This material was first published by Thomson Reuters, trading as Sweet & Maxwell, 5 Canada Square, Canary Wharf, London E14 5AQ, in *The Criminal Law Review* as "Rethinking the Orality/Confrontation Paradigm in a World of Remote Evidence" [2023] Crim. L.R. 265 and is reproduced by agreement with the publishers. For further details of *The Criminal Law Review*, please see the publishers' website: *http://www.sweetandmaxwell.co.uk*.

# Rethinking the Orality/Confrontation Paradigm in a World of Remote Evidence

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**Key words:**

Coronavirus; Criminal Evidence; Cross-examination; Oral evidence; Pandemics; Remote gearings; Right to far trial; Video evidence

**Summary:**

*This article reviews the various legislative and court initiatives which have made incursions into the orality/confrontation paradigm in recent years and in particular the recent statutory provision which was given impetus by the COVID-19 pandemic enabling all witnesses including defendants to give their evidence remotely outside the courtroom. It is argued that these incursions undermine the accused's participatory rights to cross-examine important witnesses against them and to give evidence in person at their trial that underpin the orality/confrontation paradigm. This does not mean that remote technology could not be used more optimally to enhance effective fact-finding and improve efficiency without limiting defence participation rights. In particular, it is argued that it could be harnessed to frontload the taking of greater oral testimony before trial, including the greater use of pre-recorded cross-examination, provided the defendant retains a right to testify before the tribunal of fact. But if the full potential of remote technology is to be realised, the long cultural attachment that there has been to the traditional orality/confrontation paradigm needs to be re-assessed to appraise the benefits that accrue from shifting the taking of oral testimony from the trial to the pre-trial phase.*

## Introduction

Common law criminal trial processes have long been characterised by their adherence to two particular principles: orality and confrontation. Roberts has observed that "live courtroom testimony, delivered orally by witnesses with relevant first-hand knowledge of the matters in issue, is the paradigmatic form of evidence in English criminal trials".[1] The principle is

* My thinking for this article began before the Covid emergency and some of the ideas were presented at an evidence workshop at the University of Girona in September 2019. A revised paper was presented at a conference on the McDonaldization of Justice at the University of Warwick in May 2022. I am grateful to participants at

supplemented by the principle of confrontation which is sometimes equated with the right to cross-examination but has been described more expansively as a paradigm overlapping with the orality principle which requires that witnesses identifiable to the parties give evidence in open court, face the accused in the presence of the fact-finder, under an obligation to tell the truth, and are able to be cross-examined by opposing parties.[2] We shall refer to this as orality/confrontational paradigm.

Although the majority of cases do not proceed to a contested trial, for those that do the orality/confrontation paradigm has proved remarkably resilient. Its precise scope has remained unclear. Face-to-face confrontation between witnesses and the accused has never carried the same weight in Europe as in the US where it is famously enshrined in the Sixth Amendment to the Constitution.[3] However, during the course of the 19th century in-court testimony combined with cross-examination came to be considered the best way throughout Europe of uncovering the truth and ensuring fairness by enabling the accused to directly challenge adverse witnesses in court.[4] Article 6(3)(d) of the European Convention on Human Rights (ECHR) guarantees a criminal defendant the right "to examine or have examined witnesses against him" and the European Court of Human Rights (ECtHR) has said that this enshrines the principle that before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument.[5]

But over the course of the 20th century a wealth of social science research has pointed to the weaknesses of oral testimony and cross-examination as tools for accurate factfinding.[6] It has been demonstrated that live oral testimony often given some time after disputed events is not a particularly accurate form of fact-finding as gaps in memory come to be filled increasingly by intuitive association, stereotypical thinking and interactions with others.[7] *Pace* Wigmore,[8] there are also increasing grounds for doubting the effectiveness of cross-examination in uncovering the truth.[9] There have also been difficulties in justifying the paradigm on non-epistemic grounds, particularly the confrontation right which emerged as an important constitutional safeguard protecting the citizen from evidence obtained in secrecy but which scholars have found more difficult to justify in the modern era when there has been a

these events for their comments. Special thanks are due to Debbie Cooper, Sam Fairclough, Laura Hoyano, Matt Thomason and Jenia Turner who commented on an earlier draft. Any errors are entirely my own responsibility.

[1] P. Roberts, *Roberts & Zuckerman's Criminal Evidence* 3rd edn. (OUP, 2022) 311.
[2] S. Maffei, *The European Right to Confrontation in Criminal Proceeding; Absent, Anonymous and Vulnerable Witnesses* (Europa Law Publishing, 2012) 35.
[3] See I. Dennis, "The Right to Confront Witnesses: Meanings, Myths and Human Rights" [2010] Crim. L.R. 255, 263, R. Friedman, "The Confrontation Right" in D.K. Brown, J.I. Turner and B. Weisser (eds.), *The Oxford Handbook of Criminal Process* (OUP, 2019) 285.
[4] S. Summers, *Fair Trials* (Hart, 2007) 50-52.
[5] *Al-Khawaja and Tahery v UK* (2012) EHRR [118].
[6] See D.S. Greer, "Anything but the Truth? The Reliability of Testimony in Criminal Trials" (1971) B. J. Crim. 147.
[7] A. Roberts, "The Frailties of Human Memory and the Accused's Right to Accurate Procedures" [2019] Crim. L.R. 912, 921.
[8] Wigmore famously described cross-examination as "the greatest legal engine ever invented for the discovery of truth": J. H. Wigmore, *Evidence*, vol 5 (Chadbourn rev., Little, Brown, 1974) §1367, 32.
[9] A. Roberts, "The Frailties of Human Memory and the Accused's Right to Accurate Procedures" [2019] Crim. L.R. 912, 921.

greater commitment to open justice.[10] Non-epistemic rationales for various defence rights are increasingly founded upon notions of legitimacy and integrity.[11] Although these concepts are contested and there are differing views on what is necessary to secure legitimacy for verdicts,[12] there is a growing consensus that within the criminal justice system defence participation plays a key role in legitimising the manner in which verdicts are reached and it can be argued that this today is what underpins the orality/confrontation paradigm.[13]

In the last few decades, however, a number of developments have led to a shrinking of the paradigm, forcing common law lawyers to rethink their traditional adherence to the principles of orality and confrontation as in-court testimony becomes a less preferred method for admitting and challenging evidence. First of all, certain rules of evidence such as the hearsay rule and the rule against narrative that have long bolstered the paradigm have been relaxed with the result that out-of-court testimony in various forms has been able to be admitted more easily. Secondly, a sustained critique of the paradigm has pointed to the difficulties that afflict particularly vulnerable witnesses when they are required to submit to the rigours of cross-examination in open court before the accused.[14] A series of special measures, specifically the use of screens, live link testimony and recorded video evidence, designed to alleviate stress and enable such witnesses to give their 'best evidence' outside the courtroom has resulted in a relaxation of the orality/confrontation paradigm for these witnesses. So long as these measures were regarded as special and limited to certain classes of vulnerable or intimidated witnesses, it could be claimed that the paradigm was still the norm for other witnesses. Indeed some commentators have criticised special measures for doing little to ameliorate the problems that the paradigm poses for all manner of witnesses.[15] But a third development spurred on by the Covid-19 pandemic has been for increasing numbers of all kinds of witnesses now to give their evidence in a virtual manner outside the courtroom, leading to speculation that trials may become an almost entirely 'virtual' experience with the orality/confrontation paradigm destined to wither on the vine.[16]

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[10] See A. Choo, *Hearsay and Confrontation in Criminal Trials* (OUP, 1996), I. Dennis, "The Right to Confront Witnesses: Meanings, Myths and Human Rights" [2010] Crim. L.R. 255, J. Jackson, "International Developments on the Right to Confrontation: Searching for a Core Value" (2011) 1 *Criminal Law and Procedure Review Volume 1* (2011) 61, M. Redmayne, "Confronting Confrontation" in P. Roberts and J. Hunter (eds.), *Criminal Evidence and Human Rights* (Hart, 2012) 283, L. Heffernan, "Calibrating the Right to Confrontation" (2016) 20 *International Journal of Evidence & Proof* 103. Cf. Friedman, "The Confrontation Right" in Brown, Turner and Weisser (eds.), *The Oxford Handbook of Criminal Process* (2019) 285.

[11] See generally J. Hunter, P. Roberts, S. Young and D. Dixon (eds.), *The Integrity of Criminal Process* (Hart, 2014), J. D. Jackson and S. J. Summers (eds.), *Obstacles to Fairness in Criminal Proceedings: Individual Rights and Institutional Norms* (Hart, 2018).

[12] See e.g. I, H. Dennis, *The Law of Evidence* 7th edn. (Sweet & Maxwell, 2020) 50-58, A. Bottoms and J. Tankebe, "Beyond Procedural Justice: a dialogic approach to legitimacy in criminal justice' (2012) 102 *Journal of Criminal Law & Criminology* 119, H.L. Ho, "The Criminal Trial, the Rule of Law and the Exclusion of Unlawfully Obtained Evidence." (2016) 10 *Criminal Law and Philosophy* 109.

[13] A. Owusu-Bempah, *Defendant Participation in the Criminal Process* (Routledge, 2017) 26-27.

[14] See e.g..L. Ellison, *The Adversarial Process and the Vulnerable Witness* (OUP, 2001), J. Doak, *Victims' Rights, Human Rights and Criminal Justice* (Hart, 2008).

[15] See e.g. Ellison, *The Adversarial Process and the Vulnerable Witness* (2001). For the under and over-inclusiveness of the vulnerable and intimidated categories, see S. Fairclough, "Vulnerability in the Criminal Trial" in E. Johnston (ed.), *Challenges in Criminal Justice* (Routledge, 2022).

[16] Some commentators were predicting this before the pandemic: see L. Mulcahy, "The Unbearable Lightness of Being? Shifts Towards the Virtual Trial" (2008) 35 *Journal of Law and Society* 464, J. Horan and S. Maine, "Criminal Jury Trials in 2030: A Law Odyssey" (2014) 41 *Journal of Law and Society* 551.

The rise in the use of remote hearings goes back before the pandemic.[17] In 2016 a joint vision statement published by the Lord Chancellor, the Lord Chief Justice of England and Wales and the Senior President of Tribunals envisaged that all cases in the criminal, civil and family courts should begin online with a large number completed without persons having to attend hearings in person.[18] Such a shift was central to the aim of modernising and upgrading the justice system so that "it works better for everyone, from judges and legal professionals, to witnesses, litigants and the vulnerable victims of crime".[19] In relation specifically to the criminal courts, the statement envisaged that increasing numbers of victims and witnesses would have no need to come to court to give evidence as the number of non-court locations from where victims and witnesses can give their evidence is increased.[20]

The pandemic brought this vision closer to reality as remote evidence was used more widely in order to enable trials to continue. It was the catalyst for requiring witnesses and defendants to testify outside the courtroom and a temporary measure to enable this has now been made permanent under the recently enacted Police, Crime, Sentencing and Courts Act 2022. This has to be seen against the background of a series of measures taken recently to try to deal with trials more speedily and efficiently with major repercussions for the orality/confrontation paradigm. In this article, we will first briefly review the various legislative and court initiatives which have made incursions into the orality/confrontation paradigm and consider their implications for a fair trial. It will be argued they undermine core participatory rights that underpin the orality/confrontation paradigm - the right to have witnesses cross-examined and the right to give evidence in person at trial. This does not mean that remote technology could not be used more optimally to enhance effective fact-finding and improve efficiency without limiting defence participation rights. In particular it will be argued that it could be harnessed to frontload the taking of greater oral testimony before trial, including the greater use of pre-recorded cross-examination, provided the defendant retains a right to present testimony before the tribunal of fact. But if the full potential of remote technology is to be realised, the long cultural attachment that there has been to the traditional orality/confrontation paradigm needs to be re-assessed to appraise the benefits that accrue from shifting the taking of oral testimony from the trial to pre-trial phase.

## The shrinking orality/confrontation paradigm

### *(i) Rules of evidence*

The hearsay rule has been described as the principle of orality's "alter ego" because it operates to exclude many out of court statements from the fact-finder.[21] But the hearsay reforms in the Criminal Justice Act (CJA) 2003 relaxed the rule considerably by enabling hearsay statements to be admitted where the witnesses who made them are unavailable for a whole host of reasons and by permitting judges to exercise a new 'inclusionary' discretion to admit hearsay

[17] M. Rossner, "Remote Rituals in Virtual Trials" (2021) 48 *Journal of Law and Society* 334.
[18] Ministry of Justice, *Transforming Our Justice System: By the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals* (2016) 5, available at: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/553261/joint-vision-statement.pdf>.
[19] Ibid. 3.
[20] Ibid. 8.
[21] Roberts, *Roberts & Zuckerman's Criminal Evidence* (2022) 312.

statements where it would be in the interests of justice to do so.[22] Insofar as the rationale for admitting many hearsay statements is that the witnesses who made them are not available to give oral evidence at trial, it may be claimed that it is at least still considered important that witnesses give oral evidence at trial when they are available. But the CJA also shifted the focus towards the admission of the previous out-of-court statements of available witnesses made before trial which would previously have been excluded by virtue of the rule against narrative. This rule also buttressed the orality principle by providing that witnesses giving evidence may not make use of their own previous statements to supplement or support their oral testimony. The CJA significantly relaxed the exceptions that already existed to this rule. In particular it is now much easier for witnesses to refresh their memory from an earlier account which has been put into documentary or audio-form provided the witness states in oral evidence that the document or audio recording records her recollection of the matter at that earlier time and her recollection is likely to have been significantly better at that time than it is at the time of giving oral evidence at trial.[23] Where the previous statements of witnesses are admissible, they may now be part of the evidence in the case and be used by the fact finder as evidence of the truth in its own right rather than merely bolstering the credibility of witnesses' oral evidence at trial.[24]

This shift in favour of admitting witness statements before trial has gone hand in hand with a view that there should also be more focus on how defendants have reacted to allegations made against them before trial. Of course, confessions have always been able to be admitted against accused persons. But legislation curtailing the right of silence by permitting the court to draw inferences from their failure to mention facts at a police interview which are later relied on in their defence at court has meant that whatever suspects say or do not say in police interviews can be of as much significance as anything they say or do not say in court.[25] As Laws LJ put it in an oft-quoted dictum, the silence legislation is one of several measures which has served to counteract a culture, or belief, which had long been established in the practice of criminal cases, that in principle a defendant may without criticism withhold disclosure of his defence until the trial.[26] Now the police interview and the trial are to be seen as part of a continuous process in which the suspect is engaged from the beginning.

*(ii) Vulnerable and intimidated witnesses*

In 1999 a comprehensive framework of special measures for vulnerable and intimidated witnesses which detract from the orality/confrontation paradigm, including pre-recorded cross-examination, was enacted in Part II of the Youth Justice and Criminal Evidence Act (YJCEA) and a measure permitting witness anonymity orders to be made was enacted in 2008.[27] Certain special measures have taken some time to implement. It took 14 years before a pilot programme for pre-recorded cross-examination was commenced at three Crown Centres. But there now

[22] CJA 2003 ss. 116, 114(1)(d)(2).
[23] CJA 2003 s. 139. There is also no requirement that the document used to refresh memory be the witness's original statement. See *DPP v Sugden* [2018] EWHC 544 (Admin); [2018] Crim. L.R. 752.
[24] CJA 2003 s. 119(2), s. 120(4).
[25] Criminal Justice and Public Order Act 1994 s. 34. This legislation also permits inferences to be drawn when suspects are silent in police interviews in other situations, for example, when they fail to account for objects, substances or marks found on them or in their possession or to account for their presence at a crime scene. See Criminal Justice and Public Order Act 1994 ss. 36–7.
[26] *Howell* [2003] EWCA Crim 1 [23] and [24].
[27] See Criminal Evidence (Witness Anonymity) Act 2008 replaced by Coroners and Justice Act 2009 Pt 3 Ch. 2.

finally seems to be a much greater impetus to roll this measure out.[28] A full national roll out limited to children and adult witnesses with a physical or mental disability was achieved in November 2020 and on 9 December 2021 the government announced that this would be extended to include adult complainants of sexual violence and modern slavery.[29] Although no data are collated or reviewed by the Ministry of Justice about the use of special measures at court, it would appear that screening witnesses from the defendant, live link, and the giving of evidence in chief by playing the police video-recorded interview (the so-called "ABE interview") are the most commonly requested special measures by prosecutors and are usually granted by the court.[30]

Apart from these measures restricting the principle of giving live testimony in court, further measures have begun to restrict a key aspect of the orality/confrontation paradigm, namely the right to cross-examine witnesses. Since 1991 the accused has been prohibited from cross-examining child witnesses in person and the 1999 Act extended this prohibition to include adult complainants in sexual offence cases as well.[31] The court may also prevent the accused from cross-examining any witness where the quality of the witness evidence is likely to be diminished if cross-examination is conducted by the accused and likely to be improved if a direction prohibiting cross-examination by the accused is made.[32] Another special measure introduced by the 1999 Act has been the appointment of registered intermediaries to support the communication needs of certain vulnerable witnesses.[33] The intermediary may not only communicate questions and answers to and from a witness, but may also explain the questions and answers in such a way as to enable them to be understood, although their substance or meaning may not be changed.[34] This measure which was originally proposed by the Pigot Committee in 1989 was met with significant opposition on the grounds that it appears to pose a fundamental challenge to the freedom of counsel to question witnesses.[35] But intermediaries have become accepted as part of a new 'revolution' spearheaded by senior members of the judiciary which is shifting cross-examination away from what has been called the 'advocacy' model, traditionally associated with the orality/confrontation paradigm, towards a 'best evidence' model.[36] This has resulted in a sea change in terms of judicial willingness to restrict the use of inappropriate questions put to vulnerable witnesses by counsel, although counsel are still expected to put their client's case to such witnesses in all but the most unusual circumstances.[37] Criminal Practice Directions now require judges to take control of the cross-examination of vulnerable witnesses not only in the trial but in pre-trial 'ground rules hearings'

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[28] J. Doak, J. Jackson and D. Cooper, "Pre-recorded cross-examination in the fast lane" (2022) 165(4) *Solicitors Journal* 13.

[29] See government press release: https://www.gov.uk/government/news/landmark-reforms-for-victims?utm_medium=email&utm_campaign=govuk-notifications&utm_source=8d80b2f2-7d52-4fbe-b0c5-d5f87ad36948&utm_content=daily

[30] HMICFRS and HMCPSI, *Joint Thematic Inspection of the Police and CPS's Response to Rape 2022*, fig. 10.

[31] YJCEA 1999 ss. 34-35. Oddly, however, the prohibition does not apply to complainants of domestic/relationship abuse. I owe this point to Laura Hoyano.

[32] YJCEA 1999 s. 36.

[33] YJCEA 1999 s. 29.

[34] For an overview of how the scheme works in practice, see https://www.theadvocatesgateway.org/intermediaries [accessed 11 August 2021]

[35] L. C. H. Hoyano, "Variations on a theme by Pigot: Special measures directions for child witnesses" [2000] Crim. L.R. 250.

[36] See e.g. E. Henderson, "Theoretically Speaking: English Judges and Advocates Discuss the Changing Theory of Cross-Examination" (2015) Crim. L.R. 929, J. Doak, J. Jackson, C. Saunders, D. Wright, B. Gómez Fariñas and S. Durdiyeva, *Cross-Examination in Criminal Trials: Towards a Revolution in Trial Practice?* (2021) available at: https://irep.ntu.ac.uk/id/eprint/44924/1/1497281_Doak.pdf

[37] *RK* [2018] EWCA Crim 603. See L. Hoyano, "Putting the Case in Every Case" (November 2018) *Counsel*.

before trial where they must determine the nature and extent of the questioning that will occur at trial.[38] The requirement for advocates to obtain pre-approval of questions to be asked of certain very vulnerable witnesses is in particular a significant step away from orality/confrontation paradigm.

Finally, it should be noted that in a restriction on the principle of open justice associated with the orality/confrontation paradigm the court has the power to order that witnesses give their evidence in private in proceedings related to sexual, human trafficking or slavery offences, or where the court has reasonable grounds for believing that someone other than the accused has tried to intimidate the witness.[39] One nominated member of the media is allowed to attend the proceedings.[40] It does not appear that this power has been widely used to date in England and Wales.[41] However, there is growing pressure for the evidence of sexual complainants to be heard in closed court. Noting that England & Wales is the only jurisdiction in the UK and Ireland where the public are not excluded from rape hearings, at least when the complainant is giving evidence, the Home Affairs Select Committee recently recommended that the Government consult with the judiciary and wider legal sector on evidence given in private as a special measure and explore whether its use could be further widened.[42]

*(iii) The wider use of remote evidence*

Some of the restrictions that special measures have placed on the orality/confrontation paradigm for vulnerable and intimidated witnesses are also being extended to other witnesses as well. The use of remote evidence in particular has become more widespread. Sections 51 and 52 of the CJA 2003 made provision for *any* witness other than the defendant to give evidence by live video-link in the interests of the "efficient or effective administration of justice". In response to the pandemic the Coronavirus Act 2020 replaced s. 51 with more sweeping virtual justice powers by enabling any person *including the defendant* to testify through a live link as part of a general temporary measure enabling any person (not just witnesses but lawyers, the parties and even the judge) to participate by live link in a trial from a remote location where the court was satisfied it was in the interests of justice. The Police, Crime, Sentencing and Courts Act 2022 has now replaced ss. 51 and 52 with permanent new provisions that further extend the court's virtual justice powers. The new Act empowers the court to "require or permit" any person to take part in eligible criminal proceedings including summary and Crown Court trials by live link and, despite the retreat of the pandemic, it has gone further than the Coronavirus Act by providing that entire Crown Court trials may be held remotely.[43]

It has been pointed out that this opens the door to forcing witnesses, including defendants, to having to give their evidence by live link against their will.[44] The Act permits the court to make a live link direction on an application by any party or on its own motion. A

[38] CPD I General Matters, 3E.
[39] YJCEA 1999 s. 25.
[40] YJCEA 1999 s. 25(3).
[41] A joint inspection report by HMICFRS and HMCPSI recently found that clearing the court, among other special measures, is underused: see HMICFRS and HMCPSI, *A Joint thematic Inspection of the Police and CPS's response to rape* (2022) 66.
[42] Home Affairs Committee, *Investigation and Prosecution for Rape*, Eighth report of session 2021-22, HC 193, 12 April 2022, 71.
[43] Police, Crime, Sentencing and Courts Act 2022 s. 200 and sch. 20 replacing ss. 51 and 52 of the CJA 2003.
[44] L. Hoyano, "Postage Stamp Justice? Virtual Trials in the Crown Courts under the Police, Crime, Sentencing and Courts Bill" [2021] Crim. L.R. 1029.

number of circumstances are to be considered before deciding whether to issue a direction including the person's views but this is only one circumstance to be considered and it can be overridden in the overall interests of justice. The special measures regime similarly allowed the court to issue Special Measures Direction (SMDs) of its own motion and to override the wishes of vulnerable or intimidated witnesses where the quality of their evidence would be much improved by them. But in practice courts would seem to have given witnesses considerable freedom to choose whether to avail of SMDs. There used to be a mandatory rule that children's evidence must be given by ABE interview, if available, and by means of a live link but this rule does not now apply where children inform that court that they do not wish the rule to apply and the court is satisfied that not complying with it would not diminish the quality of their evidence.[45]

The rationale of the special measures regime is centred on facilitating witnesses in giving their evidence in a manner that achieves the best effect and a lot of weight would seem to be given in this calculation to what medium the witness thinks will best achieve this. This is not the primary rationale of the new measure in the 2022 Act. Some of the circumstances to be considered before issuing a direction under the new measure, it is true, seem to require consideration to be given to the circumstances of the witness. These include their needs and whether they would be able to take part in the proceedings effectively. It is also true that parties must be given an opportunity to make representations before a decision is made to issue a direction. But the new measure is not principally about enabling witnesses to achieve their best evidence but rather, as the explanatory notes put it, about the court's duty to deal with cases "effectively and expeditiously".[46] The notes state that live links have been increasingly used across the courts, enabling greater participation in proceedings from remote locations, particularly during the current pandemic, and by putting the emergency measure favouring greater use of live links on a permanent footing the government appears to be indicating its intent that they should continue to be used.

The new measure would seem to have particular repercussions on defendants. The special measures regime was amended in 2006 and 2009 respectively to permit vulnerable defendants to testify by live link and to be assisted by intermediaries, although on a more restricted basis than other vulnerable or intimidated witnesses.[47] But there was never any prospect of defendants being forced to give evidence by live link. As will be argued below, defendant participation and choice over how their case should be presented are key ingredients in the legitimacy of the trial process. This would now seem to be being questioned. It is also pertinent to note that in permitting potentially all witnesses in a trial to give their evidence by live link, not merely vulnerable or intimidated witnesses, the measure not only undermines the principle of orality in a much more sweeping way but also undermines the principle of confrontation whereby witnesses should give their evidence in the presence of the accused. It is true that in determining whether there should be a live link direction consideration should be given to the importance of the witness's evidence to the proceedings and whether a direction

[45] YJCEA 1999 s. 21(4)(ba).

[46] Police, Crime, Sentencing and Courts Act 2022, Explanatory notes, para. 262.

[47] Police and Justice Act 2006 s. 47, Coroners and Justice Act 2009 s. 104. Section 104 authorising intermediary assistance for vulnerable defendants has not yet been brought into force but courts have used their inherent powers to grant such assistance in cases of "pressing need" (CPD 2015 3F.13). Cf. *Ukpabio* [2008] EWCA Crim 2108, [2008] 1 WLR 728, and *Louanjli* [2021] EWCA Crim 819 where the Court of Appeal ruled the court has no inherent power to make a live link direction. See L. Hoyano and A. Rafferty, "Rationing Defence Intermediaries under the April 2016 Criminal Practice Direction" [2017] Crim. L.R. 93. A new scheme for the appointment of defence intermediaries began in April 2022. See J. Taggart, "Vulnerable Defendants and the HMCTS Court-Appointed Intermediary Services" [2022] Crim. L.R. 432.

might tend to inhibit any party from effectively testing her evidence.[48] But these circumstances are once again matters to be considered and they cannot determine the decision.

This new measure has to be seen against the background of other efficiency measures that are having an effect on the orality confrontation paradigm in other ways. The Criminal Procedure Rules require judges to manage cases actively and parties to assist the court in fulfilling this duty.[49] In particular judges must set a timetable for the progress of the case and the parties must establish between themselves what is agreed and what is disputed.[50] Although there is a dearth of research on the extent to which counsel admit evidence by agreement, there is some evidence to suggest that case management concerns and squeezed legal aid budgets are driving counsel to agree more evidence and that these pressures have intensified since the pandemic.[51] If this trend continues, it has considerable implications for rules of evidence. Specifically, it suggests that the hearsay rule and the rule against narrative (already weakened as we have seen by increasing relaxation) are no longer buttressing the orality/confrontation paradigm as much as has been assumed. Where evidence continues to be disputed, judges have a duty under the rules to ensure it is presented "in the shortest and clearest way".[52] When witnesses give evidence, the rules also specifically permit judges to limit the examination, cross-examination and re-examination of a witness and the duration of any stage of the hearing.[53] Although again there is a lack of research on the extent to which judges are doing this, this is a significant limitation on traditional cross-examination where parties were given considerable freedom to determine how long cross-examination should be.

## Fair Trial Deficits

Many of the recent steps that have been taken to dilute the orality/confrontation paradigm would seem to be motivated by sound policies. It makes sense to try to admit statements made by witnesses about events closer in time than the trial, to enable vulnerable or intimidated witnesses to achieve their best evidence and to conduct trials as effectively and expeditiously as possible. But a further question is whether the steps that have been taken to achieve these policies comply with the accused's right to a fair trial. Although we shall see that the measures would seem to comply with the jurisprudence of the ECtHR, it will be argued that the admission of the hearsay statements of unavailable witnesses and the recent measure empowering courts to require defendants to testify remotely undermine key participatory rights that underpin the orality/confrontation paradigm.

The ECtHR and the UK courts have accepted that many of the statutory provisions relaxing the rules of evidence and introducing special measures are compatible with art. 6 of the ECHR. Although the hearsay provisions were the subject of a long and sustained dialogue between the UK Supreme Court and the ECtHR for a number of years culminating in the ECtHR's Grand Chamber judgment in *Al-Khawaja and Tahery v UK*,[54] it has been suggested that this debate is effectively concluded as far as Strasbourg is concerned as the ECtHR seems

[48] See s. 51(6((f) of the newly substituted s. 51 of the CJA 2003.
[49] CrimPR 3.2(1) and 3.3(1).
[50] CrimPR 3.2(2)(c), 3.3(2)(c)(ii).
[51] See M. Thomason, "Admitting Evidence by Agreement: Recalibrating Managerialism and Adversarialism in Crown Court Criminal Trials" [2021] Crim. L.R. 727, 751-2.
[52] CrimPR 3.2.
[53] CrimPR 3.13(d).
[54] (2012) 54 EHRR 23.

to have accepted that the methodology laid down by the English courts for the admission of hearsay will generally ensure compliance.[55] There are also grounds for considering that the anonymity provisions which protect the identity of witnesses from the accused are also compatible with the ECHR. In a series of decisions the ECtHR appeared to endorse a rule akin to the sole or decisive rule it had developed in relation to hearsay statements that no conviction should be based solely or to a decisive extent upon the statements or testimony of anonymous witnesses.[56] But in *Balta and Demir v Turkey*[57] the Grand Chamber applied the same requirements towards anonymous statements that it laid down in *Al-Khawaja and Tahery* for hearsay statements indicating that even where they constitute the sole or decisive evidence, they could be used where there were sufficient counterbalancing safeguards.

In these decisions the Court adopted a proportionality approach that has underlain its approach towards limitations on many Convention rights.[58] This requires that any limitation on the confrontation principle enshrined in art. 6(3)(d) must be justified and that any restrictions must be no more than are strictly necessary. In *Balta* the Court ruled that there was a violation of art. 6 on the ground that the defence had not even been allowed to question the anonymous witness who had incriminated the defendant. But it suggested that if the Turkish authorities had applied a less restrictive measure provided for in Turkish law, which would have involved the anonymous witness being questioned in a room away from the hearing room, with an audio and video link enabling the accused to put questions to the witness, it might have regarded this as a sufficient counterbalancing safeguard. The reference to the use of audio and video links is an expression of how technology can be used both to protect witnesses and ensure a fair trial. The live link and recorded video measures that may be directed under the YJCEA 1999 can similarly be justified on the ground that they protect vulnerable or intimidated witnesses and enable them to give their best evidence whilst at the same time preserving the accused's right to have their evidence tested by cross-examination.[59] The reference in s.116 of the CJA 2003 to the need for judges to consider whether a direction for special measures could be made as an alternative to admitting the hearsay statements of witnesses who do not give oral evidence through fear is an acknowledgement that special measures are a less restrictive means of protecting witnesses than the use of hearsay evidence.

The House of Lords gave a ringing endorsement of the compliance of the live link and recorded video measures under the 1999 Act with art. 6 when it held in *R v Camberwell Green Youth Court ex p D (a minor)*[60] that there was nothing in them that was inconsistent with the principles set out by the ECtHR. According to Lady Hale:

> The evidence is produced in the presence of the accused, some of it pre-recorded and some of it by contemporaneous television transmission. The accused can see and hear it all and has every opportunity to challenge and question the witnesses against him at the trial itself. The only thing missing is face-to-face confrontation, but the appellant accepted that the Convention does not guarantee a right to face-to-face confrontation.[61]

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[55] Dennis, *The Law of Evidence* (2020) 734.
[56] *Doorson v Netherlands* (1996) 22 EHRR 330 [72]; *Van Mechelen v Netherlands* (1997) 25 EHRR 647 [54], [55]; *Visser v Netherlands*, no. 26668/95, 14 Feb. 2002 [43].
[57] [2015] ECHR 615.
[58] See E. Billis, N. Knust and J. Rui (eds.), *Proportionality in Crime Control and Criminal Justice* (Hart, 2021).
[59] L. C. H. Hoyano, "Striking a balance between the rights of defendants and vulnerable witnesses: Will special measures directions contravene guarantees of a fair trial?" [2001] Crim. L.R. 948.
[60] [2005] 1 WLR 393.
[61] Ibid. [49].

The reference to face-to-face confrontation suggests that the prohibition on accused persons cross-examining vulnerable witnesses in person is also Convention proof. In *Camberwell* the House of Lords were considering a challenge to child witnesses being examined in chief by pre-recorded video and cross-examined by live link as a primary rule but there is no reason to believe that when the cross-examination is carried out by video-prerecording before the trial this procedure would be any less compliant with art. 6. Although the ECtHR has articulated the right to confrontation enshrined in art. 6(3)(d) as normally requiring that evidence is produced at a public hearing,[62] there is a long line of authority to the effect that the right to examine witnesses need not be exercised at the trial, and that it may be exercised either at the time the witness made his statement or at some later stage of the proceedings.[63] Nor is there is any reason to think that when an intermediary interjects in the course of cross-examination that this would not be compatible with the Convention. The ECtHR has endorsed procedures whereby the accused or defence counsel are able to put questions through a judge.[64] Recent procedures requiring judges to exercise much greater control over the course of the cross-examination of vulnerable witnesses would also seem to comply with the Convention. Finally, so far as the provision enabling vulnerable or intimidated witnesses to give their testimony in private is concerned, art. 6(1) on its face, of course, admits exceptions to the principle that trials should be heard in public where the interests of juveniles or the protection of the private life of the parties so require.

This brings us to the recent measures introduced to enhance the effectiveness and expeditiousness of criminal trials. There is no doubt that this is a legitimate aim and it is doubtful whether the measures taken by judges under the Criminal Procedure Rules to manage cases actively whilst limiting the parties' ability to control how their cases are presented undermine the right to a fair trial. The recent tendency for judges to set time limits on cross-examination has been upheld by the Court of Appeal provided the defence have an ample opportunity to put their case.[65] But the recent statutory measure enabling judges to order entire trials to be conducted by live link is of a different order. The emergency measures taken to increase the use of live link testimony during the Covid-19 pandemic may well have been justified during the pandemic but it is questionable whether directions requiring that all evidence is presented from out of court locations in a 'new normal' post-pandemic world would be fully compliant. Where live link testimony is used in order to assist vulnerable or intimidated witnesses or in order to deal with a serious health emergency, it may be justified as an exceptional but necessary departure from the norm. But as one commentator has put it, where such special measures become part of the norm and are used routinely we would need to urgently consider whether English trials were still being conducted in accordance with the essential canons of fairness and due process under the Human Rights Act and in accordance with common law jurisprudential principle.[66]

Under the new measure judges have to consider in so far as each witness is concerned the importance of her evidence to the proceedings and whether a live link direction might tend to inhibit any party from effectively testing her evidence. So long as adversarial testing is permitted in some manner and the defence case is able to be put, a fact specific determination

[62] *Al-Khawaja and Tahery v UK* (2012) 54 EHRR 23 [118].
[63] *Kostovski v Netherlands* (1990) 12 EHRR 434 [41], *Luca v Italy* (2003) 36 EHRR 807 [39], *Solakov v Former Yugoslavia Republic of Macedonia* ECHR 2001-X [57], *Al-Khawaja and Tahery v UK* (2012) 54 EHRR 23 [118].
[64] *PV v Germany* no. 11853/85 13 July 1987, *SN v Sweden* (2004) 39 EHRR 13.
[65] *Simon* [2018] EWCA Crim 3086, *Lally (Mark Stephen)* [2021] EWCA Crim 1372. Cf *Bhatt* [2022] EWCA Crim 926, where the Court of Appeal said that time limits should not be rigidly enforced without compelling reason and there should be flexibility depending on how the course of the cross-examination actually goes.
[66] Roberts, *Roberts & Zuckerman's Criminal Evidence* (2022) 525.

on whether the circumstances for live link evidence are met in each case may not be regarded as incompatible with art. 6. In *Al-Khawaja and Tahery v UK* the ECtHR considered that the essential question so far as hearsay evidence is concerned is whether a fair and proper assessment of the reliability of the evidence has taken place.[67] It would seem to follow that, *mutatis mutandis*, so long as a fair and proper assessment can be made of the reliability of live link evidence, live link directions ordered in the interests of conducting trials more effectively and expeditiously are compliant with art. 6.

But as critics of the ECtHR's approach in *Al-Khawaja and Tahery v UK* have pointed out, there is more to fairness than simply reliability.[68] It can be argued that the orality/confrontation paradigm is primarily predicated upon post-enlightenment ideals of individual dignity and autonomy which require that defendants *themselves* are able to participate as fully as possible in their trial by testing evidence against them and giving evidence if they choose to do so.[69] There is a large literature which has emphasised the importance of litigants being able to participate in proceedings not only as a means to correct decision making but as an inherent aspect of fairness that gives the proceedings their overall legitimacy.[70] When triers of fact are presented with the hearsay statements of unavailable witnesses whom defendants have been unable to cross-examine, defendants are prevented from participating in the process of adversarial testing. When they are required to give their own evidence remotely before triers of fact, this has an even more negative impact on their participation rights. It has been argued that being able to participate in person before judges and juries brings an important 'humanising' quality to the proceedings.[71] The ECtHR has accepted that art. 6, read as a whole, guarantees the right of an accused to participate effectively in a criminal trial which includes, *inter alia*, not only his right to be present, but also to hear and follow the proceedings.[72] It has affirmed that an oral hearing constitutes a fundamental principle enshrined in art. 6 (1) which is particularly important in the criminal context, where an applicant has an entitlement to have his case 'heard' at his trial, with the opportunity *inter alia* to give evidence in his own defence, hear the evidence against him and examine and cross-examine the witnesses.[73] This would seem to imply physical presence of the accused at least in those aspects of the proceedings that matter most to him and in which he can make the most impact which includes in particular the giving of evidence in the presence of the jury or the tribunal of fact.[74]

This does not mean that an accused's participation in proceedings by live link may not be ordered in certain exceptional circumstances. We have seen that live link evidence may

[67] *Al-Khawaja and Tahery v UK* (2012) 54 EHRR 23 [147].
[68] L. Hoyano, "What is Balanced on the Scales of Justice? In Search of the Essence of the Right to a Fair Trial" [2014] Crim. L.R. 4, J. Jackson, "Protecting the Right to a Fair Trial in an Era of Criminal Justice Transformation" in B. Dickson and C. McCormick (eds.) *The Judicial Mind; A Festschrift for Lord Kerr of Tonaghmore* (Hart, 2021) 261.
[69] See Owusu-Bempah, *Defendant Participation in the Criminal Process* (2017) 45-46.
[70] For a review of the literature on the importance of participation see J. Jacobson and P. Cooper, *Participation in Courts and Tribunals* (Bristol University Press, 2020) 80-89.
[71] Ibid. 83.
[72] See *Stanford v UK* 23 Feb. 1994, Series A no. 282-A [26], *SC v UK* [2004] ECHR 263, *Marcello Viola v Italy* [2006] ECHR 2006-XI [53], *Murtazaliyeva v Russia* [GC] no. 36658/05, 18 Dec. 2019 [91].
[73] *Jussila v Finland* ECHR-XIV [40], *Sanader v Croatia* no. 66408/12, 12 Feb. 2015 [67]. Note also the Court has said that it is of "capital importance that the accused should appear at his trial both because of his right to a hearing and because of the need to verify the accuracy of his statements and compare them with those of the victim - whose interests need to be protected - and of the witnesses" (see *Sejdovic v Italy* [GC], ECHR 2006-II [92], *Marcello Viola v Italy* ECHR 2006-XI [50]).
[74] See K. Kamber and L. K. Markić, "Administration of Justice during the Covid-19 Pandemic and the Right to a Fair Trial" (2021) 5 *EU and Comparative Law Issues and Challenges Series* 1049, 1067.

enable vulnerable witnesses including defendants to give their best evidence. The question is in what circumstances it may be used when the accused would rather give evidence in person the court. The ECtHR has held that the participation of an accused in a hearing via video link may be used if such a measure serves a legitimate aim but the arrangements for the giving of evidence must be compatible with the requirements of respect for due process, as laid down in art. 6. In particular, the Court has ruled that the applicant must be able to follow the proceedings and to be heard without technical impediments, and that effective and confidential communication with a lawyer is provided for.[75] But it is questionable whether the resort to such a measure may be used simply in order to make proceedings more efficient and expeditious. In the one case where the Court ruled there was no violation of art. 6 when the applicant was ordered to give evidence by live link at an appeal, it was stressed that this was in a case where it was necessary to protect the lives and safety of witnesses from the Mafia.[76] The court referred to legitimate aims under the Convention, namely, prevention of disorder, prevention of crime, protection of witnesses and victims of offences in respect of their rights to life, freedom and security, and compliance with the "reasonable time" requirement in judicial proceedings. In relation to the latter aim, the video-conferencing measure provided for by the Italian legislature was aimed, among other things, at reducing the delays and risks incurred in transferring detainees and thus simplifying and accelerating criminal proceedings *after* the applicant's initial trial. The Court was therefore very far from accepting that the right of the accused to give evidence in person before the trier of fact at his trial could be removed simply in the interests of efficiency and expedition and it is submitted that such interests could not justify the routine use of mandatory live link evidence by defendants at such a crucial stage of the proceedings for them.[77]

**Re-thinking the Orality/Confrontation Paradigm**

Although the orality/confrontation paradigm would seem originally to have been justified in order to ensure an open transparent system of justice as a check against abuse of process by the state, in this article it has been argued its modern underpinnings are founded upon the core value of defence participation. While the measures that have shrunk the orality/confrontation paradigm in recent years may be compliant with art.6 of the ECHR, the accused's participatory rights to cross-examine important witnesses against them and to present evidence in person before triers of fact are undermined by the admissibility of hearsay statements of unavailable witnesses and by the recent measure extending the use of live link evidence. This is not to say that greater use could not be made of video technology to record statements before trial in a manner that preserves the core value of defence participation. If video technology were used more to record witnesses' accounts at the time they are made and to enable adversarial testing to take place before trial by more extended use of video-recorded cross-examination, this would achieve a number of goals. It would aid truth finding by ensuring that tribunals of fact are presented with evidence taken closer to the time of disputed events, give the defence an opportunity to challenge the evidence of witnesses who may not be available at trial and

[75] *Marcello Viola v Italy* ECHR 2006-XI [63]-[67], *Asciutto v Italy* no. 35795/02, 27 Nov.2007 [62]-[73], *Sakhnovskiy v Russia* [GC] no. 21272/03, 2 Nov. 2010 [98]. See also ECtHR, *Guide on Art 6 of the ECHR (criminal limb)*, updated 31 December 2021, para. 157, Kamber and Markić, "Administration of Justice during the Covid-19 Pandemic and the Right to a Fair Trial" (2021) 5 *EU and Comparative Law Issues and Challenges Series* 1068-69.

[76] *Marcello Viola v Italy* ECHR 2006-XI [51].

[77] See also *Sakhnovskiy v Russia* [GC] no. 21272/03, 2 Nov. 2010 [96]: "A person charged with a criminal offence should, as a general principle based on the notion of a fair trial, be entitled to be present at the first-instance trial hearing."

improve efficiency overall by reducing the need for contested trials when accused persons are given the chance to see and challenge the evidence against them before trial.

There are a number of respects in which video-technology could be more widely used to take evidence before trial. First of all, there is scope for extending the recording of police interviews with vulnerable witnesses - the so-called ABE interviews - to other witnesses at the scene of the alleged crime. The recent revised guide for *Achieving Best Evidence* states that consideration should always be given to video-recording interviews with significant witnesses because it is likely to increase the amount and quality of information gathered from the witness and increase the amount of information reported by the witness being recorded.[78] Significant witnesses are defined as "those who have or claim to have witnessed, visually or otherwise, an indictable offence, part of such an offence or events closely connected with it (including any incriminating comments made by the suspected offender either before or after the offence); and/or have a particular relationship to the victim or have a central position in an investigation into an indictable offence".[79] The guidance states that the additional benefits of video-recording interviews with significant witnesses are that this ensures that the interview process is transparent and increases the opportunities for monitoring and for the development of interview skills.[80]

There would seem to be considerable advantages in having a recording of witness interviews. However, as the guidance points out, it is not yet possible for such recordings to be played to the jury as evidence-in-chief, although it is open to the defence to ask the court for permission to play some or all of the recording in support of their case.[81] Section 137 of the CJA 2003 enables the court to admit the video-recording of an earlier account of any witness in place of that witness's evidence in chief in any proceedings for a serious offence where, as would seem to be the norm, the witness's recollection of events is likely to have been significantly better when the recording was made than when she testifies in court. But this section is not yet in force. Instead the practice is for statements to be drafted based on any recordings made and then signed by the witness, or, alternatively but less commonly for a short statement to be taken from the witness confirming that what they said was accurate and a transcript of the recording to then be prepared as a statement.[82] Clearly, however, any statements or transcripts derived from recordings are a less authentic version of what the witness said than the recordings themselves. In an earlier article in this *Review* Roberts and Ormerod have argued that body-worn camera recordings should be routinely used to record witness statements and section 137 should be implemented to facilitate this subject to certain safeguards.[83] As they argue, there would be considerable epistemic benefits in making such recordings available to fact finders as they would be provided with more accurate accounts by the witness, as well as evidence of the manner in which that account was reported by the witness and about the process of the statement taking itself.

[78] See Ministry of Justice, *Achieving Best Evidence: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures* (2022 revision), para. 1.29.
[79] Ibid. para. 1.27.
[80] Ibid. para. 1.30.
[81] Ibid. para. 1.31.
[82] Ibid. para. 2.155.
[83] A. Roberts and D. Ormerod, "The Full Picture or Too Much Information? Evidential Use of Body-Worn Camera Recordings" [2021] Crim. L.R. 620.

The risk of using body-worn camera recordings to record voluntary at scene interviews with suspects has been highlighted in another article in the *Review*.[84] One of these is that the full interaction between the police and the suspect is not recorded. Roberts and Ormerod argue that implementation of s. 137 should be made subject to a code of conduct regulating the manner in which body worn camera interviews are conducted and one of the requirements should be that recordings should be continuous. Consideration should also be given to holding the interview in as neutral a setting as possible to offset any prejudicial inferences that the tribunal of fact may draw from the setting in which the recording takes place. Although it may be intimidating for certain witnesses and suspects to attend police stations, the more formal setting of a police interview room may be a better location for recording both witness and suspect interviews.

The greater use of video-recorded witness statements raises the question whether interviews with suspects should be video-recorded more commonly and whether such interviews should be presented more commonly before the tribunal of fact. Mention has already been made of the silence legislation under which tribunals of fact may draw inferences from a suspect's silence at interview. This makes it extremely important to establish exactly what was said at interview and how it was said. PACE, of course, requires that interviews with suspects are audio-recorded but video-recordings are far from the norm.[85] Furthermore, recordings of interviews with suspects (audio or video) are seldom presented to the tribunal of fact. Instead it is generally the "Record of Taped Interview" which is relied upon as the evidence of what took place in the interview room and which is normally read out to the court by a police witness acting as the interviewer, and counsel generally taking the part of the defendant interviewee, although either party may seek to have an audio or video played to the court.[86] Research has indicated that there are a whole series of problems with ways in which what is said at interview is presented to the court, including difficulties relating to the recording process; the problem of how to portray spoken language in a written format; questions of editing, as very few interviews are ever transcribed in full; and finally there is the process of converting the data back into a (different) spoken form in the courtroom.[87] There would seem to be grounds for reviewing this process with a view to enabling the tribunal of fact to be presented more often with the data source which is as close as possible to the original wherever possible.

So far it has been argued that a greater use of pre-trial video-recordings would enable tribunals of fact to be provided with a more accurate picture of witnesses and suspects' accounts before trial. A further question is whether greater use should be made of pre-trial cross-examination along the lines of the pre-recorded cross-examination provisions that are being rolled out presently for vulnerable and intimidated witnesses under s. 28 of the YJCEA 1999. This would give the defence a greater opportunity to challenge the statements of witnesses

[84] W. Ng and L. Skinns, "A Formal Interview Tool in an Informal Setting? An Exploratory Study of the Use of Body-Worn Camera at the Scene of an Alleged Crime" [2021] Crim. L.R. 644.

[85] Code of Practice F para. 2.2 sets out certain circumstances when officers may consider that a video-recording should be made including where the suspect has an appropriate adult; where the suspect or their solicitor or appropriate adult requests that the interview be recorded visually; where the suspect or other person whose presence is necessary is deaf or deaf/blind or speech impaired and uses sign language to communicate; where the interviewer anticipates that when asking the suspect about their involvement in the offence concerned, they will invite the suspect to demonstrate their actions or behaviour at the time or to examine a particular item or object which is handed to them; and when the officer in charge of the investigation believes that a visual recording with sound will assist in the conduct of the interview.

[86] CPD V Evidence 27C.

[87] See K. Haworth, "Tapes, Transcripts and Trials: The Routine Contamination of Police Interview Evidence" (2018) 22 *International Journal of Evidence and Proof* 428.

which may later be admitted at trial under exceptions to the hearsay rule mentioned earlier. As we have seen, the unexamined statements of witnesses may be admitted under section 116 of the CJA where such witnesses become unavailable at trial. This places the defence at a disadvantage as it encourages the prosecution to proceed with prosecutions on the basis of such unexamined statements where the witnesses who made them become unavailable at trial. At the same time there can be uncertainty in individual cases as to whether judges will admit such statements and prosecutors are disadvantaged knowing that if they do go forward with prosecutions where witnesses become unavailable, there is a risk that the witnesses' statements may not be admitted by the judge at trial and their case may collapse.

This leads on to the question whether provision should be made for greater adversarial testing to take place before trial in cases where it is anticipated that witnesses may be unable or unwilling to testify at trial. We have seen that the ECtHR considers pre-trial confrontation to be compatible with the ECHR. Indeed it has positively encouraged member states to consider this where witnesses may not testify at trial. In *Schatschaschwili v Germany*[88] the Grand Chamber ruled that Germany had violated art. 6(3)(d) of the ECHR when the applicant was convicted on the testimony of two women from Lithuania who had been robbed in Germany. After testifying before a judge but in the absence of the applicant early in the proceedings, the two witnesses returned to Lithuania and refused to participate any further in them. The Chamber criticised the German law enforcement authorities for failing to anticipate the witnesses' departure; they should have made certain that the defendant or a lawyer appointed for him could attend the judicial interview with the witnesses and ask questions. Although the decision surprised lawyers in Germany,[89] it has particular repercussions for common law systems where the orality/confrontation paradigm has traditionally focused on the trial.[90]

In order to facilitate greater pre-recorded cross-examination before trial, procedures would have to be adjusted to enable it to be conducted before a judge. It has been argued that it is fundamental to "adversarial argument" that such a confrontation takes place in an adversarial environment supervised by an independent judge in which the accused is assisted by counsel.[91] In England and Wales, there have in the past been procedures which have enabled magistrates to take formal depositions on oath from certain witnesses (e.g. young children and persons who were dangerously ill) for use at trial. The depositions taken could be used at trial in place of oral testimony in certain circumstances.[92] But most of these procedures have since been abolished or are now rarely used.[93] There also, of course, used to be oral committal proceedings whereby witnesses were examined on oath before magistrates in the presence of the defence. However, the defence were not given advance disclosure of the case against the accused before the witnesses were questioned and defence lawyers rarely availed of the opportunity to cross-examine them.

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[88] (2016) 63 EHRR 14.

[89] See J.D. Jackson and T. Weigend, "Witness Evidence in Pre-Trial and Trial Procedure" in K. Ambos, A. Duff, J. Roberts and T. Weigend (eds.), *Core Concepts in Criminal Law and Criminal Justice – volume 2* (CUP, 2022) 260, 278.

[90] J.D. Jackson, "Common Law Evidence and the Common Law of Human Rights: A Harmonic Convergence?" (2019) 27 *William and Mary Bill of Rights Journal* 689, 714.

[91] J.D. Jackson and S.J. Summers, *The Internationalisation of Criminal Evidence* (CUP, 2012) 345.

[92] See e.g. Children and Young Person Act 1933 ss. 42 and 43; Magistrates' Courts Act 1980 s. 105; Criminal Justice Act 1925 s. 13.

[93] Criminal Procedure and Investigations Act 1996 s. 47 sch. 1. For more detailed commentary, see J.R. Spencer, *Hearsay Evidence in Criminal Proceedings* 2nd edn. (Hart, 2014), 71–72.

In its review of the hearsay rule in criminal proceedings back in the 1990s, the Law Commission considered that the introduction of a new system for judges to take evidence on commission would constitute a radical change to English criminal procedure and it did not pursue the idea.[94] Its final report focused instead on making witness statements obtained by the police more widely admissible at trial without proposing any formal rules and safeguards governing how these should be obtained.[95] But procedures for taking evidence on commission are more common in Scotland whereby both examination-in-chief and cross-examination of witnesses may take place in a pre-trial hearing by a commissioner who may not be the presiding judge at trial.[96] Since 1980 it has been possible for the evidence of witnesses who are abroad, ill or infirm to be taken on commission in any criminal case.[97] Since then one of the special measures for vulnerable witnesses has been to take evidence by commission with a recording made available if the case goes to trial and this has been increasingly the practice in the case of children.[98] In 2019 legislation was enacted stipulating that in the most serious, so-called 'solemn', cases the evidence of any witness under the age of 18 must be given in such a manner unless it is satisfied that to do so would significantly prejudice the interests of justice.[99] Most recently, the Lord Justice Clerk's Review Group on serious sexual cases chaired by Lady Dorrian has recommended that video-recorded police interviews and evidence on commission should constitute the evidence of complainers in all serious sexual offences.[100]

One of the advantages of this procedure is that it would appear to enable evidence to be taken earlier in the proceedings than pre-recorded cross-examination in England and Wales.[101] Another advantage is that it is not conditioned upon an ABE interview having been recorded and admitted as evidence. The police may not identify witnesses as eligible for ABE interview or for various reasons prosecuting counsel may conclude that the ABE interview should not be used.[102] In these circumstances the witness must await trial to give all of her evidence. A third advantage of the Scottish procedure is that it allows *both* evidence in chief and cross-examination to be facilitated thereby placing both under the control of counsel and the judge although in practice it would seem that when the police have carried out a joint investigative interview (the Scottish equivalent of the ABE interview) that is used as the evidence in chief.[103] It is sometimes forgotten that the original Pigot proposals in England and Wales were predicated upon the entirety of a child's evidence being taken at a pre-trial hearing.[104] A pre-trial hearing combining both examination in chief and cross-examination would enable prosecution counsel to ask questions clarifying earlier testimony of the witness and to structure questions more in accordance with the prosecution case which can then be directly tested under cross-examination.

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[94] Law Commission, *Evidence in Criminal Proceedings: Hearsay and Related Matters* (1995) para. 11.31.

[95] See Law Commission, *Evidence in Criminal Proceedings: Hearsay and Related Matters* (1997) Cm. 3670.

[96] See I.D. Macphail, *Sheriff Court Practice* 3rd edn. (Sweet & Maxwell, 2006) para. 15.18.

[97] Criminal Justice (Scotland) Act 1980 s. 32, Criminal Procedure (Scotland) Act 1995 s. 272.

[98] See Criminal Procedure (Scotland) Act 1995 s.271I (as amended).

[99] See Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019.

[100] Lord Justice Clerk's Review Group, *Improving the Management of Sexual Offence Cases* (2021).

[101] The High Court of Justiciary issued a Practice Note in 2017 which states that the commission should proceed at as early a stage as possible after concern was raised by the Appeal Court about delays between JIIs (joint investigative interviews which are the equivalent of ABE interviews in England & Wales) and evidence on commission. See *MacLennan v HM Advocate* 2016 JC 117 and High Court of Justiciary, Practice Note No.1 of 2017.

[102] See L. Hoyano and J. Riley, "Making S. 28 more flexible and effective" (June 2021) *Counsel.*

[103] Hoyano and Riley, ibid, recommend this more flexible approach for England and Wales.

[104] Home Office, *Report of the Advisory Group on Video Evidence* (1989), paras. 2.25-2.31. See D. Cooper "Pigot Unfulfilled" [2005] Crim. L.R. 456.

The Scottish model provides a precedent for extending video-recorded cross-examination to witnesses who may not be able to give evidence at trial with the potential for it to become the norm for all significant witnesses. If this trend became the norm, we could see a marked shift away from the trial as the locum for contesting witness testimony towards a pre-trial phase where witnesses' accounts are tested under the supervision of a judge and video-recorded for any future trial. As indicated above, this would benefit truth-finding by enabling witnesses to give their best evidence earlier and there may be efficiency gains in terms of reducing the need for contested trials, once defendants see how witnesses against them have performed and decide to plead guilty.[105] There would also be due process gains in such a system. As we noted at the outset, the majority of cases are disposed of without a contested trial. Pleas are often made without the benefit of witness testimony against the accused being properly tested. Pre-trial adversarial testing would provide a more informed basis for pleas and sentencing.

## Conclusion

The orality/confrontation paradigm whereby convictions are based solely or mainly on evidence presented in the trial has been increasingly difficult to justify on grounds of truth finding, the well-being of witnesses and the effective and expeditious conduct of the trial. We have seen that a number of measures have been taken in recent years which have diluted its effect culminating now in the prospect of virtual trials where witnesses do not present evidence in person at the trial at all. It has been argued, however, that the orality/confrontation paradigm is underpinned by the core principle of effective defence participation which is central to the legitimacy of the criminal trial. This requires that defendants are given the opportunity at some stage in the proceedings to challenge key witnesses and fundamentally to give evidence themselves in the presence of the tribunal. But without sacrificing this principle, video-technology could be used more frequently to present fact-finders with the best evidence of witnesses taken at a much earlier stage of proceedings and for this evidence to be adversarially tested in advance of the trial. If this happened more, in-court oral testimony given in the presence of the fact-finder would no longer be the paradigmatic manner of giving evidence but defendants would remain entitled to give evidence in the presence of the triers of fact at their trial. In this way the core value underpinning the orality/confrontation paradigm would be preserved but much more witness testimony would in practice be taken before the trial.

Of course, a massive cultural shift would have to take place if we were to move away from the trial towards the pre-trial process as the focal point for achieving best evidence and ensuring that it is properly tested. Although it could be much improved, the technology is already here for preserving such evidence when it is necessary to have it presented at trial. But there is a widespread view amongst practitioners that recorded testimony and video link testimony generally create a 'distancing' effect', which diminishes their impact on the jury.[106]

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[105] Although at present section 28 hearings count as the first day of trial for the purposes of discounts for plea with the result that if defendants wait until the sections 28 is completed before pleading guilty, they lose the benefit of any discount they would have gained if they had pleaded earlier. I owe this point to Matt Thomason. See Sentencing Council, *Reduction in Sentence for a Guilty Plea* (2017), D2; *Crown Court Compendium*, Appendix IV 18E.46)

[106] See Gillen Review, *Report into the law and procedures in serious sexual offences in Northern Ireland* (2019) para. 4.97, S. Fairclough, "Using Hawkins' Surround, Field, and Frames Concepts to Understand the Complexities

A meta-analysis of research using mock jurors watching pre-recorded evidence and live link testimony concluded that this medium does not have a negative effect on trial outcomes.[107] But this has yet to be tested on 'real' juries and there is scope for more research on this issue.[108] If it were to come to light that there is empirical evidence of a distancing effect that impacts on pre-recorded testimony, then prosecutors may become more resistant to making applications for pre-recorded testimony. Essential safeguards such as full disclosure before adversarial testing would also have to be ensured in order to make pre-trial defence participation fully effective.

We should not under-estimate the difficulty in shifting a mind set which is still deeply wedded to the trial as the proper, legitimate forum for witness testimony to be elicited and tested. The considerable difficulties there have been in implementing pre-recorded cross-examination under s. 28 of the YJCEA 1999 may be grounds for thinking that a move towards a paradigm where more witnesses give their testimony before trial is little more than a utopian dream. But at one time it was thought that section 28 would never come into force,[109] yet it now looks at last as if it will be fully implemented. Concerns about counsel not being properly remunerated for the work they have to do to at section 28 hearings would seem to have been ameliorated by the recent settlement following the Criminal Bar Association's strike whereby advocates are now able to be paid for s.28 hearings as if they were a day of the trial.[110] We have seen that other changes such as restrictions on cross-examination at trial, hardly imaginable 10 or 20 years ago, are also taking place. In a lecture given in 2013 Lord Judge CJ observed that a quiet revolution was going on in our trial processes which was necessary and still ongoing.[111] He was referring specifically to the changes involving modern technology taking place in order to ensure that children give their best evidence. But these changes have also affected the way other kinds of witnesses give evidence and it is not perhaps so fanciful to think that more changes are yet to come which result in the transfer of adversarial practices from the trial into the pre-trial phase.

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of Decision Making in Crown Court Trials" (2018) 45 *Journal of Law and Society* 457, 471, Hoyano and Riley, "Making S. 28 more flexible and effective" (June 2021) *Counsel.*

[107] V. Munro, *The Impact of the Use of Pre-recorded Evidence on Juror Decision Making: An Evidence Review* (Scottish Office, 2018).

[108] Light should be shed on this by Cheryl Thomas's UCL Jury Project which is testing actual jurors' impressions of, and ability to evaluate the credibility of, evidence given through video link, ABE interviews, and section 28 hearings. See Gillen Review, *Report into the law and procedures in serious sexual offences in Northern Ireland* (2019) para. 4.82.

[109] See Cooper "Pigot Unfulfilled" [2005] Crim. L.R. 456.

[110] *Crown Court Fee Guidance (publishing.service.gov.uk)* Appendix R. Thanks to Matt Thomason for alerting me to this.

[111] Lord Judge, "Half a Century of Change: The Evidence of Child Victims", Toulmin Lecture in Law and Psychiatry, 20 March 2013, available at: https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Speeches/lcj-speech-law-and-psychiatry.pdf