Prosecutorial Challenges – Vulnerable Victims and Witnesses

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General Introduction

The general view of what is fair and proper in relation to criminal trials has always been the subject of change and development. Rules of evidence and rules of procedure have gradually evolved as notions of fairness developed. The courts, in utilising relevant legislative provisions and their own inherent jurisdiction, must find the appropriate means by which the child or vulnerable witness can be assisted in given evidence without infringing the fundamental right of the defendant to a fair trial. The development of specific rights of the child can be derived from the following:

- Constitutional rights as per Article 40 and Article 42 A of our Constitution.
- National Legislation:
  - Criminal Evidence Act 1992
  - The Children's Act 2001
- EU Directive 2012/29/EU on Establishing Minimum Standards on the Rights Support and Protection of Victims of Crime (Article 10 outlines the right of victims to be heard in Criminal Proceedings) , Article 24 The Rights of the Child, The Charter of Fundamental Right of the European Union 2000/C 364/01, The European Convention on Human Rights

The establishment and development of the specific rights of the child can be traced on an international legislative basis from the Geneva Declaration on the Right of the Child in 1924 through to the Universal Declaration of Human Rights 1948 to the UN Declaration on the Rights of the Child in 1959 and through to the UN Convention on the Rights of the Child 1989.

In addition, European Court of Human Rights case law has consistently stated that children and other vulnerable individuals are entitled to effective protection.[1]

The legislation (which does differentiate between victims and witnesses[2]) although not expressly stated within it, has the goal of facilitating the vulnerable witness, to allow his or her voice to be better heard within criminal proceedings and thereby, to allow better evidence to be received by the court[3] and to minimise the trauma of the complainant / witness while doing so.[4]

Ground Rules Hearings and the use of support measures

- **Legislative provisions**

The *Criminal Evidence Act 1992* provides for the following important support measures for certain offences under Part III of the Act.

- Use of live video link for vulnerable witnesses. (S.13 (1) (a) and (b) *Criminal Evidence Act 1992)*
- Use of Intermediaries. (S. 14 (1) (b) *Criminal Evidence Act 1992*)
- Recorded Testimony under S. 16 (1) (b) *Criminal Evidence Act 1992* which is a specific provision for the admission of a video recorded statement taken by a member of An Garda Siochána or a person competent for the purpose, as examination in chief evidence for certain vulnerable witnesses. The witness must be available for cross

1 See CS and CAS .v. Romania (Application 26692/05 20.3.2012; NC .v. Slovenia (Application 16605/09 ECtHR 15.1.15); Z and Others .v. UK (Application 29392/95 10.5.2001)

2 For example, see s.16(1)(b) Criminal Evidence Act 1992 which provides for the submission of recorded evidence for certain offences for:

*'(i) by a person under 14 years of age (**being a person in respect of whom such an offence is alleged to have been committed**), or*

*(ii) by a person under 18 years of age (**being a person other than the accused**)'.*

3 '*The Bill …. makes it easier for children and persons with mental handicap to give evidence in cases of physical or sexual abuse……At present there are serious difficulties where children are required as prosecution witnesses in cases of physical or sexual abuse. The child may be too young to give evidence at all and no prosecution can be taken. Even where the child can give evidence the court appearance may be disturbing and harmful. It involves facing the accused again in the atmosphere of a crowded courtroom. It involves the ordeal of examination and cross-examination. There is sometimes the need to denounce a loved relative and also, perhaps, the possibility of a future threat from the accused. Understandably, there is a desire to shield children from such an experience, often leading to a failure to report or prosecute the crime. That situation encourages further abuse.*'

Padraig Flynn, Minister for Justice, Criminal Evidence Bill, Dáil Debates, Tuesday, 3 March 1992. Vol. 416 No. 6 Col.1284.

4 *Donnelly v Ireland* [1998] I IR 321

examination. It applies to complainants under 14 or those who have an intellectual disability. In 2013, it was also extended to apply to:

- a person under 18 years of age (being a person other than the accused) in relation to an offence under—

(I) section 3(1), (2) or (3) of the Child Trafficking and Pornography Act 1998, or

(II) section 2, 4 or 7 of the Criminal Law (Human Trafficking) Act 2008. [5]

- Application of support measures to persons with an intellectual disability – s.19 *Criminal Evidence Act 1992*
- Dispensation of the necessity for sworn testimony – s. 27 *Criminal Evidence Act 1992*
- Abolition of a mandatory corroboration warning - s.28 *Criminal Evidence Act 1992*

Further legislative provisions provide additional support measures that include the following:

- Use of video link through s.*39 Criminal Justice Act 1999* where witness is in fear or subject to intimidation[6]
- In certain cases "In Camera" hearings s.20 Criminal Justice Act 1951, s. 257 Children's act 2001
- S. 255 of the Children's Act 2001 applies to s.4F of the Criminal Procedure Act 1967 and the taking of evidence of a child on deposition or by live television link through s.13 Criminal Evidence Act 1992. [7]
- Right of anonymity for child witnesses - S. 252 Children's Act 2001
- Right to provide victim impact evidence though live television link and intermediary - ss. 5 and 6 of the Criminal Procedure Act 2010 (which amends the Criminal Justice Act 1993).

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[5] As to what will happen when cases involving recordings of children over 14 but under 18 start coming through the courts, this has, apparently, not been examined or dealt procedurally in terms of legislative or procedural guidance to date.

[6] Criminal Justice Act 1999

39. Witnesses in fear or subject to intimidation

(1) Subject to subsection (2), in any proceedings on indictment for an offence (including proceedings under Part IA of the Act of 1967) a person other than the accused may, with the leave of the court, give evidence through a live television link.

(2) A court shall not grant leave under subsection (1) unless it is satisfied that the person is likely to be in fear or subject to intimidation in giving evidence otherwise.

[7] S.255 Children Act 2001 allows for the taking of evidence '*where a judge of the District Court is satisfied on the evidence of a registered medical practitioner that the attendance before a court of any child, in respect of whom an offence under this Part, or any offence mentioned in Schedule 1, is alleged to have been committed, would involve serious danger to the safety, health or wellbeing of the child*'.

In addition, victims have available to them the optional use of court accompaniment though victim support services, a Garda liaison officer, and use of the witness suite within the Criminal Courts of Justice. However, other courtrooms and court facilities may not be as well-equipped and as victim friendly as the Criminal Courts of Justice. [8]

Recorded evidence - s.16(b) Criminal Evidence Act 1992

Pre – Trial Considerations

Recent developments in recorded testimony have greatly facilitated the giving of evidence by a vulnerable witness. In these cases, preliminary advices may be required in addition to the traditional advice on proofs. For example, when it is the intention of the Prosecution to utilise Section 16 (1) (b) it must be remembered that the Specialist Interviewers are working with little detail and cannot be sure of how the investigation will progress. A difficult dynamic may also exist in that the Specialist Interviewer is not the Investigating Member. There may, following service of the Book of Evidence be a necessity to seek a second or third interview. The reasons for seeking a further recording, the rights of the accused, as well as the passage of time must be considered before any decision is made to seek further recordings. Secondly, the recording may be challenged either in its entirety or the DVDS may be need to be edited causing uncertainty as to what evidence exactly will be admitted at trial, if it is clear that certain portions must be redacted (with agreement with the Defence), this should be done in advance of the trial, in the absence of agreement a Court will be required to rule on issues of admissibility. Thirdly, an accurate transcript of a DVD is essential for a number of reasons. If there is an early plea, the prosecution counsel will need to be able to outline the offences to the court. If the DVD is being played to the jury and the audio is poor, the jury may need a transcript of the portion that cannot be easily heard in order to follow that portion of evidence. It would seem to be best practice to allow the jury receive the relevant portion of the transcript for the playing of the recording and only for the playing of the recording. A fourth consideration when a particularly vulnerable witness is involved in a case is the need to seek expert opinion on issues of competency and communicative challenges, with a view to assisting not only the complainant but also the Court. Further early consultation with the victim and his or her family members or guardians is also vital to open

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[8] See Courts Services Report 2015 at page 22. http://www.courts.ie/Courts.ie/library3.nsf/(WebFiles)/A9CCBEE01757C58280257FF00031EEBE/$FILE/Courts%20Service%20Annual%20Report%202015.pdf

up the lines of communication, establish trust and to understand and appreciate the victim's particular needs and wishes.

Early Stages of Trial Process

Use of DVD and Test of Competency

When the jury is in charge, and after the opening speeches, the prosecution need to apply, in the absence of the jury, for the recording taken under s.16 (1)(b) to be used as evidence.[9] While the use of any DVD's is always subject to a possible defence challenge there is a legislative presumption that it shall be used. For example, in the recent case of *DPP v FE*, [10] Judge Hunt stated that:

> *The use of the word shall in the section gives the provisions a directory or mandatory flavour in that where the age or mental handicap qualifications are met, the relevant evidence shall then be given by the means specified in the section unless it shall not be in the interests of justice to do so.* [11]

It should be remembered that the use of s.16 (1) (b) is dependent on the court being satisfied that the witness is eligible under the criteria of s.27 *Criminal Evidence Act 1992. S.27* allows for the admission of unsworn testimony in any criminal proceedings of children under 14 or persons with an intellectual disability who have reached that age.[12] S.27 therefore tied in perfectly with s.16(1)(b) in terms of an under 14 complainant prior to the extension of the legislation in 2013. But the court has to be satisfied that the complainant '*is capable of*

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9 The timing of these applications may be changed with the putting of preliminary hearings on a statutory basis under Head 2 Criminal Procedure Bill (General Scheme) (last draft April 2015, Published June 2015).

10 *DPP v FE* , Bill No. 84/2013, 4th December 2015

11 *DPP v FE* , Bill No. 84/2013, 4th December 2015

12 Criminal Evidence Act 1992

27.Oath or affirmation not necessary for child etc., witness

(1) Notwithstanding any enactment, in any criminal proceedings the evidence of a person under 14 years of age may be received otherwise than on oath or affirmation if the court is satisfied that he is capable of giving an intelligible account of events which are relevant to those proceedings.

(2) If any person whose evidence is received as aforesaid makes a statement material in the proceedings concerned which he knows to be false or does not believe to be true, he shall be guilty of an offence and on conviction shall be liable to be dealt with as if he had been guilty of perjury.

(3) Subsection (1) shall apply to a person with mental handicap who has reached the age of 14 years as it applies to a person under that age.

giving an intelligible account of events which are relevant to those proceedings.' It is this criterion, the ability to give an intelligible account of events which are relevant to the proceedings, which has emerged as the competency test in this jurisdiction under *O'Sullivan v Hamill.*[13]

If the DVD is admitted under s. 16(1)(b) then there can be a follow up competency test at trial with the witness by the court before the DVD is played and before the witness is cross examined to ensure that the witness is still competent particularly if they are very young or have an intellectual disability which may affect their competency. Archbold notes[14] that the incompetency of a witness may become apparent, however, only after he has commenced to give evidence[15] and, at common law, an objection may be made at any time during the trial.[16] The recording of pre-trial testimony now means that there may be a long interval between the taking of recorded examination in chief evidence and cross-examination at trial. In *R v Powell*[17]and *R v Malicki*[18], the implication of both judgments.is that competency is an issue that remains live throughout the trial. The question of competence must be determined in the case itself; the trial judge cannot rely on a previous finding of competence by him or her or any other judge in a previous case.[19] *DPP v PP*[20] indicates that the procedure for the inquiry into the assessment of the witness is quite wide once there is no unfairness in the trial but that it is preferable to hold the inquiry prior to the evidence being heard:

> *While this Court accepts the respondent's submission that s. 27 of the Act of 1992 does not prescribe the manner or form in which the inquiry should be embarked on, it is the view of this Court that it is preferable that such an inquiry be held prior to placing the evidence before the jury. The question for this Court is*

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13 *O'Sullivan v Hamill* [1998] 2 IR 9.

14 Archbold, *Criminal Pleading Evidence and Practice* (ed. P.J. Richardson) (Sweet & Maxell 2016) Para. 8.56.

15 *Jacobs v Layborn* (1843) 11 M. & W. 685

16 *Stone v Blackburn* (1793) 1 ESp.37.

17 *R v Powell* [2006] 1 CAR 31.

18 *R v Malicki* [2009] EWCA Crim 365.

19 *People (AG) v Keating* [1953] I.R. 200 at 201.

20 *DPP v PP* [2015] IECA 152
Court of Appeal Judgement delivered on the 6th July 2015 by Mr. Justice Sheehan.

whether in the circumstances of this case, the failure to carry out a formal inquiry in advance rendered the trial unsatisfactory. [21]

Reported Irish case law

- *Donnelly v Ireland* [1998] I IR 321. This case outlines the principles in respect of the use of special measures and any modifications in how evidence is submitted to the court.
- *DO'D v DPP & anor* [2015] IECA 273 The final appeal in this case ultimately failed but judicial review proceedings regarding the use of video link where the witnesses had an intellectual disability stated that there must be an inquiry as to the need and use of video link and not just that it is used in respect of convenience of witnesses - *DO'D v. DPP and Judge Ryan [2009] IEHC 559.*[22]
- *KD v DPP and AG* [2016]IEHC 21; [2016] 1 JIC 1504 - This case confirmed that s.16 Criminal Evidence Act 1992 does not cease to apply when an injured party turns 14, Humphries J affirming the judgment in DPP v JPR (ex tempore judgment of O'Malley J on the 1st May 2013.
- *P.P. v DPP* [2015] IECA 152 [2015] 7 JIC 0602 - This case outlined that the Court's inquiry as to competence of witness should ideally be done at beginning of submission of evidence, and that recorded testimony should not be treated as exhibits (See R .v. Rawlings and R .v. Broadbent 1995 1 WLR 178).

Use of Videolink where witness is over 18 (vulnerable witnesses – offence eligible)

S.13 (1)(b) *Criminal Evidence Act 1992*

- *DPP v Ronald McManus (AKA Ronald Dunbar)* [2011] IECCA 32[23] provides some guidance from the Court of Criminal Appeal regarding the factors the court will consider in allowing a witness to give evidence via video link. The case involved the use of video link under s.13 (1)(b) *Criminal Evidence Act 1992* by a female witness who had just turned 18 and who was to give evidence against the accused, her father, in a murder trial.

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[21] at para .27 DPP v PP [2015] IECA 152

[22] *The evidence must establish to the satisfaction of the Court hearing the application under s.13 of the Act of 1992 that the probability is that the witness in question will be deterred from giving evidence at all or will, in all probability, be unable to do justice to their evidence if required to give it viva voce in the ordinary way, This is necessarily a high threshold, but I am satisfied that in order to strike a fair balance between the right of the accused person to a fair trial and the right of the public to prosecute offences of this kind, it must be so. DO'D v. DPP and Judge Ryan [2009] IEHC 559* As per O'Neill J. Judgment delivered the 17th day of December 2009.

[23] *DPP v Ronald McManus (A.K.A. Ronald Dunbar)* [2011] IECCA 32.

- EC v DPP [2016] IECA 150 – This case was similar to the facts in DPP v Dunbar and in it the Court of Appeal noted that the trial judge had examined the balancing of the rights of the defendant and the giving of evidence of the witness by video link. The trial judge stated:

  The concern, as I've said, always is that the accused is disadvantaged. Well, I can only say that my own experience of trials involving video links is that those who have a need to cross-examine persons on video link are in a position to do so and are in a position to do so effectively. The technology available does mean that the jury is in a position to observe the demeanour of the witness, are in a position to not just to consider what the witness says but how the witness says it, and all in all I'm entirely satisfied that permitting K to give her evidence by video link represents no threat to the fairness of the trial of the -- of Mr C, and it seems to me that there being no substantial threat to the fairness of the trial that the arguments presented by Dr Robertson are absolutely overwhelming, so overwhelming indeed that it's perhaps slightly surprising that, given what has been said about the risk to life, that the objection has been persisted in by the accused but there you are, it was. So, I will permit the evidence to be given.

The Court of Appeal stated at para. 115:

> *It was submitted in the written submissions filed on behalf of the appellant, although only pressed lightly in oral submissions at the appeal hearing, that there were "not sufficient grounds to allow the video link application". In our view that contention is simply untenable in the light of the testimony given by the psychiatrist. We are satisfied that the trial judge's decision to allow K to testify via a video-link was made within the scope of his legitimate and lawful discretion having regard to the terms of the statute and having regard to the evidence that he had received.*[24]

Inherent Jurisdiction

In two recent Central Criminal Court cases, the DPP invited the Courts to invoke their inherent jurisdiction to find means by which a child or vulnerable witness can be assisted to give evidence by use of further special measures and through the use of a Ground Rules

[24] EC v DPP [2016] IECA 150.

Hearing (GRH). It is submitted that the concept of a GRH should be a necessary part of the trial process when dealing with very young or vulnerable witnesses.

The idea of a ground rules hearing arose in the UK out of the training of the intermediaries, it was added to the Criminal Practice Directions, [25] and upheld by the Court of Appeal[26]. The concept of the GRH as it has developed in this jurisdiction can involve the use of some or all of the above legislative provisions together with use of further additional discretionary special measures that the Court deems appropriate. These latter may be such as were used in DPP v FE[27]:

- *Prior to cross-examination that the Complainant be introduced to Judge and SC and the Courtroom setting via video link in the absence of the jury*; (Counsel and judge called each other by first names for the duration of the Complainant's testimony.)
- *The use of informal, jargon free, terminology in the questioning of Complainant ;*
- *The dispensing of gowns and wigs* (required by statute under s.13);
- *The dispensing of tabs* (Counsel and judge wore suits for the duration of the Complainant's testimony)
- *Complainant to be allowed to view both of the DVDs in order to refresh her memory;*
- *Complainant to be given time (preferably overnight) to assimilate the content of the DVDs before she is required to give evidence;*
- *The presence of complainant's mother (off camera) in room close to the video link room as the Complainant gives her evidence;*
- *The Court to watch out for signs of stress (tensing of body etc.) in the Complainant as she gives her evidence and to allow her opportunities to pause, regroup and/or change the topic of discussion;*
- *That the tone of questioning be positive gentle and slowly paced;*
- *That the Complainant be given sufficient time to answer the questions asked of her.*
- *That questions of the Complainant be constructed in simple, concrete and open-ended language – Counsel to provide three options where possible.*

[25] See S.3E (General Matters: Ground Rules Hearings to plan the questioning of a vulnerable witness or defendant.) Criminal Practice Directions [2015] EWCA Crim 1567.

[26] *R v Lumbeba and JP* [2014] EWCA Crim 2064

[27] DPP v FE, Central Criminal Court, November / December 2015

- *In circumstances where an intermediary was not deemed to be necessary that the expert psychologist and the Specialist Interviewers be made available to prosecution and defence counsel and the judge to assist in the phrasing of questions if required*
  (It should be noted that the latter was an exceptional and unusual measure deemed appropriate in the particular circumstances of the case, it was ultimately not necessary to invoke the measure);

Questioning

During the course of a grounds rule hearing the trial judge may direct how and in what way a complainant is to be cross examined. It would be unusual for Defence advocates to use the same method of questioning for an adult as they would for a child or person with an intellectual disability, however by establishing rules for questioning it gives a complainant an advance guarantee that he or she is will not be questioned in an aggressive or complicated manner. Further taking a simpler, non-aggressive approach to cross-examination may be beneficial if or when it comes to sentencing. The case of *DPP v D.O'D (No.2)*[28] from December 2015 is the Court of Appeal stated that reducing the stress of the complainant by low key cross examination wasn't given enough weight when sentencing:

> *The court is also concerned that the learned sentencing judge did not attach sufficient weight to the manner in which the appellant participated in his trial, and particularly, the extent to which counsel for the respondent was permitted to examine Miss A without interruption or objection from the appellant's counsel, and the relatively low key cross examination of Miss A by the appellant's counsel. Undoubtedly, these are matters which could reasonably be expected to have significantly reduced the stress of the proceedings for Miss A, and which deserved specific recognition in the sentencing of the appellant.* [29]

During the course of a GRH it might be appropriate to agree to the use of short, simple questions. It may be appropriate, particularly with a witness with an intellectual disability to ensure that a witness has sufficient time to answer. It may be decided not to use tag questions. It may also be decided not to jump around in chronology or use repetitive questions. The use of expert opinion is vital when dealing with complainants with

[28] D*PP v D. O'D (No. 2)* [2015] IECA 306. Date of judgment 10th December 2015.

[29] D*PP v D. O'D (No. 2)* [2015] IECA 306 Sentence reduced from 5 years to 3 years.

communicative and or intellectual disabilities, the experts can teach, guide and assist both the advocates and the court in dealing with particularly vulnerable complainants.

The use of the ground rules hearing attempts to ensure that the child or vulnerable witness can achieve his or her best evidence and that the least amount of trauma is visited upon that witness during the course of his or her involvement in the criminal justice system. It goes without saying that methodology employed by a trial judge in ensuring that a child or vulnerable witness can achieve best evidence must not infringe the fundamental right of the defendant to a fair trial.

In order to protect the rights of the child/vulnerable witness and indeed the rights of the defendant, there is no "one size fits all" model for special measures, whatever measures are to be employed depends on the individual circumstances of each case. What is vital however for the right and appropriate measures to be utilised, is early preparation by the respective legal teams, open and frank involvement with interested parties (Complainant, Gardaí, Guardians, Parents, Experts) in order that informed decisions can be made, open and frank exchange of views and opinions with the defence legal team before a GRH and open and frank discussion with the Court during the course of a GRH.

Not "Putting the Case"

Courts have in principle accepted that it may not be strictly necessary to put one's case to a vulnerable complainant as per *Browne v Dunn.*[30] It is arguable whether the rule strictly applies in this jurisdiction when one looks at *A.C. v O'Brien J and DPP*[31] and *DPP v Burke*.[32] In England and Wales, there are modifications in respect of the Court's tolerance for the case to be put to very young vulnerable witnesses where there is an alternative.[33] In *Lubemba*[34] the Court of Appeal held:

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30 *Browne v Dunn* (1893) 6 R.67.

31 *A.C. v O'Brien and DPP* [2015] IEHC 25; [2015] 1 JIC 2103

32 *DPP v Burke*[2014] IEHC 483; [2014] 10 JIC 1703

33 *R v Lubemba (Cokesix) and JP* [2014] EWCA Crim 2064; [2015] 1 Cr. App. R. 12 (CA (Crim Div))

Also included in the Criminal Practice Directions:

"*All witnesses, including the defendant and defence witnesses, should be enabled to give the best evidence they can. In relation to young and/or vulnerable people, this may mean departing radically from traditional cross-examination. The form and extent of appropriate cross-examination will vary from case to case. For adult non vulnerable witnesses an advocate will usually put his case so that the witness will have the opportunity of commenting upon it and/or answering it. When the witness is young or otherwise vulnerable, the court may dispense with the normal practice and impose restrictions on the advocate 'putting his case' where there is a risk of a young or otherwise vulnerable witness failing to understand, becoming distressed or acquiescing to leading questions. Where limitations on questioning*

the Court is required to take every reasonable step to encourage and facilitate the attendance of vulnerable witnesses and their participation in the trial process. Save in very exceptional circumstances a ground rules hearing should be held in every case involving a vulnerable witness. The hearing should cover among other matters the general care of the witness, if, when and where the witness is to be shown their video, when where and how the parties intend to introduce themselves to the witness, the length of questioning and frequency of breaks and the nature of the questions to be asked. So as to avoid any unfortunate misunderstanding at trial it would be an entirely reasonable step for a judge at the ground rules hearing to invite defence advocates to reduce their questions to writing in advance. It is now generally accepted that if justice is to be done to the vulnerable witness and also the accused a radical departure from the traditional style of advocacy will be necessary. Advocates must adapt to the witness not the other way around. They cannot insist on 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 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 intimidation or distressing a witness.[35]

Alternatives methods of putting the case may include commenting on the evidence, including comment by the defence advocate or indeed the judge, after the child has finished giving evidence on testimony which is inconsistent or which may undermine the credibility of the child.

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are necessary and appropriate, they must be clearly defined. The judge has a duty to ensure that they are complied with and should explain them to the jury and the reasons for them. If the advocate fails to comply with the limitations, the judge should give relevant directions to the jury when that occurs and prevent further questioning that does not comply with the ground rules settled upon in advance. Instead of commenting on inconsistencies during cross-examination, following discussion between the judge and the advocates, the advocate or judge may point out important inconsistencies after (instead of during) the witness's evidence. The judge should also remind the jury of these during summing up. The judge should be alert to alleged inconsistencies that are not in fact inconsistent, or are trivial."

Criminal Practice Directions [2015] EWCA Crim 1567 at Para 3E.4

[34] *R. v Lubemba (Cokesix) and JP* [2014] EWCA Crim 2064; [2015] 1 Cr. App. R. 12 (CA (Crim Div))

[35] *R v Lubemba (Cokesix) and JP* [2014] EWCA Crim 2064; [2015] 1 Cr. App. R. 12 (CA (Crim Div)) at para 45.

Legislative Changes

A number of legislative proposals are included in draft legislation which will expand the facilitation of evidence by vulnerable witnesses in criminal proceedings. These changes are included in the *Criminal Law (Sexual Offences) Bill 2015* and the *Victims of Crime Bill* (which is still at a General Scheme stage)

Section 6 of the Criminal Law (Sexual Offences) Bill 2015 will modify the Criminal Evidence Act 1992

- It will expand the definition of 'sexual offence' to include provisions for child exploitation contained in the Act itself.[36]

Under s.35 Criminal Law (Sexual Offences) Bill 2015

- A new section 14A would provide for the giving of evidence from behind a screen or other similar device.[37]
- A new section 14B would provide that neither the judge nor lawyers will wear a wig or gown.
- A new section 14C would prohibit personal cross-examination of a child complainant or child witness in a trial for a sexual offence.

Under s.36 Criminal Law (Sexual Offences) Bill 2015, s.16 of the 1992 Act will be extended:

> "s *16 of the Act of 1992 is amended in subsection (1) by the substitution of the following paragraph for paragraph (b): "(b) a video recording of any statement made during an interview with a member of the Garda Síochána or any other person who is competent for the purpose—*
>
> *(i) by a person under 14 years of age (**being a person in respect of whom such an offence is alleged to have been committed**),*

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[36] **Criminal Law (Sexual Offences) Bill 2015**

S.32 Amendment of section 2 of Act of 1992

'sexual offence' means rape, sexual assault (within the meaning of section 2 of the Criminal Law (Rape) (Amendment) Act 1990), aggravated sexual assault (within the meaning of section 3 of that Act), rape under section 4 of that Act or an offence under— (a) section 3 or 6 of the Criminal Law Amendment Act 1885, (b) section 5 of the Criminal Law (Sexual Offences) Act 1993, 21 5 10 15 20 25 30 35 (c) section 6 of the Criminal Law (Sexual Offences) Act 1993, (d) section 1 or 2 of the Punishment of Incest Act 1908, (e) section 4A or 5A of the Child Trafficking and Pornography Act 1998, (f) section 249 of the Children Act 2001, (g) the Criminal Law (Sexual Offences) Act 2006, or (h) section 3, 4, 5, 6, 7 or 8 of the Criminal Law (Sexual Offences) Act 2016, excluding an attempt to commit any such offence;"

[37] The case of *R v Smellie* (1919) 14 Cr App R 128 (CA) already established the precedent that screens may be used in order to shield the witness from sight of the accused.

*or (ii) by a person under 18 years of age (**being a person other than the accused**) in relation to—*

(I) a sexual offence,

(II) or (II) an offence under section 3(1), (2) or (3) of the Child Trafficking and Pornography Act 1998,

(III) or (III) an offence under section 2, 4 or 7 of the Criminal Law (Human Trafficking) Act 2008,".

Under s.38 (Disclosure of third party records in certain trials)

- This will provide a narrow legislative framework for third party disclosure re. counselling records in criminal proceedings for the first time.

There are a number of Heads in the Criminal Justice (Victims of Crime) Bill 2015[38] under which the assessment and provision for support measures under the *Criminal Evidence Act 1992* may be extended.

- Head 6 *Assessment of a victim where a complaint has been made*
- Head 15 *Special measures during investigation*
- Head 16 *Special measures during trial*

In addition Part 6 *Special measures for child victims* states that

(1) A victim who is a child shall be presumed to require the special measures set out in section 15 and section 16 of this Act.

Education and Looking to the Future

- Advocacy Training in England and Wales
  - Advocate's Gateway – An amazing resource tool for all practitioners - http://www.theadvocatesgateway.org/news
  - Toolkits on the website – beginning to be used internationally and although the legislation may be different they provide a good foundation for preparation in dealing with treatment of vulnerable witnesses in criminal justice system
- Anna Giudice Saget, Justice Section, Division of Operations, UNODC (United Nations Office on Drug and Crime) noted in her paper in the IAP Conference in Dublin in

[38] (General Scheme, 8 July 2015)

September, the development of UN Guidelines, Model Strategies and Practical Measures in this area.

  - *United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice* (United Nations General Assembly - 25 September 2014)
  - *Justice in Matters involving Child Victims and Witnesses of Crime Model Law and Related Commentary* (United Nations, New York, 2009)

- Dr Miriam Delahunt - Specific articles on the most recently commenced support measure of recorded evidence.[39]

- Recorded cross-examination under s.28 *Youth Justice and Criminal Evidence Act 1999* still being piloted but national rollout can be expected in the future as results of pilot scheme are positive. (See *Conclusion of 'Process Evaluation of Pre-recorded Cross Examination s.28 Youth Justice and Criminal Evidence Act 1999*.[40] However, it should be considered that resource issues remain an issue in England and Wales as is likely to be the case in this jurisdiction and it is likely that this will be an issue here as well particularly if proposed legislation expands the need for Specialist Interviewers.

> *3F.5 In light of the scarcity of intermediaries, the appropriateness of assessment must be decided with care to ensure their availability for those witnesses and defendants who are most in need. The decision should be made on an individual basis, in the context of the circumstances of the particular case.* [41]

- Interesting research and findings may be taken from the Barnahus Model from Iceland. This model allows for a number of the children's needs including the taking of evidence, to be met in one location. It is reported that from Spring 2017, child victims of sexual abuse, will be able to give their evidence in the safety of a Child House ('Barnahus') at two London locations[42]

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[39] Video Evidence and s.16(1)(b) Criminal Evidence Act 1992 Miriam Delahunt B.L. Feb 2011 – The Bar Review.

Recorded Evidence for Vulnerable Witnesses in Criminal Proceedings - Miriam Delahunt B.L. June 2015 – The Bar Review.

[40] *Process Evaluation of Pre-recorded Cross Examination s.28 Youth Justice and Criminal Evidence Act 1999* (John Baverstock, Ministry of Justice, 15 September 2016)

[41] Criminal Practice Directions 2015 Amendment No. 1 : [2016] EWCA Crim 97 23/03/2016.

[42] '*Child abuse interviews rethink urged by children's commissioner*'

After suspected victims of sexual abuse are referred to the Barnahus by the Child Protection Service, all services are delivered under one roof, including the forensic interview, medical examination and child/family therapy. The Barnahus is an unmarked residential property, situated in a typical street which has been designed to be non-threatening and child friendly.[43]

The Barnahus model has considerable potential for England. It demonstrably overcomes many of the key challenges for agencies responding to child sexual abuse by:

— offering a safe space for children who demonstrate the signs and symptoms of abuse to disclose to professionals;

— ensuring that children are interviewed in a manner which minimises traumatisation and maximises the evidential value of their account;

— embedding the criminal justice process in the Barnahus and so eliminating the need for traumatic cross-examination; and

— enabling children to access therapeutic support rapidly and in a child-friendly location.[44]

SUMMARY

When dealing with vulnerable victims and witnesses, prosecutors need to assist the victim/witness in achieving his or her best evidence, and enable them to do so in a manner that minimises stress but does not encroach upon the right of an accused to a fair trial.

When a prosecutor takes the view that the legislative measures are insufficient he or she can, and should, ask a court to provide for additional measures by relying upon a courts inherent jurisdiction.

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14 June 2016 See http://www.bbc.com/news/uk-36524422 and http://www.theadvocatesgateway.org/news (Accessed 16th November 2016).

[43] Children's Commissioner of England. Barnahus: Improving the response to child sexual abuse in England (June 2016) at page 4.

[44] Children's Commissioner of England. Barnahus: Improving the response to child sexual abuse in England (June 2016) at page 8. (Implications for England.)

Though much can be done by way of preparation and agreement, the rules or measures that are to be employed can only be done when the jury is in charge and during the trial process. This may change with legislative reform in time and that reform will hopefully allow for pre-trial rulings. The latter will provide for certainty in relation to the measure that might be employed but at a much earlier stage in the proceedings and without having to wait for the trial to commence.

Many of the special measures could never be said to, in any way, interfere with the accused's right to a fair trial. As noted, each case depends on its own facts and circumstances, the level of vulnerability and the resources available. Therefore while in a case involving an extremely vulnerable victim with for example significant intellectual disability, numerous special measures both legislative and discretionary will be necessary. Equally there may be circumstances where one or two simple measures will be sufficient, such as an agreement that a gentle tone would be used, and breaks provided.

Some of the measures referred to in the paper maybe controversial. Prosecutors must be careful when seeking such measures that they can satisfy the Court that the rights of the accused will not be infringed. It may be that some of the measures referred to from other jurisdictions will not sit easily with our Courts system, nonetheless they provide valuable assistance in seeing how other jurisdictions have evolved as society evolves.

Legislation

Criminal Evidence Act 1992

s.13 Evidence through television link

(1) In any proceedings [(including proceedings under section 4E or 4F of the Criminal Procedure Act, 1967)] for an offence to which this Part applies a person other than the accused may give evidence, whether from within or outside the State, through a live television link—

(2) Evidence given under subsection (1) shall be video recorded.

(3) While evidence is being given through a live television link pursuant to subsection (1) (except through an intermediary pursuant to section 14 (1)), neither the judge, nor the barrister or solicitor concerned in the examination of the witness, shall wear a wig or gown.

s.14 Use of intermediaries

14. Evidence through intermediary

(1) Where—

(a) a person is accused of an offence to which this Part applies, and

(b) a person under 18 years of age is giving, or is to give, evidence through a live television link,

the court may, on the application of the prosecution or the accused, if satisfied that, having regard to the age or mental condition of the witness, the interests of justice require that any questions to be put to the witness be put through an intermediary, direct that any such questions be so put.

(2) Questions put to a witness through an intermediary under this section shall be either in the words used by the questioner or so as to convey to the witness in a way which is appropriate to his age and mental condition the meaning of the questions being asked.

(3) An intermediary referred to in subsection (1) shall be appointed by the court and shall be a person who, in its opinion, is competent to act as such.

s.16(1)(b) Video-recording as evidence at trial

(1)(b) a video-recording of any statement made during an interview with a member of the Garda Síochána or any other person who is competent for the purpose—

(i) by a person under 14 years of age (being a person in respect of whom such an offence is alleged to have been committed), or

(ii) by a person under 18 years of age (being a person other than the accused) in relation to an offence under—

(I) section 3(1), (2) or (3) of the Child Trafficking and Pornography Act 1998, or

(II) section 2, 4 or 7 of the Criminal Law (Human Trafficking) Act 2008,

shall be admissible at the trial of the offence as evidence of any fact stated therein of which direct oral evidence by him would be admissible:

Provided that, in the case of a video recording mentioned in paragraph (b), the person whose statement was video recorded is available at the trial for cross-examination.

(a) Any such video-recording or any part thereof shall not be admitted in evidence as aforesaid if the court is of opinion that in the interests of justice the video-recording concerned or that part ought not to be so admitted.

(b) In considering whether in the interests of justice such videorecording or any part thereof ought not to be admitted in evidence, the court shall have regard to all the circumstances, including any risk that its admission will result in unfairness to the accused or, if there is more than one, to any of them.

(3) In estimating the weight, if any, to be attached to any statement contained in such a video recording regard shall be had to all the circumstances from which any inference can reasonably be drawn as to its accuracy or otherwise.

(4) In this section "statement" includes any representation of fact, whether in words or otherwise.

Section 16(1)(b) commenced by art.2 of the Criminal Evidence Act 1992 (Section 16(1)(b))

(Commencement) Order 2008 (S.I. No. 401 of 2008) with effect from October 15, 2008. Paragraph (1)(b) substituted by s.4(b) of the Criminal Law (Human Trafficking) (Amendment) Act 2013 (No. 24 of 2013) with effect from August 9, 2013.

19. Application of Part III to persons with mental handicap

The references in sections 13 (1) (a), 14 (1) (b), 15 (1) (b) and [16(1)(a) and (b)(ii) to a person under 18 years of age and the reference in section 16(1)(b)(i)] to a person under 14 years of age shall include references to a person with mental handicap who has reached the age concerned.