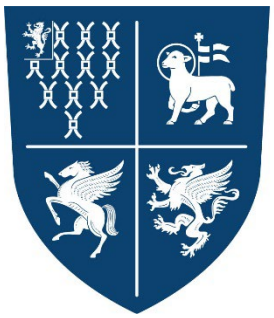

The Inns of Court College of Advocacy

Advocacy and the Vulnerable (Crime)

National Training Programme

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Contents

Introduction

In the last 25 years a wealth of statute, procedure, caselaw and best practice has been developed to assist vulnerable people and children, including defendants, to effectively participate in criminal proceedings. This paper is a brief summary of those developments.

Competence

All witnesses, regardless of age (or disability) are deemed competent to give evidence.[1] So far as is relevant to this paper, a person is not deemed competent if it appears to the court that they are unable to understand questions put to them as a witness and give answers thereto which can be understood.[2]

The court determines any assessment of competence on the balance of probabilities. And it does so on the basis that the witness would be given any special measure that has been or will be given.[3]

The age of the witness is not, therefore, determinative and the Equal Treatment Bench Book (ETBB)[4] emphasises that what is **not** required is for "*the witness to understand every question, or to give a readily understood answer to every question; the test is not failed because the forensic techniques of the advocate or court processes have to be adapted to enable witnesses to give the best evidence of which they are capable.*"[5]

Special measures: those applying to witnesses other than defendants

The YJCEA 1999 (as amended by the Coroners and Justice Act 2009 and the Domestic Abuse Act 2021), introduced measures to assist 'vulnerable' or 'intimidated' witnesses in giving evidence. The following categories of witness are eligible for assistance:

- All witnesses under 18 at the time of the hearing or video recording (automatic eligibility).[6]
- Vulnerable witnesses affected by a mental or physical impairment, the quality of whose evidence is likely to be diminished as a result.[7]
- Witnesses in fear or distress about testifying, the quality of whose evidence is likely to be diminished as a result.[8]
- Adult complainants of sexual/trafficking/exploitation/domestic abuse offences, unless the witness opts out.[9]

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1 Section 53(1) Youth Justice and Criminal Evidence Act 1999 (YJCEA 1999).
2 Section 53(3) YJCEA 1999.
3 Section 54(3) YJCEA 1999.
4 February 2021 edition with April 2023 revisions.
5 ETBB, chapter 2, Children, Young People and Vulnerable Adults at [36].
6 Section 16(1)(a) YJCEA 1999.
7 Section 16(2)(a) and (b) YJCEA 1999.
8 Section 17(1) YJCEA 1999.
9 Section 17(4) YJCEA 1999. Note that section 62 of the Domestic Abuse Act 2021 amended s.17(4) so that domestic abuse complainants (as defined under s1 of the Domestic Abuse Act 2021) were automatically eligible for certain special measures.

- Witnesses to a 'relevant offence' (homicide or offences involving firearm or a knife) unless the witness opts out.[10]

The '*quality of evidence*' is defined by its completeness, coherence and accuracy.[11]

The primary rule under sections 21 and 22 YJCEA 1999 is that the Court will direct special measures for a child or qualifying witness (one who is under 18 at the time of video recording). The special measure granted will be that the video recording of an interview with the witness will take the place of examination-in-chief and that a live link is granted for cross-examination; or screens will be ordered. In these circumstances no application need be made to the court.[12]

For witnesses who are not automatically eligible, the court must take into account any views of the witness when deciding whether a witness falls within that section. Where the court determines a witness is eligible, the court must determine which measures, or combination of them, would be likely to improve the quality of their evidence.[13] The views of a witness, or their carer, as to which measures would be most appropriate, should be considered.

The measures available are:

- Screening the witness from the defendant.[14]
- Giving evidence by live link, accompanied by a supporter.[15]
- Giving evidence in private (available only for sex offence, human trafficking cases, domestic abuse offence or where there is a fear the witness may be intimidated).[16]
- Removal of wigs and gowns when the witness gives evidence.[17]
- Video recorded evidence in chief.[18]
- Video recorded cross-examination and re-examination where the evidence in chief has already been video recorded.[19]
- Examination through an intermediary for a young or incapacitated witness.[20]
- Provision of communication aids for a young or incapacitated witness,[21] and
- A witness anonymity order.[22]

The long awaited fourth edition of the Ministry of Justice guidance Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses, and guidance on using special measures was published on 31 January 2022 and last updated on 21 June 2023.

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10 Section 17(5) YJCEA 1999.
11 Section 16(5) YJCEA 1999.
12 CPR 18.9.
13 Section 19(2) YJCEA 1999.
14 Section 23 YJCEA 1999.
15 Section 24 YJCEA 1999.
16 Section 25 YJCEA 1999.
17 Section 26 YJCEA 1999.
18 Section 27 YJCEA 1999.
19 Section 28 YJCEA 1999.
20 Section 29 YJCEA 1999.
21 Section 30 YJCEA 1999.
22 Section 86 Coroners and Justice Act 2009.

The guidance notes the importance of early identification for vulnerable witnesses and to ensure that there is a holistic assessment.[23] The Guidance includes useful flowchart figures at 5.1, 5.2 and 5.3 which outline the potential special measures directions that may be made for witnesses under 18, over 18 and for vulnerable defendants.

Criminal Procedure Rules and Practice Directions

The Criminal Procedure Rules 2020 (CPR) and the Criminal Practice Direction 2023 (CPD) are the law. They provide significant and detailed guidance on the approach that parties should take with witnesses, and defendants, who are in need of assistance.

The following parts of the CPR are of particular note:

- 3.8 – which notes the duty on the court to encourage and facilitate the attendance of witnesses and to facilitate the participation of any person, including the defendant. This includes directions for appropriate treatment and questioning of that person.
- 3.9 – which relates to Ground Rules Hearings (GRH).
- 18 – measures to assist a witness or defendant to give evidence.

Chapter 5 of the CPD - Trial Management - and, in particular, chapter 6 - Vulnerable people and witness evidence - are essential reading.

Professional Competence/Guidance:

It can no longer be doubted that practitioners must adapt their approach to vulnerable persons:

> *"There is now widespread recognition that the questioning of children and vulnerable people is a specialist skill [and]…that the more traditional and robust style of cross-examination does not achieve best evidence from a child or vulnerable person. Such an approach is unfit for the task of enabling a jury to assess the credibility and the accuracy of a vulnerable witness's evidence and it leads to the traumatisation of those least able to cope".*[24]

Advocates should ensure that they are familiar with the toolkits through The Advocate's Gateway, which include:

- Planning to question someone with autism, a learning disability or hidden disability.
- Planning to question a child or young person.
- Effective participation of young defendants.
- Identifying vulnerability in witnesses.
- General principles when questioning witnesses and defendants with mental disorder.

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[23] See [1.10].

[24] Rook and Ward on Sexual Offences Law and Practice 6th Edition, at 28.02 – Sweet and Maxwell

These toolkits are explicitly referred to in the CPD which notes that they are a "*valuable resource*" and that they should be used by advocates and Judges.[25] Advocates should be aware that some of these resources have not been updated for some time.

In addition, advocates should be familiar with The 20 Principles of Questioning – A Guide to the Cross-Examination of Vulnerable People and Children (2022) from the ICCA. These principles are specifically referred to in the latest PTPH form within the section: "Young / Vulnerable / Intimidated Defendants - Measures to assist that can be granted at PTPH".

This Guidance includes 13 specific principles for questioning which notes the importance of signposting, structured questioning, avoiding repetition and tagged questions etc.

The above should be considered as an essential part of the specialist training which Thomas CJ outlined was necessary for advocates who were dealing with young or vulnerable witnesses in *R v Rashid* [2017] EWCA Crim 2. That was a case where the defence appealed a refusal to grant the defendant an intermediary. The Court stated that in deciding what is needed in a case, the Judge "*must take into account the fact that an advocate…will have undergone specific training and must have satisfied himself or herself before continuing to act for the defendant or in continuing to prosecute the case, that the training and experience of that advocate enabled him or her to conduct a case in accordance with proper professional competence.*"[26]

The Court of Appeal has emphasised, in *R v Grant Murray* [2017] EWCA Crim 1228, the necessity of ICCA training and, in *R v YGM* [2018] EWCA Crim 2458, the importance of advocates and Judges being up to date with current best practice in the treatment of vulnerable witnesses.

In the more recent case of *R v Biddle* [2019] EWCA Crim 86, the Court of Appeal stated that Judges at pre-trial and GRH should check that advocates have undergone the necessary training.

Vulnerability

The CPR and CPD make clear that the court is under a duty to provide assistance and make reasonable adjustments for witnesses/defendants who present with vulnerabilities that fall outside of the definition of vulnerable within the special measures legislation. However, there remains no universal definition of vulnerability within the criminal justice system. As the authors of Rook and Ward note, this is not without issue:

> *"[t]he terminology used by the Court of Appeal, in the CPR and in the CPD, is inconsistent and leads to confusion. As a result, judges and practitioners struggle to determine who is "vulnerable", and therefore what their duties towards them are."*[27]

Vulnerability is, therefore, a question of fact to be determined in each case and the views of each and every witness/defendant will be significant. Advocates should not assume that vulnerability would already have been, or has been, identified. If there is doubt about the existence of vulnerability, or its impact, expert advice should be sought. Parties should be cognisant that vulnerability can fluctuate, so the issue should be kept under review throughout the case.

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25 At [6.1.2].
26 At [80].
27 Rook and Ward on Sexual Offences Law and Practice 6th Edition, at 28.15 – Sweet and Maxwell

Flexibility

A flexible approach is needed to accommodate vulnerable people's needs. Courts will need to be creative in respect of physical and mental health disabilities and impairment. Appendix B of the ETBB contains a glossary of the more common forms of disability and impairment and suggests reasonable adjustments that could be made.

Dame Joyce Plotnikoff and Richard Woolfson have published *Falling short: a snapshot of young witness policy and practice for the NPCC* (February 2019), in which they outline other examples given by Judges of reasonable adjustments they have made:

- A four year-old giving evidence in the live link room while sitting on a rocking horse.
- Use of a mobile live link from the child's home.
- Restricting questions to five at a time, then taking a short break.
- Providing paddles or sticks of different colours for children to raise if they did not understand a question 'on the basis that they do not verbally say "I don't understand".
- Accommodating a child with an obsessive-compulsive disorder which included regular hand washing. 'I directed if he needed to, he would point to a card only he and his intermediary could see and he would be allowed to leave without saying anything, escorted by an usher to a toilet facility nearby'. Similar arrangements included letting a child with urinary urgency go to the toilet without seeking permission first and arranging access to a shower at court for a child at risk of soiling.
- Face-to-face cross-examination in the live link room, sometimes with both counsel and the Judge and sometimes just the cross-examiner. On occasion, counsel 'joined in playing with toys with the child'.
- Letting a 'a deeply traumatised' witness, using the live link, to write down her answers and have them read out by the usher, with whom the witness had a good rapport.
- Allowing the witness's mother (not a witness) to accompany the child while giving evidence in the live link room, and permitting a police liaison officer to wait outside the link room 'so she was readily accessible if the witness was suddenly distressed, and needed the comfort of someone with whom she had built up a rapport'.
- Having vulnerable witnesses at Truro Crown Court accompanied by a trained therapy dog in the waiting room, live link room or in court. The dogs are provided through a national charity and are brought to court by their handler/owner.

Ground Rules Hearings (GRH)

CPR 3.8(6) notes that facilitating the participation of any person includes giving directions for the appropriate treatment and questioning of them, especially where such questioning is to be conducted through an intermediary.

A GRH is good practice in every case where there is a young or vulnerable witness or defendant, in order to determine the parameters for their treatment (including questioning) at trial. A GRH is mandatory where an intermediary is to be used and is part of the procedure for s.28 cases. Save in exceptional circumstances, it

should be held before the trial date with the trial advocates and any intermediary present. A further GRH can be held where this is required.[28]

Where an intermediary is appointed, the hearing can establish how questions should be put to help the witness understand them, and how the intermediary will alert the court if the witness has not understood or needs a break.

CPR 3.8(7) notes that where directions for appropriate treatment and questioning are required, the court must—

a) invite representations by the parties and by any intermediary; and

b) set ground rules for the conduct of the questioning, which rules may include—

   i) A direction relieving a party of any duty to put that party's case to a witness or a defendant in its entirety.

   ii) Directions about the manner of questioning.

   iii) Directions about the duration of questioning.

   iv) If necessary, directions about the questions that may or may not be asked.

   v) Directions about the means by which any intermediary may intervene in questioning, if necessary.

   vi) Where there is more than one defendant, the allocation among them of the topics about which a witness may be asked, and

   vii) Directions about the use of models, plans, body maps or similar aids to help communicate a question or an answer.

Regard must be had to CPD at [6.16 – 6.1.11] which can be distilled as follows:

- A Judge is under a duty to stop over-rigorous or repetitive cross-examination of a child or vulnerable witness/defendant. The risk of this can be reduced by the GRH process.
- Any limitations set on questioning should be clearly defined, enforced and directions should be given to the jury about the limitations and, where appropriate, circumstances when counsel do not comply with these.
- Accommodating the needs of young and/or otherwise vulnerable people may require a radical departure from traditional cross-examination. In most cases the defence case should still be put, but this may be limited or dispensed with in an appropriate case (see caselaw below).
- Rather than exploring true and significant inconsistencies through cross-examination, this may properly be done after cross-examination as well as in summing up. Consultation should take place between the advocates and the Judge about this.
- In multi-defendant cases, repeated questioning should be avoided, and topics divided.
- Special caution is required in sexual offence cases. Judges should not permit advocates to ask the witness to point to a part of their own body. Similarly, photographs of the witness' body should not be shown while they are giving evidence.

[28] CPD at [6.1.4].

Judges can invite defence counsel to submit their proposed questions of a vulnerable witness in writing in advance. The hearing should cover, amongst other matters, "*the general care of the witness, if, when and where the witness is sot be shown their video interview, when where and how the parties (and the judge if identified) intend to introduce themselves to the witness, the length of questioning and frequency of breaks and the nature of the questions to be asked*".[29]

It is very likely after such discussion that there will be specific limitations on questioning. Any limitations should be witness and case specific and they should be clearly defined.

The 'trial practice note', created after the GRH may include:[30]

- An agreed description of the nature of the witness/defendant's vulnerability.
- A list of any particular developmental issues/milestones reached or unattained, which should be taken into account when questioning and in trial management.
- For those with learning disabilities/a mental health diagnosis, an outline of particular concerns which should inform questioning or trial management.
- Any adaptations to the trial arrangements that are considered necessary – such as breaks, length of sessions etc.
- Any arrangements made for the editing and judicial approval of questions to be asked in cross-examination, where appropriate.
- Where questions are to be committed to writing and subject to judicial editing, with or without input from an intermediary, then, as a general rule, the proposed questions must be shared with the other parties to the trial.
- What arrangements are to be made for memory refreshment pre-trial.
- Time limits set, or subject boundaries for questioning identified.
- How a prompt start for the witness' evidence will be ensured.
- How a witness will be provided with material to be referred to in cross-examination.

Section 28 – video recorded cross-examination

The section 28 scheme has vastly expanded. It is currently eligible for:

- Vulnerable witnesses as defined under section 16 (i.e. under 18, suffers from a mental disorder or otherwise has a significant impairment of intelligence and social functioning or has a physical disability or is suffering from a physical disorder).
- Vulnerable witnesses as defined under section 17 (complainants in sexual offences, offences under s.1 or 2 of the Modern Slavery Act and for witnesses in Schedule 1A cases which are predominantly knife/firearm offences).

[29] R v Lubemba; R v JP [2014] EWCA Crim 2064 at [42-43].

[30] CPD at [6.1.5] and ETBB chapter 2 Children, Young People and Vulnerable adults at [149].

However, there is a distinction between the courts as to whether the section 28 procedure has been implemented: all courts should now provide for eligibility under section 16 and further extensions were given for the rollout of eligibility under section 17.

A section 28 direction can only be made where there is a recorded ABE interview within section 27.

CPD 6.3 sets out at length the procedure to be followed under section 28. In cases where the section 28 procedure applies The Protocol to expedite cases involving children under 10 no longer applies. In all cases the s.28 preliminary hearing form and the defence s.28 GRH form must be completed.

It is of note that under the new CPD, continuity of counsel is encouraged but is no longer mandatory.[31] The decision behind this change appears to be based on prioritising listing such cases expeditiously.

Intermediaries

An intermediary is a communication specialist (not a supporter or an expert witness) whose role is to facilitate communication between the witness and court, including the advocates.

The CPD at [6.2.1] notes that "*[t]heir primary function is to improve the quality of evidence and aid understanding between the court, the advocates and the witness or defendant. Intermediaries are independent of parties and owe their duty to the court*".

Section 29 YJCEA 1999 notes that the function of an intermediary is to communicate to the witness, put question to the witness, and to any person asking such questions, the answers given by the witness in reply to them, and to explain such questions or answers so far as necessary to enable them to be understood by the witness or person in question.

It is permissible for an advocate to consult with an intermediary privately when formulating questions for a witness. It is common procedure that the court directs that advocates' draft questions be provided to the intermediary in advance of cross-examination. An intermediary can be used at trial even if the ABE was conducted without one.[32]

Witnesses, prosecution and defence, can only be eligible for an intermediary under s.16 YJCEA 1999.

There is an apparent distinction between the best practice and the actualisation of this. The ETBB notes that "*[a]ssessment by an intermediary should be considered if the person seems unlikely to be able to recognise a problematic question or, even if able to do so, may be reluctant to say so to a questioner in a position of authority. Studies suggest that the majority of young witnesses, across all ages, fall into one or other or both categories.*"[33] However, there remains a scarcity of intermediaries which creates issues of prioritisation.

Where directions for appropriate treatment and questioning are required, the court must invite representations by the parties and any intermediary.[34]

At trial, the Judge will need to explain the role of the intermediary to the jury at the outset and, in neutral terms, any particular health problems of the witness.[35]

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31 At [6.3.51].

32 See in particular ETBB at chapter 2, Children, Young People and Vulnerable Adults at [117].

33 ETBB at [113].

34 CPR 3.8(7)(a).

35 Crown Court Compendium at 3-7.

An application for an intermediary must be made in accordance with CPR part 18. The Witness Intermediary Scheme, which identifies intermediaries for witnesses, is run by the NCA and may be used for a witness for the prosecution and defence. The Divisional Court in R (OP) v Secretary of State for Justice [2014] EWHC 1944 noted the distinct benefits of the registered intermediary scheme.

For the procedure regarding intermediaries see CPD at [6.2] and The Advocate's Gateway Toolkit 16 on intermediaries (last updated 2019). Detailed guidance can also be found in the Registered Intermediary Procedural Guidance (2023) at parts 3-5.

Intermediaries: Defendants

Statutory provisions to provide an intermediary to an eligible defendant whilst giving evidence are not yet in force. Instead, the court may appoint an intermediary relying on its inherent powers (C v Sevenoaks Youth Court [2009] EWHC 3088 (Admin)). There is no presumption that a defendant will be so assisted and, even where an intermediary would improve the trial process, appointment is not mandatory. The court should adapt the trial process to address a defendant's communication needs (R v Cox [2012] EWCA Crim 549).[36]

If the court directs that an intermediary should be appointed, this may be for the full trial or limited to the defendant giving evidence.[37] A trial will not be unfair because a direction to appoint an intermediary for a defendant is ineffective.[38] It remains the court's responsibility to adapt the process to the defendant's needs.[39]

It should be noted that the comments made in Rashid [2017] EWCA Crim 2, that it would be 'rare'[40] for the court to appoint an intermediary, is to be seen in the context of all cases which come before the court, as opposed to the smaller context of those in which applications are made for an intermediary (see Thomas (Dean) [2020] EWCA Crim 117 & TI v Bromley YC [2020] EWHC 1204 (Admin) below).

CPD at [6.4.2.d] also highlights the merit of applications for a support worker or other companion for a Defendant who is vulnerable or who has communication difficulties.

Significant caselaw

R v Baker [2010] EWCA Crim 4. The landmark case that triggered the change in approach to cross-examination of child witnesses: "*it should not be over problematic for the advocate to formulate short, simple questions which put the essential elements of the defendant's case to a witness, and fully ventilate before the jury areas of evidence which bear on the child's credibility*".[41] "*Comment on the evidence, including comment on evidence which may bear adversely on the credibility of the child, should be addressed after the child has finished giving evidence*".[42]

R v Wills [2011] EWCA Crim 1938. Where it was necessary to place limitations on cross-examination, Judges had a duty to ensure those limitations were compiled with. Where appropriate, the Judge should explain the limitations to the jury and the reasons for them. It was also deemed appropriate that defendants do not perceive the cross-examination by their advocate less effective than that of another

36 See CPD at [6.2.4].
37 CPD at [6.2.5].
38 CPD at [6.2.7].
39 CPD at [6.2.4].
40 At [84].
41 At [42].
42 At [43].

who does not comply with directions about the treatment and questioning of a witness.[43] If counsel fails to comply with limitations, it is important the judge gives a direction to jury when that occurs.[44]

As was stated in R v Barker, inconsistencies during cross-examination of a vulnerable witness could be drawn to the jury's attention at or about the time when evidence was given, and not just in closing speeches at the end of trial. Important inconsistencies could be pointed out after the vulnerable witness has finished giving evidence, either by the advocate or, perhaps more likely, by the Judge following discussion with the advocates.[45]

R v Edwards [2011] EWCA Crim 3028. The Defendant's right to a fair trial was not compromised because his advocate could not cross-examine in the 'traditional' way. The judge had directed the jury to "*make fair allowances for the difficulties faced by the defence"* by the limits imposed on cross-examination.[46]

R v S [2014] EWCA Crim 1730. Where a child witness refused to answer questions in cross-examination, the trial was not unfair when the Judge instead asked the questions, as drafted by defence counsel: "*[w]hat mattered was not who had asked the questions, but the answers that had been given*". And the jury were appropriately directed as to the approach to be taken to this part of the evidence.[47]

R v Lubemba; R v JP [2014] EWCA Crim 2064. Essential reading. Guidance was given on the procedure to follow when deciding whether cross-examination of a vulnerable witness was appropriate. The duties of advocates was also outlined:

> *42. "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…The ground rules for the treatment of a vulnerable witness. We would expect a ground rules hearing in every case involving a vulnerable witness, save in very exceptional circumstances. If there are any doubts on how to proceed, guidance should be sought from those who have the responsibility for looking after the witness and or an expert.*
>
> *43. In general, experts recommend that the trial judge should introduce him or herself to the witness in person before any questioning, preferably in the presence of the parties…The ground rules hearing should cover, amongst other matters, the general care of the witness, if, when and where the witness is to be shown their video interview, when, where and how the parties (and the judge if identified) 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.*
>
> *43. …The trial judge is responsible for controlling questioning and ensuring that vulnerable witnesses and defendants are enabled to give the best evidence they can. The judge has a duty to intervene, therefore, if an advocate's questioning is confusing or inappropriate.*

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43 At [36].
44 At [38].
45 At [39].
46 At [28].
47 At [22-23].

> *44. …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 intimidation or distressing a witness."*

So, in limited circumstances, advocates were permitted, or required, not to put the case to a vulnerable witness. However, the later case of R v RK (see below) confirmed that this should be done where possible.

R v Pipe [2014] EWCA Crim 2570. A trial did not necessarily need to be stopped where the complainant became too emotionally distressed to complete cross-examination. It was right that what remained of her evidence, medical records showing inconsistencies, could properly be reduced to admissions.

R v Rashid [2017] EWCA Crim 2. This case provides authority on the use of intermediaries, and the necessity for advocates to undertake vulnerable witness training. An advocate's competence in such cases "*includes the ability to ask questions without using tag questions, by using short and simple sentences, by using easy to understand language, by ensuring that questions and sentences were grammatically simple, by using open ended prompts to elicit further information and by avoiding the use of tone of voice to imply an answer. These are all essential requirements for advocacy whether in examining or cross-examining witnesses or in taking instructions. An advocate would in this court's view be in serious dereliction of duty to the court, quite apart from a breach of professional duty, to continue with any case if the advocate could not properly carry out these basic tasks.*"[48]

R v SG [2017] EWCA Crim 617. The 18 year-old complainant became distressed during evidence. The Judge ordered that further questions be drafted in advance and restricted subsequent cross-examination. There had been no GRH and the complainant was recovered the following day and finished her evidence. The CoA held that the trial Judge had been mistaken when he treated her as a 'vulnerable' witness, albeit noting that it had been necessary to take case management steps to reduce her distress:

> *"In deciding on the right course of action when a witness becomes distressed while giving evidence, it is important for the court to hold a balance. On the one hand the court must bear in mind the importance of a witness being able to give the best evidence they can (see CPD1 3E.4) without being harassed by the form or nature of the questioning. On the other hand, it must also weigh in the balance the potentially conflicting interest of a defendant in being able properly to challenge a witness's account. There may be a number of reasons for signs of distress. Witnesses may find giving evidence in court (and reliving their experiences through their evidence) to be highly stressful. On the other hand, there may be a reason which might be said to favour the defence: a witness may have been caught out in a lie or may be apprehensive about being challenged in relation to an untruthful account given in evidence. Importantly in the present context, a witness exhibiting signs of distress is not necessarily to be treated as a vulnerable witness."*[49]

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48 At [80].

49 At [58].

R v Dinc [2017] EWCA Crim 1206. Further guidance was given on the questioning of vulnerable witnesses. This case is one of a series where the CoA found appellants were unable to demonstrate that there was a proper question they had been prevented from asking or an issue that was not aired:

> *"There is nothing inherently unfair in restricting the scope, structure and nature of cross examination and or in requiring questions to be submitted in advance, in any case involving a child witness...*
>
> *Far from prejudicing the defence, it is the experience of many trial judges that the practice ensures that defence advocates ask focussed and often more effective questions of a vulnerable child witness...A list of admissions of behaviour or previous inconsistent statements that potentially undermine the complainant's credibility can be put before the jury to cover those issues on which questioning is restricted. The combination of admissions and focussed cross examination can produce a powerful defence case".*

The Court reaffirmed that in appropriate cases, and not just those under the s28 scheme, where the witness is young/suffers from a mental disability or disorder, advocates may be required to prepare their cross-examination for the court's consideration. It was clarified that the case of R v SG [2017] EWCA Crim 617 did not hold that a Judge should only require a list of questions in advance for the court's approval in exceptional cases. The Crown Court Compendium states that at a GRH "*the defence advocate must serve on the court and on the prosecution a copy of the list of proposed questions to be put to the young or vulnerable witness*".[50]

R v RK [2018] EWCA Crim 603. The Court expressed disapproval of an increasing practice by the defence not to cross-examine a vulnerable, particularly a child, witness. If a child witness was assessed as competent, the Court would generally expect them to be called to give evidence and be cross-examined, with appropriate special measures in place. In that case defence counsel had declined to cross-examine a 3 year-old witness, despite assistance from an intermediary being available.

The Court stated that there is "no reason to avoid putting the defence case by simple, short and direct questions. Although this court has in the past doubted the right to put every aspect of the defence case to a vulnerable witness, whatever the circumstances, it has not questioned the general duty to ensure the defence case is put fully and fairly and witnesses challenged, where that is possible."[51]

R v Hampson [2018] EWCA Crim 2452. Best practice was set out for cases in s.28 cases, as follows:[52]

1. At the GRH, the Judge should discuss with the advocates how and when any limitations on questioning will be explained to the jury.
2. If this has not happened, or there have been any changes, the Judge should discuss with the advocates how any limitations on questioning will be explained to the jury before the recording of the cross-examination is played.
3. The Judge can give the jury the standard direction on special measures with a direction on the limitations that the Judge has imposed on cross-examination and the reasons for them before the recording is played.

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50 At chapter 10-5 Evidence of children and vulnerable witnesses at [14].

51 At [27].

52 At [21]. The Crown Court compendium highlights the case has wider application to vulnerable witnesses generally – 10-5 evidence of children and vulnerable witnesses at [6].

4. The Judge should consider if it is necessary to have a further discussion with the advocates before their closing submissions and the summing-up on the limitations imposed and any areas where those limitations have had a material effect. In this way, the advocates will know the areas upon which they can address the jury.

5. In the summing-up, the Judge should remind the jury of the limitations imposed and any areas identified where they have had a material effect upon the questions asked.

6. If any written directions are provided to the jury, the Judge should include, with the standard measures direction, a general direction that limitations have been imposed on the cross-examination.

It does not follow that a failure to follow the above will mean that a conviction is unsafe.

R v YGM [2018] EWCA Crim 2458. The issue on appeal was whether the balance had tipped too far in favour of the child witness. The CoA rejected this. Further guidance was given on best practice in vulnerable witness cases, in particular on jury directions when limitations are placed on cross-examination: directions should be given before cross-examination, potentially after, and certainly in summing up.

> *"First, the identification of any limitations on cross examination should take place at an early stage. We assume that this will occur at the ground rules hearing where the judge will discuss with the advocates the nature and extent of the limitations imposed and whether they are simply as to style or also relate to content. Before the witness is cross examined, it is best practice, (as recommended by the Judicial College) that as well as giving the standard special measures direction, the trial judge also directs the jury in general terms that limitations have been placed on the defence advocate. If any specific issues of content have been identified that the cross examiner cannot explore, the judge may wish to direct the jury about them after the cross examination is completed. On any view, the judge should direct the jury about them in the summing-up."*

The ETBB contains a helpful summary of questioning techniques at chapter 2 – Children, Young People and Vulnerable Adults at [160 – 164].

R v Mahomud [2019] EWCA Crim 667. This was a multi-defendant case in which the defendants had run a 'cut-throat' style defence. The appellant had the benefit of an intermediary. Counsel for a co-accused made a number of comments in relation to this in their closing speech. The CoA gave important guidance as to the limits as to the comments and questioning that could be made in this context:

> *"he was entitled to suggest that the appellant was sheltered from more robust questioning by the provision of an intermediary. That is a standard argument advanced and indeed this court has endorsed more than once that a judge should direct the jury that the effect of a special measure may mean that an advocate may not ask questions of the witness in the usual form…[counsel] was also entitled to ask questions about the level of the appellant's functioning, as we have indicated, provided that it was relevant to an issue in the case."*[53]

The Court also held that the Judge was right in this case not to admit into evidence contents of the intermediary report: *"A trial judge will allow the instruction of an intermediary to a witness or a defendant to assist them in communicating and participating in the trial. The role of an intermediary is not to provide expert or professional opinion on the level of cognitive skills or intellectual functioning of a defendant or*

[53] At [26].

witness… If evidence of cognitive skills or intellectual functioning is both relevant and admissible, it should come from an expert suitably qualified to comment."[54]

Le Brocq v Liverpool Crown Court [2019] EWCA Crim 1398. During their closing speech defence counsel made disparaging comments on the section 28 process, that it led to a "*virtual emasculation of the defence case*" and that it led to "*pussy-footing around the issues and not putting them directly*." The CoA noted that the criticism was laid at the GRH process which they stated to be "*a fundamental part of the way in which evidence is now presented from young and vulnerable witnesses*."[55] They noted that the "*purpose of cross-examination is to elicit evidence. It [the GHR] ensures that the evidence of a witness is properly tested when in conflict with the case of the party cross-examining. It is not designed to be an opportunity for theatricality nor for an advocate to demonstrate robustness in the sense of being antagonistic or as the judge put it, engaging in "aggressive, repetitive and oppressive questioning"…The purpose of cross-examination is not to discomfort, harass or abuse a witness for the sake of it*."[56]

The CoA held that the advocate's comments should not have been made. The Court held this aligned with the decision in *Mahomud* [2019] (above). There was a distinction between the argument that the witness was sheltered, to one that the trial was unfair by the procedure.[57]

R v RT [2020] EWCA Crim 155. In a multi-defendant case a vulnerable 16 year-old refused to continue giving evidence during cross-examination of the first defendant and before the case had been put. The Court held that the conviction was safe as the defence had, nevertheless, been able to fairly present their cases and any unfairness was accommodated by the trial process. The Court noted at [40] "*that fairness in court proceedings extends to complainants and witnesses. The law and practice in relation to the questioning of vulnerable witnesses has developed.*" One of the reasons the Court gave for finding that it was fair for the trial to proceed was that the witness' refusal correlated to "*unfortunate questioning*" which explained their refusal to carry on.[58]

R v A [2022] EWCA Crim 988. The Judge had erroneously allowed the complainant's evidence in cross-examination to be adduced by way of pre-recorded video evidence at a time when, in the circumstances of the case, s.28 was not available to the court. The CoA held that the use of the s.28 procedure had not affected the safety of the offender's conviction: "*it seems to us that this part of the appellant's case is based on a misconception, namely that the receipt of the pre-recorded cross examination of a witness is unfair to a defendant without more. Different measures have been adopted over time for the receipt of evidence to refine and improve the criminal trial process – including the use of screens, live links and the receipt of prerecorded evidence. Provided the relevant safeguards are in place, there is nothing inherently unfair to a defendant in the jury receiving such evidence*."[59]

The CoA further held that it could not be said that amendments made to the questions to be put in cross-examination had undermined the conviction. They were considered to be "*unobjectionable*" in a "*sensitive case in which an allegation of sexual assault was made by one young family member against another – and where…the complainant was barely out of her teens*".[60]

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54 At [24].
55 At [61].
56 At [62].
57 At [63].
58 At [42].
59 At [16].
60 Penultimate paragraph of the Judgment.

Vulnerable Defendants

R v Grant-Murray [2017] EWCA Crim 1228 reaffirmed that the principles put forward in Lubemba [2014] applied to child defendants as witnesses, as well as vulnerable witnesses. Furthermore, the Court held that the current measures to ensure effective participation of vulnerable defendants were sufficient in law.

In **R v Welland [2018] EWCA Crim 2036** the defendant was found unfit to testify and, therefore, was unfit within the terms of CPD [3D], as it was. The issue on appeal was whether he had been afforded a fair opportunity to give evidence. He had suffered seizures during the trial which resulted in him failing to attend part of the proceedings. He had wanted to give evidence but the risk of further seizures was such that defence counsel felt that they could not call him. The CoA found that the court had not taken 'every reasonable step' to facilitate his participation: "*the judge should in our view have allowed time for medical evidence to be obtained addressing the significance of the appellant's fits and any means of controlling them. Such evidence was required to find out whether any measures could be taken – for example, allowing the appellant a day or two of rest and/or through the use of any medication – which might enable him to give evidence. To insist that the trial must proceed without exploring that possibility and without establishing through medical evidence that there was no realistic means of enabling the appellant to give evidence was unfair*."[61]

It was further held that where adverse inferences are prohibited due to a defendant's medical condition, a simple direction that the jury should not hold the defendant's silence against him, will not be sufficient: "*the direction should have spelt out the consequences of the fact that the appellant had been unable to give evidence – in particular, that the jury had not had been able to hear at first hand his account of events – including where it conflicted with that of other witnesses – and assess its credibility. Consideration should also have been given to whether specific points of significance had been raised by the prosecution evidence which were not covered in the appellant's police interview and which he had therefore never had an opportunity to address*."[62]

R v Biddle [2019] EWCA Crim 86. In this case the intermediary report recommended the defendant have an intermediary for the whole of the trial. The trial Judge ruled that one was only needed for the defendant giving evidence and the intermediary provider refused to provide an intermediary in those circumstances. The CoA were critical of the intermediary provider but held that the conviction was safe and that the trial Judge was right to permit the jury to draw an adverse inference from the defendant's refusal to give evidence: there was no evidence of a causal link that the absence of an intermediary led to the defendant not giving evidence.

R v Pringle [2019] EWCA Crim 1722. In this case the CoA held that the defendant's conviction was unsafe where the intermediary provider again refused the Court order that they should be present for the defendant's evidence alone. The CoA noted that at the very least that there should have been a consideration of the recommendations made by the intermediary, which were not implemented. The CoA considered that in the circumstances of this case, the failure to adopt the trial process to account for the defendant's needs was prejudicial and that this was heightened by the Defendant's co-accused having an intermediary and the absence of a summary of the defendant's intermediary report, outlining the defendant's difficulties, going before the jury.

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61 At [21].

62 At [22].

Thomas (Dean) [2020] EWCA Crim 117. A defence application was refused for the defendant to have an intermediary for the length of the trial. A Judge then permitted the instruction of an intermediary, for the defendant's evidence, but had declined to use the court's inherent powers to appoint an intermediary when Legal Aid Agency funding had not been secured. As a result, no intermediary was present.

The Court noted the CPD in force at the time and noted that whether an intermediary was necessary was a "*fact-sensitive decision*" which required "*an assessment of the relevant circumstances of the defendant…[and] the circumstances of the particular trial. Put otherwise, any difficulty experienced by the defendant must be considered in the context of the actual proceedings which he or she faces*.

Criminal cases vary infinitely in factual complexity, legal and procedural difficulty, and length. Intermediaries should not be appointed as a matter of routine trial management, but instead because there are compelling reasons for taking this step, it being clear that all other adaptations to the trial process will not sufficiently meet the defendant's needs to ensure he or she can effectively participate in the trial. The assessment in the Practice Direction as to the number of instances when this is likely to occur, albeit an important reminder to the judge to apply the most careful scrutiny to these applications, cannot derogate from the need to appoint an intermediary as identified by the Lord Chief Justice in Grant Murray "when necessary"."

The Court noted that where it was possible that a defendant had comprehension or communication difficulties, advocates should assess whether to request a GRH and that intermediaries may be of useful assistance to counsel in obtaining instructions where the defendant has substantive comprehension or communication difficulties.

TI v Bromley YC [2020] EWHC 1204 (Admin). The Youth Court rejected an application for an intermediary in respect of a 15 year-old defendant whose general cognitive ability, his verbal comprehension and his working memory were measured within the lowest two percentiles of the population. The High Court noted the caselaw and adopted the "*core principles*" set out by the CoA in Thomas [2020] (above) and held that these were of general application to all defendants.[63]

The Court noted that "*[t]he essential point is that any defendant in any criminal proceedings must have a fair trial. Where a defendant cannot participate effectively in the proceedings, whether in whole or in part, he will not have a fair trial. Particular problems may arise in cases involving vulnerable young defendants and a court must be vigilant to consider how issues of concentration and understanding may affect such a defendant's ability to participate in his trial.*"[64]

The Court again rejected the argument raised in Grant-Murray [2017] (above) that the current measures for vulnerable defendants were insufficient. However, the Court held that the Judge had failed to consider the individual circumstances of the defendant's difficulties and had failed to appreciate the context that the rarity of an appointment of an intermediary was to be seen in reference to all cases coming before the courts. This did not set "*a high hurdle to overcome for the appointment of an intermediary if one is necessary for the effective participation of a defendant in the trial process*".[65]

63 At [22-23].
64 At [23].
65 At [39].