

Pre-recorded video evidence in sexual assault trials



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The use of pre-recorded video evidence in sexual assault and rape trials. Has the law of criminal evidence managed to strike an appropriate balance between protecting the victims of sexual assault, who are usually the prime witnesses in prosecution proceedings, and protecting the due process rights of defendants charged with these crimes, in particular the right to properly test the evidence which has been admitted against them?

Introduction:

i. Background to the conflicting issues of this research

In the title of this paper, it is conjectured that victims of sexual assault are usually the prime witnesses in prosecution proceedings for these types of crime. The reason for this is that most sexual assaults are perpetrated in private by someone already known to the victim. What is more, often there is no forensic evidence available and so victims of sexual assault are not only the prime witnesses in prosecution proceedings for these types of crime but, often, the only evidence that a crime has taken place at all. This can place a real burden on sexual assault victims during the trial stage of the prosecution. For one thing, the victim must relive the traumatic events in question, by explaining them to the court, jury and defence barrister. Secondly, a common defence strategy is to undermine the credibility of the victim and to convince the Court either that no sexual contact occurred or that it was consensual. In the absence of forensic evidence, often it boils down to the victim's word over that of the defendant and it is very difficult to resolve two conflicting accounts to the satisfaction of the criminal standard of proof required for a successful conviction. As the Office for Criminal Justice Reform writes, " Those victims whose cases do make it to court are faced

with the intimidating prospect of having to recount traumatic and often intimate details, endure cross-examination and in some cases have information about their past sexual behaviour presented to the court as evidence against them. ”

In light of this, it is not surprising that (i) the rates of conviction for rape and sexual assault are so low (approx. 6% of all cases brought result in a successful prosecution); and, (ii) a substantial number of victims of sexual assault or rape do not report their crimes to the police, either in a timely manner* or at all**, or choose to drop their claims when it transpires that they will have to testify as a prime witness in the prosecution against their attacker . Research suggests that the drop-out rate is currently 33%. As the Office for Criminal Justice Reform writes, “ Research has found that victims who declined to complete the initial investigative process and victim withdrawals accounted for over one-third of cases lost at the police stage. Key contributory factors were not being believed and fear of going through the criminal justice process. ”

*The chances of securing a successful prosecution against a rapist or sexual attacker decrease substantially as time passes and therefore anything that leads victims to delay reporting their crime to the Police has the consequential effect of reducing the rate of successful conviction.

**This author does not purport to suggest that these are the only reasons why victims of sexual assault choose not to report their crimes to the Police; it is well documented that victims of sexual assault often feel shame and guilt for what has happened to them, as if they are somehow to blame, and

this is another major reason why such victims often prefer to keep their ordeals secret . Other factors include fear of retaliation and the distrust of the reactions of family and friends .

While these barriers to timely reporting and successful prosecution cannot all be redressed by criminal justice reform, nevertheless, in light of the fact that some of these barriers emanate from fear of or lack of confidence in the court process itself, the law of criminal evidence can play an important role in mitigating some of these barriers; for example, by protecting these vulnerable witnesses and making the ordeal of trial less traumatic, the law of criminal evidence could, eventually, change victims' perceptions of the trial process and make them less likely to allow their fears of that process to interfere with their decisions to report their sexual assaults.

One reform proposal which is often discussed in this context is the use of pre-recorded video testimony for victims of sexual assaults. The idea behind this proposal is that victims of such crimes are less likely to be afraid of the trial process if they know that they can record their testimony in advance and that they cannot be cross-examined by their attacker's barristers (even if they are asked to respond to certain questions within their testimony). Such reforms have been implemented in the field of youth justice for some time—for example, there are various provisions under the Youth Justice and Criminal Evidence Act 1999 which allow for the use of video links to shield child victims of sexual or physical abuse from their attackers—but are relatively new in the context of adult rape and sexual assault cases.

While the use of video testimony is clearly beneficial to victims, prima facie it poses a real risk to the integrity of the due process rights of defendants charged with these crimes. Under the criminal justice system of England and Wales there is a presumption that all persons charged with a criminal offence are innocent of that offence until proven guilty. This is provided, inter alia, by Article 6(2) of the Human Rights Act 1998 which states that, " Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. " What is more, it is a human right of all persons charged with a criminal offence to be able to challenge effectively the accuracy of any evidence which is admitted against them. This is provided inter alia by Article 6(3) of the 1998 Act which states that, " Everyone charged with a criminal offence has the following minimum rights: (...) (b) to have adequate time and facilities for the preparation of his defence; (...) (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him... "

In this present research paper, we are concerned specifically with the question of whether or not the use of video testimony in sexual assault cases (involving both adult and child victims) unduly prejudices the right of criminal defendants to properly challenge the accuracy and reliability of evidence adduced against them.

ii. The aims and objectives of this research:

The primary aim of this research is to evaluate the extent to which the law of criminal evidence has managed to strike an appropriate balance between protecting the victims of sexual assault, who are usually the prime witnesses

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in prosecution proceedings, on the one hand, and protecting the due process rights of defendants charged with these crimes, in particular the right to properly test the evidence which has been admitted against them, on the other?

The secondary aim of this research is to derive recommendations for reform to the law of criminal evidence to effect a more appropriate balance between protecting the victims of sexual assault on the one hand, and protecting the due process rights of defendants charged with these crimes on the other.

The objectives of this research paper are as follows: To identify the legal provisions which purport to allow the use of video evidence in sexual assault and rape trials; to identify the procedures which must be adhered to when utilizing this kind of evidence; to evaluate the likely impact of the use of video testimony on rates of reporting and successful prosecution; to examine the right of criminal defendants to test the evidence relied upon against them by the Crown Prosecution Service and to identify the extent to which it might be argued that this right is a qualified right under the law of England and Wales; to evaluate the extent to which the use of video evidence might prejudice the right of criminal defendants to test the evidence relied upon against them by the Crown Prosecution Service; to identify and critically evaluate the safeguards which exist currently to ensure that the use of video evidence is not permitted where its use would prejudice the ability of the defendant(s) in question to receive a fair trial; to evaluate whether or not an appropriate balance has been struck in practice between protecting the interests of victims through the use of video testimony on the one hand and preserving the interests of justice and the right of criminal defendants to test <https://assignbuster.com/pre-recorded-video-evidence-in-sexual-assault-trials/>

the evidence relied upon against them by the Crown Prosecution Service, on the other; to derive high level recommendations for reform to the way that the law currently permits the use of video evidence in sexual assault and rape trials.

iii. The structure of this research paper.

The structure of this paper takes the following form: In chapter one, this author traces the development of the use of video evidence in sexual assault and rape trials, identifies the legal provisions which regulate the use of such evidence and the procedures which must be followed when this type of evidence is relied upon by the Crown Prosecution Service and critically evaluates whether or not the use of video evidence is really likely to have any impact on rates of reporting and rates of successful prosecution of rapists and sexual offenders.

In chapter two, this author traces the development of the right of criminal defendants to a fair trial, generally, and, specifically, their right to test the evidence adduced against them, identifies the legal provisions which give rise to these rights and evaluates the nature of those rights (i. e. whether they are absolute rights or qualified rights) and evaluates the extent to which the use of video evidence might prejudice the right of criminal defendants to test the evidence relied upon against them by the Crown Prosecution Service, and the circumstances under which that prejudice is likely to be the greatest.

In chapter three, this author identifies and critically evaluates the safeguards which exist currently to ensure that the use of video evidence is not

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permitted where its use would prejudice the ability of the defendants to receive a fair trial and evaluates whether or not, in practice, the law has managed to strike an appropriate balance between protecting the interests of victims through the use of video testimony on the one hand and preserving the interests of justice and the right of criminal defendants to test the evidence relied upon against them by the Crown Prosecution Service, on the other. Also, in this chapter, this author derives high level recommendations for reform to the way that the law currently permits the use of video evidence in sexual assault and rape trials.

Finally, this author presents his conclusions to this research.

1. Using video evidence in sexual assault and rape trials; is it likely to have a positive impact on rates of reporting and rates of successful prosecution of rapists and sexual offenders?

As noted in the introduction of this paper, it has been argued in the academic literature that a significant barrier to the timely reporting of sexual offences (and also one of the reasons why the drop-out rate—i. e. the number of victims choosing to withdraw their claims before the conclusion of the trial—is so high) are common victim perceptions that if they report their assault they will be subjected to a traumatic trial process in which their account of events will be cross-examined by their perpetrator’s legal representatives and their character will be called into question .

The use of pre-recorded video testimony is designed to mitigate these barriers (ultimately) to prosecution by protecting these vulnerable witnesses and making the ordeal of trial less traumatic for them. Over time, it has been conjectured, victims’ perceptions of the trial process will change and they

will be less afraid of the trial process and more willing to report their sexual assaults when they occur.

Currently, there are two video-based special measures for vulnerable victims . These are provided by the Youth Justice and Criminal Evidence Act 1999. The first is where the victim is permitted to present his or her evidence-in-chief in the form of a video statement rather than in person. This is provided by section 27(1) of the Youth Justice and Criminal Evidence Act 1999 which states that, “ A special measures direction may provide for a video recording of an interview of the witness to be admitted as evidence in chief of the witness. ”

Section 27(4) of the 1999 Act however makes it clear that dispensation to use this special measure will only be granted where the court is satisfied that the witness in question will be made available for cross-examination (whether that be cross-examination in person or via a ‘ special measure’ alternative equivalent): “ Where a special measures direction provides for a recording to be admitted under this section, the court may nevertheless subsequently direct that it is not to be so admitted if— (a) it appears to the court that— (i) the witness will not be available for cross-examination (whether conducted in the ordinary way or in accordance with any such direction), and (ii) the parties to the proceedings have not agreed that there is no need for the witness to be so available; or (b) any rules of court requiring disclosure of the circumstances in which the recording was made have not been complied with to the satisfaction of the court. ” The intention behind this provision was to ensure that criminal defendants accused of crimes against vulnerable victims were not unduly prejudiced by the <https://assignbuster.com/pre-recorded-video-evidence-in-sexual-assault-trials/>

existence of this special measure; if the court and jury watched a video statement from a victim explaining how they witnessed the defendant commit a criminal offence, that defendant would be grossly prejudiced if he did not have an opportunity to challenge any aspects of the video statement in question.

The second type of video-based special measure provided under the Youth Justice and Criminal Evidence Act 1999 is where the cross-examination and re-examination of a witness's testimony by the defence's legal team is pre-recorded rather than conducted live in the courtroom, in front of the defendant. This is provided by section 28(1)(b) of the Youth Justice and Criminal Evidence Act 1999: " Where a special measures direction provides for a video recording to be admitted... as evidence in chief of the witness, the direction may also provide— (a) for any cross-examination of the witness, and any re-examination, to be recorded by means of a video recording; and (b) for such a recording to be admitted, so far as it relates to any such cross-examination or re-examination, as evidence of the witness under cross-examination or on re-examination, as the case may be. "

To ensure that this special measure does not dilute the defence's ability to cross-examine or re-examine a witness, the 1999 Act provides that the court and the defence's legal representatives must be able to see and hear the live recording session and be able to communicate directly with the persons in the room. The Act also provides that the defendant should be able to see and hear the examination and that he or she should be able to communicate with his or her legal representatives throughout the process: " Such a recording must be made in the presence of such persons as rules of court or <https://assignbuster.com/pre-recorded-video-evidence-in-sexual-assault-trials/>

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

If a court has granted the use of this special measure then it is imperative that the defence’s legal representatives ask the child witness all of the questions, the answers of which they plan to later rely on in court as they will not be entitled to put any new questions to the witness on completion of this recording session unless any new matters come to light which the defendant or his legal team could not have been expected to have discovered previously with reasonable diligence .

These special measures are available to adult victims of sexual assault or rape by default. However, it is up to each witness to decide whether or not they wish to take advantage of one or both of these measures. This presumption of vulnerability is provided by section 17(4) of the 1999 Act which states that, “ Where the complainant in respect of a sexual offence is a witness in proceedings relating to that offence (or to that offence and any other offences), the witness is eligible for assistance in relation to those proceedings by virtue of this subsection unless the witness has informed the court of the witness’ wish not to be so eligible by virtue of this subsection. ”

By virtue of section 16(1) of the 1999 Act, these measures are also available to child witnesses aged sixteen or less: “ For the purposes of this Chapter a witness in criminal proceedings (other than the accused) is eligible for assistance by virtue of this section (...) if under the age of 17 at the time of the hearing... ” For child witnesses, not only is there a presumption that their testimony will be given via video but this is nearly mandatory. As Burton, Evans and Sanders explain, “ For child witnesses in need of special protection (defined by section 21 of the YJCE Act) the provision of video evidence-in-chief or live television links is near mandatory, and it is not necessary to demonstrate that they would improve the quality of the witness’s evidence. ”

Leaving aside any discussion of the potential prejudicial impact that these special measures can have on defendants’ ability to defence a claim of sexual assault or rape of a minor or adult—a discussion which will be reserved for the following chapter of this paper—the first question which, in the opinion of this author, must be asked, is whether or not these special measures actually mitigate the barriers to effective testimony identified previously in this paper.

It will be recalled that one such barrier was the victim’s fear of cross-examination and being made to feel like the one to blame for the ordeal . And yet, while the second of the two special measures discussed above does allow the cross-examination to take place in a venue other than a court of law, in all other respects a video cross-examination is equivalent to a live court-based cross-examination. As the Crown Prosecution Service explains, in its ‘ CPS Policy for Prosecuting Cases of Rape’, “ Giving evidence in court <https://assignbuster.com/pre-recorded-video-evidence-in-sexual-assault-trials/>

can be a particularly traumatic experience for victims of rape. In particular, some victims may find it difficult to give evidence in the sight of the defendant. If this is so, we can apply to the court for the victim to give evidence in another way so that he or she can give their best evidence. These alternative ways of giving evidence are known as 'special measures'... [While] the victim or witness will not have to give 'live' evidence about what happened to them... they will still have to answer questions put to them by the defendant's lawyer in cross-examination. "

(emphasis added)

Therefore, while this special measure might make it more comfortable for a vulnerable or intimidated witness, it is not entirely clear, at least in theory, how it purports to mitigate the victim's fear of cross-examination itself. This is a point raised by Childs and Ellison, who argue that the efficacy of these special measures are undermined by the fact that the process remains an adversarial one, even though it is pre-recorded and conducted in a venue other than a court of law: " There is also a risk... that a commitment to traditional adversarial values and methods may yet limit the impact of reforms. "

Another barrier that was identified previously was the victim's fear of being in contact with the defendant. While pre-recorded video evidence certainly allows a vulnerable witness to give their testimony and responses (to cross- or re-examination) without having to be in the same room as the defendant, as noted previously the defendant is allowed to listen into the recording session and therefore it is not entirely clear how the victim receives any benefits from these special measures whatsoever, other than those which

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they would be able to enjoy anyway through the use of screens or live links pursuant to sections 23, 24 or 25 of the Youth Justice and Criminal Evidence Act 1999 .

Another criticism which has been raised, especially in respect of the use of pre-recorded video cross-examination, is that, historically, these measures have not often been made available to victims of sexual offences, the Courts preferring to rely upon live testimony, whether given orally in court or via a live video link (via the special measures provided by sections 23 and 24 of the Youth Justice and Criminal Evidence Act 1999. As Childs and Ellison argue, writing in 2000, “ While the special measures contained in the YJCEA 1999 are to be welcomed, the protection they afford rape complainants has, disappointingly, been constrained by a continuing attachment to the primacy of oral evidence... Adult rape complainants are to benefit from the availability of screens and CCTV but they are to be denied the protection inherent in the use of video-recorded evidence. Generally, adult rape complainants will still be required to give live oral evidence in criminal proceedings, albeit via a TV link. ”

Another criticism which has been levied against the use of these video-based special measures is that somehow a victim’s testimony is diluted by the fact that the jury is unable to see the witness in a live environment. As Burton et al note, “ Some practitioners had reservations about televised evidence because they thought it was less convincing than ‘ live’ evidence. ”

While this argument has real intuitive appeal, in reality there is very little evidence to support this view. As Burton et al conclude, “ There is no

research evidence to indicate that acquittals are more likely using these methods, however. " This is something that will be discussed in more detail in the following section of this paper.

In conclusion to this chapter, while this author cannot comment upon the general advantages or disadvantages of video-based special measures in cases of rape or sexual assault*, he is not wholly convinced that they manage to discharge the barriers which are faced by rape and sexual assault victims and therefore is not convinced that their use is having the effect of increasing rates of reporting and conviction for these types of offence.

Victims still have to undergo an adversarial style cross-examination, which has been reported to be the most daunting prospect of a rape trial for rape victims, and even though this might be conducted in a venue outside of the courtroom, the rape victim nevertheless has to respond directly to questions from the defendant's legal representatives while knowing that the defendant is listening into the recording session and able to communicate with their lawyers throughout.

In light of this, the pre-recorded video measures provided by the Youth Justice and Criminal Evidence Act 1999 is unlikely to alleviate victim perceptions that if they report their assault they will be subjected to a traumatic trial process in which their account of events will be cross-examined by their perpetrator's legal representatives and their character will be called into question.

In any event, it appears that these measures, particularly pre-recorded video cross-examinations, are rarely used with adult victims, the Courts preferring

to grant other special measures to these vulnerable witnesses such as screening or live CCTV links.

* In this chapter this author has been concerned only with the extent to which video-based special measures are able to help vulnerable victims overcome the barriers which are reported to be responsible for under-reporting and low overall conviction rates. These measures may well have benefits other than overcoming these barriers, but these are not of relevance to this present research paper. Therefore, one should be cautious not to use the conclusions of this paper to support an argument that video-based special measures should not be used; all that can be said is that they are not apparently very effective at meeting their direct intended objectives.

2. The right of criminal defendants to a fair trial and to test the evidence adduced against them; are these rights prejudiced by the use of video evidence and under what circumstances, in particular?

As noted in the introduction to this paper, Article 6(3) of the 1998 Act provides that any person charged with a criminal defence has the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him . The question which falls for determination in this chapter is whether or not this right is unduly prejudiced by the use of the two video-based special measures identified and analysed in the previous section of this paper.

While it is the case that these special measures are not used in every case of adult rape or sexual assault, in this chapter we are concerned with the potential for prejudice when either or both of these measures are employed.

In other words, the fact that these special measures, particularly pre-recorded video cross-examination, are rarely used in adult cases will not (and should not ever) be cited as a defence to any claims of prejudice which are levied towards them.

The first thing to do is to evaluate what kind of right is created by Article 6(3)(d) of the Human Rights Act 1998; if this right is an absolute right then it would never be appropriate to derogate from it in the interests of protecting vulnerable witnesses . However, if the right is a qualified right, then it might be legitimate, where the circumstances dictate, to derogate wholly or partially from that right to serve a competing but legitimate interest .

If one relied upon the wording of Article 6 of the Human Rights Act 1998 then one would be forced to conclude that Article 6(3)(d) is an absolute right as it states unequivocally that all persons charged with a criminal offence are entitled to enjoy this right, which grants upon them an 'equality of arms' and the tool required to be able to clear themselves of the charges brought; namely, the right to cross-examination . This interpretation seems to be in line with the Strasbourg jurisprudence .

However, there is good common law authority for the proposition that this right is a qualified right and also for the proposition that, under certain circumstances, it is appropriate to derogate from this right in the interests of protecting vulnerable witnesses. For example, in the recent case of *Bonhoeffer, R (on the application of) v General Medical Council* [2011] EWHC 1585 the Court allowed a key witness to admit his evidence in written form only, which precluded cross-examination, on the basis that the witness would

face persecution back in Kenya, where he lived, if he appeared as a witness and admitted to being a homosexual. In this case, the Court accepted that the defendant's right to cross-examination under Article 6(3) of the Human Rights Act 1998 had been derogated from; however, the Court justified this derogation using a utilitarian (least harmful path) justification. A similar justification was employed in the case of *R v Xhabri* [2005] *.

*Some authors have argued that this interpretation of Article 6 is at odds with the wording of the 1998 Act and while this present author agreed with that thesis, this is not the time or the place to engage with this subsidiary debate. For our present purposes, all that matters is that it is settled law that Article 6(3)(d) is a qualified right and not an absolute standard.

Therefore, we must conclude that the right to cross-examine is a qualified right and, consequently, that the potential for video-based special measures to cause an infringement of a defendant's right to cross-examine is limited; after all, it cannot be said to be an infringement of a right if that derogation can be legitimized through legal authority.

In any event, it is not entirely clear that the use of video-based evidence is always likely to be prejudicial to defendants. For one thing, as argued in the previous chapter of this paper, these special measures do not substantially affect the cross-examination process, and therefore it is not straightforward to contend that a defendant's right to cross-examine is affected, let alone limited, by the employment of pre-recorded video cross examination.

What is more, there is no evidence to suggest that a conviction is more likely to result from the use of video-based special measures. In their experimental <https://assignbuster.com/pre-recorded-video-evidence-in-sexual-assault-trials/>

study entitled, ' The impact of pre-recorded video and closed circuit television testimony by adult sexual assault complainants on jury decision-making', Taylor and Joudo found that juries were not more likely to convict defendants charged with rape or sexual assault when the victim's testimony was presented as a pre-recorded video, than they were when it was presented face-to-face or via a live link CCTV . This study had a strong methodology: the researchers conducted 18 mock trials using a total of 210 jurors. In one third of the trials, the jurors heard the victim's evidence live, face-to face; in one third of the trials, the jurors heard the victim's evidence live, via a live link CCTV system; and, in the remaining third of the trials, the jurors heard the victim's evidence from a pre-recorded video. After the trials, the researchers undertook perception and attitude surveys via a questionnaire. This sought to measure a range of attitudes and perceptions including the degree to which the jurors felt they were able to empathize with the victim and whether or not they thought the accused was guilty of the crime. The conclusion of this study was that the mode of transmission of victim testimony had no statistically significant impact upon juror perceptions: " The study finds, overall, that immediately following the trial but before jury deliberation, mode of presentation of testimony (face-to-face, CCTV or pre-recorded videotape) did not impact differentially on juror perceptions of the complainant or the accused, or guilt of the accused. "

While the methodology of this research study was generally sound, there is anecdotal evidence to support the view that real victims come across better on pre-recorded video than they do live. As the Office of Criminal Justice Reform reports, " In one case the video was not used as it required

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substantial editing to remove inadmissible evidence. However, prosecution counsel later commented that they wished in hindsight that the video had been used, as the victim was not as good live as on the recording. " While one might argue that such evidence is of limited use, in the opinion of this author if Taylor and Joudo's study was repeated using real rape victims in real rape trials then it is highly likely that the mode of presentation of testimony would impact differentially on juror perceptions of the complainant; after all, they are likely to feel more comfortable giving testimony about their horrific ordeal in a video recording studio than they would be giving that same testimony live, in a court of law, with twelve jurors, a judge and several lawyers all looking at them. Further research needs to be conducted to test these claims empirically.

If nothing else, the pre-recorded testimony would likely have bee