLR 1513 (HL).

In drawing together the arguments, Henderson (2015a) highlights that witness demeanour is no indicator of truth or lie, and many investigators, or cross-examiner alike, often enter into interrogations with some inherent bias and assumptions about how guilt may be assessed. For example, a lack of eye contact, confidence, non-evasiveness, or that someone does not vehemently deny the allegation put to them. Whilst the nature of questions in Kebbell and Johnson (2000) shows that a witness maybe confident when asked a complex question, or indeed a series of complex questions, witness accounts were found to be much less accurate under styles of complex questions. The answering of questions, accurate or not, may also have an influence on the perceptions of jurors, and in these cases, there maybe additional interpretation from such questions where the understanding or response from the witness is not clear (Kebbell., et al., 2010). The question of employing complex questioning as a specific strategy to confuse a witness may also be subject to further research and academic comment.

Linguistic attention, VIW, and cross-examination

Keane (2012) suggests that cross-examination to any degree would benefit from the specialist employment of linguists, or forensic interrogation specialists, to develop

questioning techniques. It could be argued this would not only serve to benefit all witnesses and the overall structure for VIW. Such assistance with the development of linguistic and communication is seen within the employment of Intermediaries (s.29 YJCEA; Milne et al., 2011; O'Mahony et al., 2011; O'Mahony, 2010). Collins et al. (2017) also indicate a positive outcome for juries where an Intermediary is used, and their presence also improves perceptions of the interviews with children, with no effect on perceptions of the child (Ridley et al., 2015). However, the development of the Intermediary as a reviewer of cross-examination is currently limited. One of the developmental cases in relation to cross-examination is that of *R v Barker* [2010] EWCA Crim.4. Here the Court of Appeal began a considerable series of decisions regarding the cross-examination of vulnerable witnesses. The court held that when cross-examining a complainant in a serious criminal offence the defence advocate must 'adapt cross-examination to enable the child to give the best evidence of which he or she is capable'. Although, what is 'best evidence' may be subjectively held on individual merit. This is however a significant move to the mind-set that cross-examination should not be about the destruction of the witness, rather more the advancing of a material point using a witness to develop the overall approach to an argument or presentation of a case (Henderson, 2016). How this develops within s.28 could be key to the digitalisation of future court processes that are seen to assist some witnesses. Henderson (2016) concluded that the consequence of cross-examination is seen, wrongly, as an opportunity for advocacy in 'destroying' prosecution witnesses in a zealous and partisan approach, which leaves little margin for ethical practice.

Ellison (1999) examined the role that cross-examination plays in heightening fear and concerns amongst VIW, suggesting that the adversarial system within England and Wales does not serve them well. Ellison is critical that many governmental working groups still focus on the central theme of orality, and that this narrative is restrictive to improving the system of oral evidence as a linguistic focus. Hall (2007; 2009) highlights the process that preceded the implementation of the YJCEA, and in reference to the Pigot Report (1989) did make recommendations for the evidence, in particular that of children, to be pre-recorded along with some cross-examination. Ellison argues that the 'accommodation' approach to witnesses within the adversarial system, does not achieve the result desired. However, Hamlyn et al. (2004) found that vast proportions of witnesses (including sexual offence complainants) who had used SM found them helpful. Indeed, one third indicated that SM had enabled them to give evidence that they would not otherwise have been willing or able to

give, with this figure rising to 44% for sexual offence complainants (Burton et al., 2007; Hamlyn et al., 2004). Although Ellison (1999) and Hall (2009) highlight the restrictive narrative in which reform exists around cross-examination, the addition of s.28 is perhaps the most progressive attempt to fully implement the recommendations of The Pigot Report (1989) and *Speaking up for Justice* (Baber, 1999). It may now be useful to combine linguistic psychology and video technology within future development of s.28 and SM as a whole (Cooke et al., 2002).

The court does have some discretionary ability to intervene around questioning without s.28 being in force. The case of *R v SG* [2017] EWCA Crim 617 involves the sexual assault of a 15-year-old female by her younger brother. The defence offered was that the events, reported by the victim, had never taken place at all and that this was a fabrication by the victim herself. The Judge in this case stated: “the witness was being taken through the sort of detail that was making her re-live what she said had occurred and making her upset”. Summarising further, in the absence of the jury, the Judge considered the victim, although appearing as an articulate witness, had become vulnerable during the trial itself. The Judge asked that the defence provide a list of questions which they intended to ask the witness on her next period of cross-examination; citing the intention was to “guard against her being asked questions of detail that were 'just speculation' rather than relevant questions about the incident; and that 'speculation' might be making her re-live the finer details of what had happened”. In a later appeal against conviction, the defence referred to the fact that the victim, within the initial investigation, had not been defined as a vulnerable witness and no Intermediary had been appointed. The appeal was however dismissed. In part the appeal was dismissed because of the decision in the case of *R v Lubemba* [2015] 1 WLR 1579 [38]- [45] where it was decided that “The trial judge is responsible for controlling questioning and ensuring that vulnerable witnesses and defendants are enabled to give the best evidence they can”. This also coincides with other directions given in relation to the questioning of witnesses during cross-examination (Criminal Procedure Rules (CPR) Rule 1.1(2) Criminal Practice Direction 1 3E.4).

R v Libemba gives rise to an important consideration around the cross-examination of witnesses and victims. Given the problems faced with the identification of VIW (Cooper & Roberts, 2005), it is accepted within *R v SG* that there are other safeguards within the system to assist those who are VIW. This case however is exceptional given the position of the defence statement and the fact that the judge had directed the jury in the summary around the

way in which there had been a break in the questioning and that a list of questions had then been proposed. The decision to quash the appeal also reflects on the position in *R v JP*. Critically it emerged that there had been no Ground Rules hearing before the commencement of this trial and this viewed to have some impact on later events. It was the case that the witness had been offered screening from the defendant (s.23 YJCEA- Screening witness from accused). The evidence was recorded in the form of a video interview, but there was no submission that there were any further measures required. The witness was considered capable of understanding and answering questions and providing responses that can be understood (s.53 YJCEA Competence of witnesses to give evidence). This case is also unlike that of *R v PR* [2010] EWCA Crim 2741, where the witness, again in a familial sexual offence case, was provided SM under the wrong gateway (s.16 & s.17 YJCEA) and the witness was said to be incapable of understanding and answering questions. These issues may still not be addressed within s.28 but with little research, it maybe some time before linguistics, communication and cross-examination combine within literature.

The s.28 procedure and the YJCEA

S.28 allows for the video recorded cross-examination or re-examination of witnesses. The YJCEA does provide some scope for a combination of measures in relation to witness' and providing the competence of witnesses to give evidence is adequately assessed (s.53 YJCEA).

The YJCEA, s.28 states:

- (1) Where a special measures direction provides for a video recording to be admitted under section 27 as evidence in chief of the witness, the direction may also provide—
 - (a) for any cross-examination of the witness, and any re-examination, to be recorded by means of a video recording; and
 - (b) for such a recording to be admitted, so far as it relates to any such cross-examination or re-examination, as evidence of the witness under cross-examination or on re-examination, as the case may be.
- (2) Such a recording must be made in the presence of such persons as rules of court or the direction may provide and in the absence of the accused, but in circumstances in which—

- (a) the judge or justices (or both) and legal representatives acting in the proceedings are able to see and hear the examination of the witness and to communicate with the persons in whose presence the recording is being made, and
- (b) the accused is able to see and hear any such examination and to communicate with any legal representative acting for him.

The act is very descriptive about how the s.28 procedure operationalise. The application of s.28, argues Hall (2009), maybe restricted because of concerns over the amount of time between the initial interview and any further cross-examination and because of rules around the disclosure (the Criminal Procedure Rules lists the time limits on disclosure of material to the defence in the lead up to a trial and following the ‘charging’ of a suspect with a criminal offence); although, this is seen to be reduced thanks to s.28 being invoked. Despite rulings (R v Camberwell Green Youth Court [2005] 1 WLR 393) that the use of SM does not disadvantage a defendant’s right to a fair trial there may still be some resistance to allow for the full implementation of s.28. It may be highlighted that the current SM (s. 23. Screening witness from accused, s.24. Evidence by live link, s.25. Evidence given in private, s.26. Removal of wigs and gowns, s.27. Video recorded evidence in chief, s.28. Video recorded cross-examination or re-examination, s.29. Examination of witness through Intermediary) are adequate in providing witnesses with access to the criminal justice system and elevating the stress and pressures faced in giving evidence through cross-examination, and achieving best evidence.

Bowden et al. (2014), and McDonald and Tinsley (2012) highlight that pre-recorded cross-examination could be conducted well in advance of any trial taking place and where proper planning has been agreed. This could be established within preliminary evidence management hearings (part 3, The Criminal Procedure Rules on preliminary hearings), where rules around evidence preparation, victim and witness issues are discussed along with matters arising in relation to the evidential weight of pre-recorded material. In the case of R v Mullen [2004] EWCA Crim 602, the jury asked that they be allowed to see the pre-recorded evidence-in-chief (s.27 YJCEA) from the victim. This was agreed by counsel and the judge indicated that this be done in open court. The defendant appealed on conviction, the appeal was later dismissed. The court’s decision raises important questions around how video evidence can be replayed. Generally, the replaying of evidence in a Criminal trial is not allowed because it may attract a disproportionate weight to that evidence over other evidence in the case (R v

Rawlings; R v Broadbent [1995] 2 Crim App R 222, C.A. See also R. v M. [J.]). This is not wholly explored within many research areas and there may be a fine balance between presenting recorded witness evidence, or cross-examination, and then allowing that evidence to attract an unnecessary weight during the course of a criminal trial itself. Other challenges identified were around the continuity of counsel, or where pre-trial examination was carried out by one advocate, with another having a different view should the case be taken over. There are also concerns in relation to the ‘blunting of evidence’ (R v Rawlings et al., as cited above), this effect may only be realised within certain trials or where a victim is particularly distressed. However, as Henderson et al. (2012) outlined, the procedures of ‘best evidence’ should come before the processes of a trial. It may be beneficial to the future direction of s.28 to consider this as an area for research.

Juries and the s.28 YJCEA procedure

The question of evidential weight amongst jurors is partly explored within Ellison and Munro (2014); using mock jury members over the course of four mock rape trials, they highlight the lack of empirical evidence within the field of the actual effect of measures upon witnesses. The research measured a small variable of the overall measures available under the YJCEA, namely: (1) live-links; (2) video-recorded evidence-in-chief followed by live-link cross-examination and (3) protective screens. The findings indicated that there was no clear or consistent impact upon jurors using the different presentation modes, and that concerns over the use of such measures, in terms of impact upon the jury, may be overstated within some legal discourse. Ellison and Munro did not explore how the replaying of evidence upon jury members could have impacted upon the cumulative effect of the decisions taken by jurors, and again this may be a further research direction with the potential for future academic consideration. Although there is little empirical evidence around the use of pre-recorded cross-examination, the case of R v RL [2015] EWCA Crim 1215 can be examined as being one which shows the procedures which can be followed in using such techniques. In this case the judge requested that questions be raised in advance of the s.28 cross-examination procedure. The victims in this case were children and the defendant their mother, the allegations concerned cruelty to children (s.29 YJCEA, 1999). Within the preliminary hearing counsel were reminded of the very young nature of the victims involved and also the procedures around the questioning of such witnesses, some of the questions proposed for the witnesses were deemed to be unnecessary. An Intermediary was also

assigned to assist with the examination of the child witnesses and the position within R v JP [2014] EWCA Crim 2064 was relayed to the court:

“It is now generally accepted that if justice is to be done to the vulnerable witness and also to the accused, a radical departure from the traditional style of advocacy will be necessary. Advocates must adapt to the witness, not the other way round. They cannot insist upon any supposed right 'to put one's case' or previous inconsistent statements to a vulnerable witness. If there is a right to 'put one's case' (about which we have our doubts) it must be modified for young or vulnerable witnesses. It is perfectly possible to ensure the jury are made aware of the defence case and of significant inconsistencies without intimidating or distressing a witness”

Although there appears to be a lack of empirical evidence surrounding s.28, it can be seen that the case of R V RL demonstrates what can be done if the correct rules and procedures are applied to the pre-trial cross-examination of vulnerable witnesses. Case law evidence may go some way to quashing some of the scepticism purported (Hall, 2009). Critically, Ellison (1999) was published some time ago, and although the principle of an inquisitorial system maybe ideological, there are perhaps undiscovered advantages to a combination of measures under the YJCEA with the progression of s.28 YJCEA. The late implementation of s.28 is largely due to resistance from the legal profession who argue that the removal of witnesses, from the court is largely achieved within the current measures available (video recorded evidence, evidence via live link) notwithstanding the delays in actually progressing a case to the stage of a trial (Henderson, et al., 2012). Henderson et al. (2012) draws together studies from New Zealand, Australia and the United States. Highlighting that in most adversarial systems there has been little appetite to draw together the relationship in the initial providing of evidence to the Police, and subsequent trial procedures with many states opting to try to limit the time between evidence being initially collected, and then subsequently tested in cross-examination (ibid). It may however be the case that many courts will only use the procedure of pre-recording as a last resort, where there is a critical need to expedite the procedure because of failing health, or an abstracted argument. This is despite evidence (Plotnikoff & Woolfson, 2009) suggesting that a major source of stress for children is the phase between initial evidence gathering and the trial.

Piloting the s.28 procedure

Baverstock (2016) highlights a number of key findings from the results of a pilot of the s.28 procedure (see CPD V Evidence 18E: Use of s.28 Youth Justice and Criminal Evidence Act 1999, and Cooper & Mattinson, 2018). The relatively recent implementation of this measure means that there is limited material with which to form a wider review of the evidence. In summary, the implementation piloted between 2012 and 2016; Article 2 of SI 2016/120 brings s. 28 of the YJCEA 1999 into force on 2 January 2017 for the purposes of proceedings before the Crown Courts sitting at Leeds, Liverpool and Kingston-upon-Thames, where the witness is aged 16 or 17 at the time of the hearing. Section 28 had previously been in force by virtue of SI 2013/3236 for these courts, where the witness was eligible for SM under 16(1)(a) YJ&CEA 1999 (under the age of 16 at the time of the hearing), or under s. 16(1)(b) YJ&CEA 1999 (incapacity). The most recent pilot focussed specifically on cases involving children aged 15 and under, testifying as alleged victims of sexual assault. There were three identified benefits to the s.28 procedure. The first being the length of time in the child being called to take part in the cross-examination procedure was comparatively short. In the s.28 pilot the length of time decreased by up to four months.

It was also found in Plotnikoff and Woolfson (2016) that trial listings could be shorter as one pilot judge stated: "Cases that used to end on a Friday now end on a Wednesday". This is regarded as the "pay-off" for time invested in preparing and reviewing questions beforehand". Secondly, the length of time the child was cross-examined also reduced by up to an hour, in some cases this was even longer. This reduction was down to better prior planning in examining witnesses, and that there had been an effective Ground Rules Hearing prior to the examination taking place. The third observed benefit was that children were examined earlier in the day compared with those not in the pilot, this is considered to be better for children and when they are more 'fresh' (Plotnikoff & Woolfson, 2009).

In the Lord Chief Justices Report (2015) it was also summarised that s.28: "...judges unanimously commend it as greatly improving the administration of justice by reducing stress for the witnesses and encouraging early pleas of guilty. There is no doubt that national implementation will bring very significant benefits". Whilst these benefits to s.28 are outlined, there is a progressing approach to national roll-out of this measure. Although the measure of completely removing the child or vulnerable witness from the court was considered to have been first outlined by Pigot (1989), there still seems some significant work around ensuring the measure is extended to all witnesses and that the identification of

those witnesses who would benefit under the measure is done from the outset. The significance of the Case File cannot be underestimated within research, or practice, due to the number of reports highlighting challenges around in the way vulnerability is communicated and disclosure adequately assessed (HMIC, 2013; CJI, 2015; Leveson, 2015; NAO, 2016; Charles, 2012).

Summary and Research Considerations

The YJCEA (1999) was enacted in order to provide so called ‘vulnerable and intimidated’ witnesses with some assistance in the giving of oral evidence within a Criminal Court. It was the Pigot Report (1989) which first examined the use of video-recorded evidence within Criminal Court. In the period since the YJCEA was enacted it is only within recent years that s.28 (pre-recorded cross-examination) have been piloted. Questioning styles within the court under cross-examination remains a cause for concern amongst cases involving VIW and defendants; this is seen as an area, alongside Intermediaries, for considerable further research. This is a largely underdeveloped area in comparison with development seen within initial investigative contexts. Within some criminal justice systems (Norway, Israel, South Africa) the role of a specifically trained cross-examiner as an ‘interrogator’ has been implemented in order to deal with the specialist skills of cross-examining. Again, this area may be another avenue for research around SM. The assistance of an Intermediary under YJCEA can be sporadic due to the way in which funding is applied and eligible persons are identified, and their use within s.28 procedures are considered to be a developing area. There remains a reliance on the orally testified evidence and whilst some recent case law demonstrates safeguards available under the Criminal Procedure Rules, this remains an area where research could seek to further assess the impact upon juries of video-recorded evidential weight. The YJCEA remains the largest advancement in the development of law to support VIW. However, it remains a legislative act that provides access to an otherwise unchanged legal discipline. It can be seen that where applied correctly the YJCEA can have a significant benefit to witnesses, as in the R v SG case. Although Ground Rules hearings were designed to assist the court in planning for SM, it may be the case that disclosure hearings are implemented to properly address CPIA rules.

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