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The Examination and Cross-examination of Young and Vulnerable Witnesses

Developments and Challenges

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The Problem

Cross-examination techniques traditionally deployed in adversarial systems:

- confuse vulnerable witnesses
- reduce their ability to understand the issues
- diminish the cogency and accuracy of their evidence.

The core of the problem is the reluctance or inability of many advocates to abandon or modify traditional techniques.

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Traditional Techniques

The use of questions that are:

- leading
- contain witness-inappropriate language
- about peripheral detail
- about inconsistencies
- about topics that, without explanation, are unrelated to the preceding questions
- delivered in an intimidating tone or manner

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The Scale of the Problem

- Increase in the number of vulnerable witnesses
- Over-representation of those with intellectual disability as offenders
- The perceptions of children: *Measuring Up* (J Plotnikoff and R Woolfson, 2009)
- Thomas LJ: 'Much remains to be done…it requires a cultural change'

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Developments in Response to the Problem

- *The Judicial College Bench Checklist: Young Witness Cases*, 2012
- The Family Justice Council's *Guidelines in relation to children giving evidence in family proceedings*, 2011
- *R v Wills* [2012] 1 Cr App R 2
- *R v Barker* [2010] EWCA Crim 4
- *R v E* [2011] EWCA Crim 3028

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Key New Requirements

- Identification, as early as possible, of vulnerabilities and developmental stage of child
- Ground rules discussion for directions enabling child to give 'best evidence'
- Use *Measuring Up ? Good practice guidance in managing young witness cases and questioning children*
- *R v Wills*: judicial duty to ensure limitations are complied with
- Lord Judge, LCJ in *R v Barker* at [42]: no necessary need for either detailed cross-examination on matters going to credibility or cross-examination that amounts to no more than comment

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Will the new requirements work ?

- Potentially, for the young, but no application to other types of vulnerable witness
- Unsupported by any provision for appropriate advocacy re-training
- Unsupported by any clearly articulated principles on how restrictions on cross-examination are to be reconciled with articles 6.1 and 6.3(d), European Convention on Human Rights (accused to be given an adequate and proper opportunity to challenge and question a witness against him)

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The Need for Advocacy Re-training

According to:

- the Pigot Report, *Report of the Advisory Group on Video Evidence* (Home Office: London, 1989)
- the United Nations, *Justice in Matters involving Child Victims and Witnesses of Crime* (United Nations: New York, 2009)
- *Speaking Up for Justice…*(Home Office: London, 1998)
- *Barriers to Justice…* (MENCAP: London, 1997)
- the Advocacy Training Council, *Raising the Bar: The Handling of Vulnerable Witnesses, Victims and Defendants in Court* (London, 2011)

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The Regulator's Response

The Quality Assurance Scheme for Advocates

- Criminal advocates only (initially)
- General performance
- Designed primarily for *assessment*, not training
- Needs of vulnerable witnesses only likely to be fully met in more serious and complex cases
- No sub-criteria for evaluation of 'dealing appropriately with vulnerable witnesses'
- No agreed models of effective performance for marking or feedback

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R v E

Child complainant aged 6 ½ at trial

Court of Appeal upholds ruling of trial judge that defence counsel should not:

- put defence case
- challenge the child about it
- explore inconsistencies
- ask about lies told to those who had questioned her.

Arguably the right decision, but no reference to the European jurisprudence.

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Principles from the European Jurisprudence

1. As a rule, the rights in Art 6.1 and 6.3(d) require that an accused be given an adequate and proper opportunity to challenge and question a witness against him, either when the witness was making his statements or at a later stage of the proceedings: *SN v Sweden* (2004) 39 EHRR 13 at [44].

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Principles from the European Jurisprudence

2. Any measure restricting the rights of the defence should be strictly necessary and, if a less restrictive measure can suffice, then that measure should be applied: *Van Mechelen v Netherlands* (1988) 25 EHRR 647 at [58].

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Principles from the European Jurisprudence

3. Principles of fair trial require that, in appropriate cases, the interests of the defence are balanced against those of witnesses or victims called upon to testify; but there will be no violation of art. 6.1 taken together with art. 6.1(d) if the handicap under which the defence labours is sufficiently counterbalanced by the procedures followed by the judicial authorities: *Doorson v Netherlands* (1996) 22 EHRR 330 at [72].

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Principles from the Europoean Jurisprudence

4. Evidence obtained from witnesses under conditions in which the rights of the defence cannot be secured to the extent normally required by the Convention should be treated with extreme care: *Doorson v Netherlands* at [76].

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For a more detailed analysis

Adrian Keane, *Cross-examination of vulnerable witnesses – towards a blueprint for re-professionalisation* (2012) 16 The International Journal of Evidence and Proof, 153-174

Adrian Keane, *Towards a Principled Approach to the Cross-examination of Vulnerable Witnesses* [2012] Criminal Law Review, 407-420